

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	CA No. 22-2791 (ACR)
	.	
v.	.	
	.	Washington, D.C.
ASSA ABLOY AB, et al.,	.	Monday, May 1, 2023
	.	1:00 p.m.
Defendants.	.	
.	Afternoon Session

DAY 6
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ANA C. REYES
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

1
2 THE COURT: All right.

3 MR. HUPPERT: Your Honor, I'm sorry. Before we get
4 back into Dr. Waehrer's testimony, I just had one point of
5 clarification I wanted to make from the record in the first
6 session if that's okay.

7 THE COURT: Yeah, I had a feeling you would. Go ahead.

8 MR. HUPPERT: There was a colloquy that you had with
9 Mr. Donaldson about the analysis that Dr. Waehrer performed
10 relating to concentration. And I just wanted to clarify for
11 the Court that the government's position, the United States'
12 position in this case is that the presumption does apply at
13 step one of the *Baker Hughes* analysis as to the original
14 Assa-Spectrum merger --

15 THE COURT: Correct.

16 MR. HUPPERT: -- not taking into account the
17 divestiture. So insofar as Your Honor's analyzing under the
18 *Baker Hughes* and insofar as your questions related to legal
19 presumptions under that framework, I just wanted to clarify
20 the United States' position.

21 THE COURT: Sure. I appreciate that. But I guess my
22 question is, let's assume I agree with you and we analyze step
23 one without the divestiture, and then I take into account the
24 HHI analysis, obviously. And that would seem, and I think
25 defendants have agreed, that that would get the government

1 over step one if we don't take the divestiture into account
2 in step one.

3 My question was more focused on if we're at step two, my
4 understanding is that if there's a high HHI analysis number,
5 that that means that there is a concentration, which gives me
6 a presumption that there's an anticompetitive effect that the
7 defendants have to overcome.

8 If I take the divestiture into account, then I think,
9 according to Dr. Waehrer, and certainly according to
10 Dr. Bailey, the HHI analysis then tells me, because there's no
11 overlap, that there's not a concentration. And this would be
12 different from the case we had with Judge Mehta where he found
13 that even with the divestiture there was still a high HHI
14 concentration, or number, and so therefore presumptive
15 concentration. So I just -- my understanding is that in the
16 current case -- scratch that.

17 My understanding is that there could be a case and there
18 have been cases where at step one, not taking the divestiture
19 into account, there's a high HHI number, which shows a
20 concentration, which leads to presumptive anticompetitive
21 effect. You go to step two, we put into place -- we take into
22 account the divestiture. At that point there could be, in the
23 Judge Mehta case, still a high HHI number even if you take the
24 divestiture into account. But that here, because there's no
25 overlap at all, that you would then have not a high -- not an

1 HHI number that would lead to a presumption of concentration.
2 And my understanding is that's the world we're in.

3 MR. HUPPERT: Yes, Your Honor. And I think you're
4 referring to the *Sysco* case.

5 THE COURT: Yes. Thank you.

6 MR. HUPPERT: Judge Mehta's decision in *Sysco*. Yeah.
7 I think the more analogous case factually here on this issue
8 is *Aetna*, Judge Bates's opinion in *Aetna*. In that case at
9 step one he looked at the un-remedied merger for purposes of
10 step one and evaluating the concentration levels, and he held
11 that the government was entitled to a presumption based on
12 those facts. And then at step two he evaluated the
13 divestiture.

14 THE COURT: Right. Yes. Let's go into step two right
15 now.

16 MR. HUPPERT: Okay.

17 THE COURT: We're in step two.

18 MR. HUPPERT: Understood.

19 THE COURT: In step two, on the facts of this case as I
20 understood them, as I understand them to no longer be
21 disputed, is that there is no overlap after you take the
22 divestiture into account; therefore, no high HHI number,
23 therefore no presumption of concentration. And now what I'm
24 looking at is whether or not the divestiture will actually be
25 successful.

1 MR. HUPPERT: Maybe I'm getting hung up on the word
2 "presumption."

3 THE COURT: Yeah. Because my understanding is that
4 once we take the divestiture into account in this case,
5 Dr. Bailey and Dr. Waehrer both agree -- Dr. Waehrer as I
6 understand it doesn't think we should take HHI into account,
7 but he agrees with Dr. Bailey that if we do take it into
8 account, it does not show increased concentration, those
9 numbers do not show increased concentration, therefore, there
10 is no presumption anymore, once we take the divestiture into
11 account in step two, of a lessening of competition.

12 MR. HUPPERT: I think the way that I would frame it and
13 the way that again Judge Bates framed it in the *Aetna* case is
14 that there is a presumption, and the question is whether the
15 defendants can produce sufficient evidence of a divestiture
16 that would restore competition sufficient to rebut the
17 presumption in step two.

18 THE COURT: So I guess what you're saying is to the
19 extent that the presumption -- okay, I think I understand.
20 So you're saying there is a presumption in step two. In order
21 to rebut the presumption, they have to do more than show that
22 there is not a high HHI number; they have to show that once you
23 take -- taking the divestiture into account would actually lead
24 to the competition that it leads to on paper.

25 MR. HUPPERT: Yes. I think the standard is, as we've

1 discussed before, the standard would be whether there's enough
2 evidence to show that the divestiture would restore
3 competition, preserve competitive intensity, however you want
4 to phrase it, but that's the question -- yes. That would be
5 the question in step two.

6 THE COURT: But they no longer have to show that -- if
7 the divestiture worked, they would no longer have to show
8 there's no concentration. Everybody agrees if the divestiture
9 works, there's no concentration and therefore no presumption
10 of a competitive effect.

11 MR. HUPPERT: I think it's fair to say concentration is
12 not an issue at step two. The issue at step two would be, to
13 put it very shortly, the sufficiency of the divestiture in
14 terms of its assets and intensity of competition and so forth.

15 THE COURT: Okay. Got it. Mr Bernick.

16 MR. BERNICK: Pardon me, Your Honor. I didn't know we
17 would have argument on this today, but I just have one quick
18 point to make.

19 THE COURT: I think that you should assume that any
20 given day we will have an argument on Baker Hughes.

21 MR. BERNICK: So I guess what I would say, whether
22 we're at step one, step two --

23 THE COURT: You win.

24 MR. BERNICK: No, well, a different point. A slightly
25 different point. If their case is based on statistics from a

1 transaction that's not going to happen, then all we have to do
2 to rebut that statistical case is show those statistics are no
3 longer valid, which is what Ms. Bailey did. That's the
4 quibble I think I have with what Mr. Huppert said, is he
5 suggested that we can present a statistical case based on a
6 combination that's not going to occur. Then the defendants
7 have the burden to come forward with all this evidence about
8 the divestiture unrelated to just rebutting the statistics.

9 And this is angels dancing on the head of a pin --

10 THE COURT: No, I get it.

11 MR. BERNICK: But I actually think it's meaningful
12 that they can't prove their case with statistics that are
13 completely rebutted by our statistical case and force us
14 to come forward with new evidence. That's the only nuance.

15 THE COURT: I mean, at the end of the day, I have
16 to find that the divestiture to Fortune will actually work.

17 MR. BERNICK: We agree with that, Your Honor.

18 THE COURT: And really what we're fighting about now,
19 who has that presumption that it will work, you all or the
20 government. And at the end of the day, that's sort of the
21 legal question that I have to answer.

22 MR. BERNICK: And it's a rugby match.

23 THE COURT: Yeah. But to me, at the end of the day,
24 whoever has the presumption, the presumption is 51 percent,
25 right, because it's more likely than not. So unless I find

1 that the parties are in pure equilibrium at 50 percent on the
2 evidence, it doesn't really matter who has the presumption, as
3 a practical matter.

4 MR. BERNICK: As a practical matter.

5 THE COURT: Mr. Huppert, do you agree with that?

6 MR. HUPPERT: I would say I think the presumption does
7 matter for purposes of -- I mean, I guess to your point that
8 it's a rugby match, perhaps the presumption matters less,
9 because I think as a practical matter, to Mr. Bernick's point,
10 our case is not just based on statistics, it's based on a
11 bunch of other evidence that Dr. Waehrer has analyzed and we
12 presented in our case-in-chief regarding the intensity of
13 competition, and the degree of head-to-head competition
14 between the defendants.

15 And so, taking all that evidence into account, you know,
16 I think the presumption is meaningful, I think it's part of
17 the *Baker Hughes* framework for a reason, but at the end of the
18 day if Your Honor analyzes it this way, you know, yes, the
19 standard at the end of the day is more likely than not on
20 substantial lessening of competition. But we do think the
21 presumption is meaningful because it puts the burden on the
22 defendants to come forth with evidence of a sufficient
23 divestiture.

24 THE COURT: Look, I agree with you on paper, but in
25 this actual courtroom, it's not like they're just sitting

1 there not coming forward with evidence, right? So they're
2 going to come forward with evidence. If that's the point,
3 that they have to come forward with evidence, they're doing
4 that, or they're going to do that, because there's a bunch of
5 lawyers over there, and they're not just going to sit there.

6 MR. HUPPERT: Of course.

7 THE COURT: Okay. All right.

8 KEITH WAEHRER, WITNESS FOR THE GOVERNMENT,

9 DIRECT EXAMINATION CONTINUED

10 BY MR. DONALDSON:

11 Q. Dr. Waehrer, before the break we were discussing the
12 incentives of a divestiture seller. I would ask you to
13 consider a hypothetical divestiture seller who has a choice
14 between two buyers. Assume that both buyers are qualified
15 enough to be approved by the FTC or the DOJ, but one would
16 be a vigorous competitor to the seller in the future and the
17 other would be minimally effective as a competitor.

18 Which buyer in your opinion would the seller be
19 incentivized to choose, all else equal?

20 A. So, your hypothetical sets up a situation I think where
21 either would be approved by the Department of Justice or court
22 or whoever the regulatory agency was.

23 Q. Correct.

24 A. And in that hypothetical the incentive would be to pick
25 the buyer that was not the vigorous competitor.

1 Q. Why?

2 THE COURT: I'm sorry. I missed your question, and my
3 realtime is not set up so I can't go back --

4 MR. DONALDSON: Sure.

5 (Discussion off the record.)

6 THE COURT: Okay. Go ahead.

7 BY MR. DONALDSON:

8 Q. Dr. Waehrer, the ultimate question there was which buyer
9 in your opinion would the divestiture seller be incentivized
10 to choose, all else equal?

11 A. So as I understand your question, either buyer would be
12 approved by the DOJ and -- or whoever the regulatory agency
13 was. And in that case the seller would obviously prefer not
14 to compete as vigorously and so would select the buyer that
15 would be less competitive.

16 Q. And Dr. Waehrer, you testified earlier about the
17 relevance of market shares and HHIs in your divestiture
18 analysis. Does Yale's share today predict their competitive
19 significance under Fortune?

20 A. So my testimony with respect to the HHIs that Dr. Bailey
21 produced was really about step one in my analysis of the
22 divestiture and not about step two. I think as we go through
23 and we discuss what's going to -- what we think might happen
24 or is likely to happen, you would see perhaps a share decrease
25 by the Yale assets, the Yale assets become less competitive,

1 lose share, and then the HHIs would change. But even the
2 change in HHI in that situation doesn't really tell us much
3 about the direction of competition. So HHIs are just not the
4 right metric there.

5 But I think your question is about whether or not the
6 share calculations and HHI calculations of Dr. Bailey really
7 take into account what's happening and what our predictions
8 are in step two of the analysis, and they do not.

9 Q. Okay. Thank you. I want to switch gears a little bit.
10 You cite in your report and discuss the FTC divestiture
11 studies as supporting your conclusion with respect to the
12 proposed divestiture. Can you please share your analysis
13 regarding these studies with the Court?

14 A. Yes. So I've got a few slides on the FTC studies, and
15 I know Your Honor has questions about these. So I'll step
16 through these and hopefully get to your questions.

17 I think the first step is to put the studies into some
18 context about what is the -- what's the sample of divestitures
19 that we're looking at. And it's important to note that each
20 of these divestitures was a remedy that was subject to a
21 detailed fact-specific review and eventually accepted by the
22 FTC.

23 And in that first box I pulled a quote out of the 2017
24 study that says: "The goal of any remedy is to preserve fully
25 the existing competition in the relevant markets at issue."

1 So these were reviews and the FTC thought that these
2 divestitures would work. And after a very -- after a detailed
3 case-by-case, fact-specific review, as we will see when we get
4 to the results, it's a bit surprising that so many of the
5 divestitures involving selected assets did not fully restore
6 competition within two to three years.

7 And I think -- you know, as an economist I have to think
8 to myself, well, why, what is going on with those selected
9 assets versus the divestiture of a complete business. And,
10 you know, when you have a divestiture of an already ongoing
11 business, you know you have the set of assets that are going
12 to be needed for the company to operate fully. When you're
13 looking at a set of selected assets, we don't have evidence in
14 the market previously of these assets really being able to
15 operate independently and being effective.

16 And the high failure rate that the FTC found I think is
17 indicative of the fact that we antitrust economists and
18 antitrust lawyers are perhaps not so good at deciding whether
19 or not a certain set of selected assets are going to be
20 effective in the market or not. And I think that suggests
21 something about our ability to make a decision, or to find the
22 right set of assets, especially when we're talking about a set
23 of -- a divestiture involving selected assets.

24 I think ultimately what is important then when judging
25 the FTC study and its context for what the meaning is for our

1 case here, you have to think about how does the sample of --
2 the FTC sample compare to this present deal. And I think
3 there's a number of items that suggest that this deal may be
4 worse than the set of assets, the set of selected assets that
5 were the subject of the FTC study.

6 So what do we know? We know that the supply agreements
7 are weaker than required by the FTC. It's something I'll
8 review in more detail later. The FTC and the EC found that
9 divestitures of A-side assets -- so if the assets that are
10 being divested are by the acquiring company, as they are here,
11 they tend to have worse outcomes than if they're from the B-
12 side company.

13 And then here, unlike what would usually be the case in a
14 divestiture, we have the risk of mutual forbearance. And so
15 that is something that's different than we would normally
16 face. And then not listed here but I think is also important
17 is the risk of closing on the Vietnam facility and the delay
18 just doesn't seem to me at least, through my experience, to be
19 something that the FTC would have found acceptable.

20 Q. Thank you, Dr. Waehrer.

21 Dr. Bailey raised some questions about the methodology
22 used in the FTC studies. Have you considered those critiques?

23 A. Yes. Yes, I did. It's the subject of the next slide.

24 So Dr. Bailey claims that the FTC studies are
25 methodologically flawed and suggests that this is -- it's a

1 commonly known issue. And when I looked -- when I personally
2 looked for methodological criticisms of the FTC studies, the
3 only criticism I could find was a *New York Times* op-ed piece
4 where a law professor was suggesting that the FTC was perhaps
5 suggesting that there were too many successes.

6 And the one paper that Dr. Bailey cites here in this
7 section of her report really is not about the FTC study, but
8 it's about econometric studies similar to the one that the
9 paper itself did, and the quotes that she pulls out of that
10 paper are simply saying that these econometric studies are
11 quite different.

12 Now, an econometric study of an individual remedy is very
13 different from a case study like the FTC pursued where the FTC
14 is taking a sample of divestitures and trying to evaluate how
15 many succeeded, how many didn't succeed, and what are the
16 characteristics of those succeeded and didn't succeed.

17 And I think for our purposes when we look at these kinds
18 of samples or case studies of a case -- in fact, the FTC study
19 looked at the universe of all divestitures that the FTC
20 approved during the time period of the study, and it was
21 unlike what -- or contrary to what Dr. Bailey suggested, that
22 somehow the sample was biased because of voluntary
23 participation. What in fact happened was every divestiture,
24 every remedy was in the sample, and that for each remedy my
25 understanding is that there were multiple interviews done for

1 each of the divestitures. And to the extent that there were
2 certain participants that didn't participate, it was simply
3 that one divestiture may not have had a full set of
4 respondents answering questions for the FTC.

5 So I don't see any basis for the sample of the FTC study
6 to really be biased one way or another, and the evidence that
7 Dr. Bailey cites for this is just not there.

8 I think it's also notable that when you look at what the
9 FTC concluded, the FTC was relying on these studies to guide
10 its own divestiture policy. And so it was actually putting
11 the results of the study to some use.

12 Q. Thank you, Dr. Waehrer.

13 The FTC studies analyzed divestitures of selected assets.
14 That's a term that they use. Have you studied how that
15 relates to the divestiture here?

16 A. Yes, I did. So, in my opinion, the divestiture here fits
17 squarely into the category of selected assets. The slide is
18 not up yet, but I'm assuming you have the paper deck in front
19 of you.

20 There are a number of reasons for this. It's pretty
21 clear from the evidence, and the evidence that I'll be
22 presenting in a few slides, that nexTouch and interconnect are
23 an important part of the product portfolio of the business, of
24 the residential smart business for Yale in the United States,
25 and those are not included in the divestiture.

1 Second, the deal requires the separation of production,
2 joint production. So in Vietnam currently, not just U.S.
3 smart locks are being produced, but smart locks for all over
4 the world are being produced, and so there's joint production
5 that would need to be split.

6 So the fact that they were jointly producing it suggests
7 that we're selecting the assets out of that factory to operate
8 or to produce the U.S. smart locks from the rest of the world.

9 And then additionally, this deal would need to separate
10 the U.S. R&D efforts from Assa's global shared R&D resources.
11 And then there's also evidence that there's shared procurement
12 of certain inputs, and that would need to be separated.

13 And in my opinion all of these would obviously suggest
14 that this is a set of selected assets and not the assets of an
15 ongoing business.

16 Q. Dr. Waehrer, the FTC studies break results into different
17 categories. One of those categories is a qualified success.
18 Have you considered the FTC's definition of what constitutes a
19 qualified success?

20 A. I have. So a qualified success to the FTC could have two
21 meanings. One is that it took longer than two to three years
22 for the assets to really be fully competitive in the market,
23 or the assets might have been operating fine initially but
24 then failed to sustain that, the successful operation. And
25 the assessment of the FTC was that the original owner of the

1 assets would have fared better under the changing conditions
2 than the divestiture buyer.

3 Either of these situations I think does not suggest a
4 success as we should judge it. Two to three years is a long
5 time in the antitrust -- at least antitrust analysis, and
6 during that period consumers would be suffering from the
7 reduced competition.

8 Q. Thank you. Dr. Waehrer, the 2017 FTC study presents a
9 table that summarizes its outcomes. Have you analyzed that
10 table?

11 A. Yes. So I'd just like to walk through it with you. So
12 at the bottom row I think is the place to start this table,
13 and that's the entire sample of divestitures. And you can see
14 there that depending on how you're counting the divestitures,
15 that the success rate is 75 percent or 74 percent, not too
16 much of a difference, which means that 25 percent or 26
17 percent were not fully successful divestitures.

18 However, as I discussed earlier -- well, before I go on
19 to that, you can see that the success rate for an ongoing
20 business is quite good, at a hundred percent. However, the
21 success rate for a set of selected assets, as I've suggested
22 we're talking about here, is what I would call quite poor and
23 starkly different from the success rate of an ongoing
24 business.

25 You can see that the failure rate, if you go one minus

1 the success rate listed in the middle row of the first column
2 there, is 40 percent or above, which I know when I first saw
3 this result years ago, I thought was shockingly high. And I
4 think this is indicative of what I described earlier, that if
5 you're selling an ongoing business, we already have evidence
6 that this can be a successful business with the assets. It
7 was an ongoing business, it was operating independently
8 before, and there's really not much of a question about the
9 assets.

10 However, with a set of selected assets, that means that
11 we antitrust economists and lawyers are trying to make a
12 judgment about what are the right set of assets that could
13 allow this company to be successful. Plus, when you have a
14 set of selected assets, you're going to usually have ongoing
15 entanglements between the seller and the buyer that could
16 cause additional problems. And so it creates a stark
17 difference between the two outcomes.

18 Q. Thank you, Dr. Waehrer.

19 Moving on to the next step in your divestiture
20 analysis --

21 THE COURT: Can I ask you, so what do these numbers
22 tell us, if anything, about what the odds are that a
23 particular selected assets divestiture will be successful?

24 THE WITNESS: So if we are looking at a sample of
25 divestitures that are like the FTC sample, I would -- and

1 we're talking about a set of selected assets, I would say the
2 success rate just from reading the table is 56 or 60 percent.

3 However, I think what we're talking about here is something
4 that is different. And as I discussed on an earlier slide, I
5 think that this transaction is actually worse than what the
6 sample suggested. You know, it is a deal that has not yet
7 been accepted, it has a number of characteristics that I think
8 suggest it is worse than what's in the sample here. And so it
9 doesn't require -- I'm sorry.

10 THE COURT: No, go ahead.

11 THE WITNESS: When you think about aggregating
12 probabilities, I think really behind your question is are we
13 up to 51 percent.

14 THE COURT: Really what's behind my question is does
15 this really tell me anything? These numbers, do they tell me
16 anything?

17 THE WITNESS: I would say a couple things on that
18 topic. These were all subject to very careful review, and
19 lawyers and economists thought these would work. So where are
20 we then -- you know, if you come to the conclusion that this
21 is a set of assets -- that the current divestiture is a set of
22 assets that will work, I'm not sure we're in much of a
23 different boat than the probabilities here, except that maybe
24 we're in a worse situation because of the enforcement of the
25 supply agreements and the other issues that I discussed

1 earlier.

2 Now, I'm steeped in, you know, the math of probabilities,
3 and it doesn't take much of an additional risk to move from a
4 40 percent failure rate to a 50 percent failure rate.

5 THE COURT: I guess my question is more -- what I
6 really need to be looking at is this particular divestiture
7 and how it compares to divestitures that have succeeded in the
8 past or have not succeeded in the past. But these numbers,
9 whether they're a hundred percent or 2 percent, are really
10 meaningless to that assessment.

11 THE WITNESS: Well, we have the data that we have, and
12 the data that we have splits out a set of selected assets from
13 ongoing businesses. So we know that we can at least -- I
14 think we know, or at least I believe we're in a category of
15 selected assets. I don't think, or the FTC study doesn't
16 provide us additional information about the sample and how it
17 compares to our current -- the current situation. But perhaps
18 others will bring information that I'm not seeing in the FTC
19 study. And I think for the reasons that we discussed earlier,
20 that the sample is worse.

21 I'm not sure what -- I mean, the data, as I said, the data
22 is as the data is. And I think -- you know, when we look at
23 how do we evaluate divestitures, this is the best data that we
24 have about past divestitures, but it doesn't provide -- it
25 doesn't provide a roadmap to try to identify, well, which of

1 these selected assets are particularly close to our current
2 deal, and what's the success or failure rate of those. We
3 don't have that.

4 And then also if we started to slice this even further,
5 we'd be in the realm of smaller sample sizes that we may not
6 be happy with the results of.

7 THE COURT: Okay.

8 BY MR. DONALDSON:

9 Q. Dr. Waehrer, on slide 42 you compare this current
10 divestiture to the scenario of previous FTC divestitures and
11 you list some of the differences. Are there any additional
12 differences that you can point to with respect to this
13 transaction and the other ones studied by the FTC?

14 A. Well, as I think I mentioned, there's the three here that
15 I've listed, plus this deal is -- these were all approved
16 deals, and this transaction has not yet been approved. So
17 that would be one other difference between the two that I
18 think I've already mentioned.

19 So if we were to think about how do we fit this into a
20 larger sample, we would want to know, well, what's the sample
21 of perhaps all of the divestitures that had been proposed, and
22 some of them would be approved, some of them wouldn't be
23 approved, and how would those outcomes be -- it's hard to make
24 an assessment there because we're talking about data that
25 doesn't exist.

1 Q. Thank you. One last question on the table on slide 45.

2 Does the FTC study suggest that for selected assets that
3 the highest success we could reasonably expect is about 60
4 percent?

5 A. So as I indicated earlier, yes. So this is -- remember,
6 these are deals that have gone through very careful analysis.
7 In each of these cases it would be common, the usual practice
8 for the FTC to ask the buyer and seller for assurances that
9 these are assets that are going to be successful in the market.

10 And it would have been the case that buyer and seller
11 assured the FTC economists and lawyers that in fact these
12 assets were -- would be successful, and yet we have what I
13 would consider a pretty poor track record for the set of
14 selected assets.

15 THE COURT: Can you remind me what the sample size was
16 for the selected assets? How many were studied?

17 THE WITNESS: So if you look at the numbers in the
18 parentheses in the table that's on the screen, those are
19 the -- there's two ways that the sample is measured, the
20 number of orders or the number of buyers. So for the set of
21 selected assets, there were 18 orders and 25 buyers in total.

22 THE COURT: So if we just look at the 18, there's a 56
23 percent success rate.

24 THE WITNESS: Yes.

25 THE COURT: Okay. So that was, what, 9-1/2, 10 were

1 successful? 10, 11?

2 THE WITNESS: Yes. Something like that.

3 THE COURT: Okay. But you could switch that to 13, 14,
4 and the percentages would go up pretty dramatically. Or
5 switch it down one or two and the percentages would go down.
6 I mean, it seems a pretty small sample size.

7 THE WITNESS: So if we were to do a confidence
8 interval, you know, the success rate or the failure rate could
9 be higher or lower. I agree. This is the point estimate, and
10 so it's the best point estimate -- it's the best estimate to
11 use, I think, in this situation.

12 THE COURT: Has anyone done a confidence interval
13 assessment for this?

14 THE WITNESS: Not that I know of.

15 THE COURT: My guess is it would be much larger than .05.

16 THE WITNESS: Well, when you say --

17 THE COURT: There would be a large confidence interval,
18 wouldn't it?

19 THE WITNESS: So for these kinds of statistics,
20 sometimes you can be surprised that even with low sample size,
21 the confidence interval isn't that large. Perhaps when I come
22 back on rebuttal, I can bring you that number.

23 THE COURT: Okay.

24 MR. DONALDSON: Okay. Ready to move on unless Your
25 Honor has more questions on the divestiture studies.

1 THE COURT: No.

2 BY MR. DONALDSON:

3 Q. Dr. Waehrer, the next step in your divestiture analysis,
4 you state that the proposed divestiture will result in a loss
5 of economies of scope and scale. Can you please explain your
6 analysis of the loss of scope and scale?

7 A. So I think the DOJ's other experts deal with this topic
8 in more detail than I do, but I did review the evidence here
9 from documents and deposition testimony, and it seemed to me
10 that there were three categories where the divested assets
11 with Fortune would enjoy fewer scope and scale economies than
12 they do currently with Assa.

13 First would be procurement. And under that bullet
14 there's a quote out of a document, that Jason Williams
15 document where he expresses some concern over dyssynergies
16 relating to the procurement of electronic components for smart
17 locks, suggesting that the critical suppliers in this area are
18 managed at a global level by Assa Abloy.

19 The second category that I believe Your Honor has already
20 heard some testimony, it relates to R&D expenditures and joint
21 efforts, and here there's just two bullets that discuss some
22 of the evidence along those lines.

23 And then the joint production in Vietnam, I believe, is
24 something that hasn't yet been discussed very much, but
25 there's evidence that labor in that factory moves across

1 production lines. So when one production line is slow and the
2 U.S. production line is slow, labor can move to the, say, the
3 European production line if these are in fact different
4 production lines.

5 But I think the idea is that when you have multiple
6 production lines or you're producing smart locks for multiple
7 regions, you can perhaps operate the factory at a lower level
8 of fewer workers and therefore fewer costs.

9 And then of course, there's a -- in deposition, Nico
10 Delvaux, the CEO of Assa Abloy, indicated that he thought
11 that there must be some cost advantage -- operational and cost
12 advantages to operating and producing smart locks for all
13 three geographic divisions within the Vietnam facility.

14 Q. Thank you, Dr. Waehrer. You state that the proposed
15 divestiture does not include critical assets. Can you please
16 explain your analysis on that point?

17 A. Yes. So this is just the intro slide, and I will be
18 talking in a little bit more detail about each of these. But
19 the first area which is discussed in my reply report Section
20 V.B.1 is that the proposed divestiture doesn't include
21 nexTouch and interconnect, which has been the subject of quite
22 a bit of discussion in court so far.

23 It also involves delayed closing of the Vietnam facility
24 or risk of delayed closing. That's discussed in my reply
25 report Section V.B.3. And then the enforcement and other

1 terms within the transition services agreement and the supply
2 agreement do not provide adequate protection for Fortune going
3 forward.

4 Q. With respect to the first of these, the divestiture
5 package lacking important assets such as the nexTouch and
6 interconnect, can you please share your analysis of those
7 products?

8 A. So I think there's been some contradictory testimony on
9 exactly how these -- how some of these locks, the nexTouch
10 and interconnect locks, what they are and where they're used.
11 The evidence that I've seen suggests that the nexTouch lock is
12 -- tends to be used on the entrances to common areas within
13 apartment buildings. But also I think we heard from
14 Mr. Haldeman of SmartRent that at least for his business most
15 of those locks go on the front doors of apartment residences.

16 The interconnect lock, as I think I've already mentioned,
17 is used on the front doors of apartment -- of the apartments.
18 I don't mean the buildings but the apartment units. And my
19 understanding is that those are not used for common areas but
20 rather only used for apartment entrances.

21 The manufacturing rights, as has been discussed, have not
22 been included in the transaction, but these are very important
23 products for a large number of customers. We heard from --
24 you heard from Mr. Haldeman of SmartRent, he and other
25 customers that buy interconnect and smart locks and/or smart

1 locks from Yale account for a very large percentage of U.S.
2 Yale smart lock sales. If you look at the printed copy of
3 the slides, you'll see the number in the bottom bullet.

4 And I'd just like to say that there was discussion that
5 Mr. Haldeman's company, SmartRent, was the Yale U.S. largest
6 purchaser of smart locks in the U.S. SmartRent represents
7 well over half of that percentage. So it's quite sizeable
8 purchase. And even if as a result of perhaps not having
9 access to nexTouch or interconnect or delays in the -- or
10 degradation of the quality, delays in delivery, that could
11 have a -- even a small percentage of -- a smallish percentage
12 of these sales disappearing for Yale would represent a
13 significant loss of revenue and profitability for Yale.

14 Q. Dr. Waehrer, are nexTouch and interconnect locks
15 commercial or residential products?

16 A. So they are clearly -- exactly how the company defines
17 or people in the business define these as residential locks
18 or commercial locks, I think -- I mean, I don't know -- that
19 seems less relevant than the fact that -- to my analysis, than
20 the fact that these are locks that are really part of the
21 residential portfolio. They're part of the portfolio of
22 products of Jason Williams' division within Assa Abloy.

23 And as an example of that, I have some screenshots that
24 I put together of the Yale residential website. And on the
25 Yale residential website, there's a page that is Multifamily

1 Solutions. And if you go to Multifamily Solutions, you will
2 see only three products on that website discussed. The three
3 products are the nexTouch, the Assure interconnect lock, and
4 the Assure Lock deadbolts, the three ones that are listed
5 here.

6 Q. Dr. Waehrer, was there any particular evidence that you
7 found particularly informative on the role of the nexTouch and
8 interconnect locks with respect to the potential divestiture?

9 A. So the evidence that I looked at were documents and
10 deposition testimony, but I think there's also been already
11 testimony in court about the importance of the interconnect
12 and nexTouch locks to the Yale U.S. business.

13 We've heard from not just the SmartRent CEO,
14 Mr. Haldeman, but also the Fortune witnesses seem to think
15 that they did want to have access to nexTouch and interconnect
16 for their business going forward.

17 I also looked at the deposition testimony and documents
18 that are listed in the next few slides here. Here in the
19 first slide on slide 51, Jason Williams is quoted as saying
20 that the nexTouch product portfolio is critical to his success
21 in the B2B space.

22 On the slide following, there's a segment from Jason
23 Williams' deposition testimony where he says: "We have gone
24 to market for smart residential products and the nexTouch
25 commercial products and bundled them."

1 So he's selling them together, and he thinks that it's an
2 important -- I'm reading this as an important part of his
3 portfolio and that having these together is a competitive
4 advantage for them.

5 And then on the next slide, he indicates that the
6 analysis is pretty much the same for the interconnect lock as
7 for the nexTouch lock.

8 There was also deposition testimony, not listed here, but
9 I would just point out from Jason Williams that he testified
10 that he has responsibility for the interconnect product, and
11 he is the one that is most often taking that to market,
12 despite the fact that production seems to be owned by the
13 commercial business.

14 Q. Dr. Waehrer, you mentioned the testimony of Mr. Haldeman.
15 Is there any other third-party evidence that you found
16 particularly informative with respect to the importance of
17 nexTouch and interconnect with respect to the potential
18 divestiture here?

19 A. So on the next slide, slide 54, there's a excerpt from
20 Joshua Stamps's deposition. Joshua Stamps is the CEO of
21 GoKeyless, who is also an important customer of Yale, not
22 quite as important as Mr. Haldeman and SmartRent, but still
23 quite sizeable.

24 And here I have a quote where he is essentially echoing
25 the sentiments of Mr. Haldeman in terms of the fact that

1 customers like to have a single brand or a solution that all
2 works together, and there's some value in being able to offer
3 all the different types of locks, the nexTouch, interconnect,
4 and the standard locks for particular owners.

5 Q. Dr. Waehrer, as an economist, how do you think about the
6 relationship between market definition and the appropriate
7 scope of a divestiture?

8 A. So this is something that we've discussed already a bit
9 and I'm not -- I'll just echo what I said before, that there
10 are these two parts to the analysis of the divestiture: Is
11 the divestiture undoing the concentrating effects of the
12 merger, that's step one. And step two, does the divestiture
13 provide the buyer with the assets necessary to successfully
14 compete.

15 Market definition plays an important role in step one,
16 because you're using it to do the share analysis and
17 concentrating analysis. But in terms of deciding whether or
18 not the buyer is going to be successful, market definition
19 plays a minor role. Most businesses sell more than one
20 product in more than one market, and so to have really a
21 successful ongoing business, it would not be at all surprising
22 if that business needed to sell products in more than one
23 market.

24 And I just -- at the very bottom of the slide I pulled
25 a quote from the FTC divestiture study that essentially says

1 that the Commission will only accept divestiture packages it
2 deems sufficient and that the sufficiency of the divestiture
3 package can very well go beyond the products within a relevant
4 market.

5 THE COURT: Let me just ask you this, because I
6 understand that, I think, that there's a -- maybe two-year
7 supply agreement for interconnect and nexTouch, that there's
8 a transitory supply agreement. And as I understood it, the
9 FTC, at least the 2016 study, did say and find that supply
10 agreements were important and helpful.

11 So what exactly is it about the supply agreement or the
12 divestiture as it's currently framed that gives you concern
13 that Yale isn't going to get the interconnect or nexTouch?

14 THE WITNESS: So there's a few things, and that's
15 actually coming up on perhaps --

16 THE COURT: Oh, sorry. Maybe I should stop talking
17 then.

18 THE WITNESS: We can jump to that now, which starts on
19 slide 57. So just in terms of the FTC study about the supply
20 agreement's being important, I think when you're talking about
21 a divestiture of selected assets, often you are going to have
22 a supply agreement that's needed, and for those deals where
23 the divestiture was successful, yes, the supply agreement was
24 going to be important for those to be successful because they
25 just wouldn't have been successful without the supply

1 agreement.

2 I think with the supply agreement, if you have a supply
3 agreement, it's indicative of the fact that you are dealing
4 with a set of selected assets rather than an ongoing business.
5 If you had an ongoing business that would be divested, then
6 you wouldn't need a supply agreement.

7 I think there are a few things that are important in my
8 mind about the supply agreement, and here I include the TSA,
9 because the TSA is the agreement that governs the operation
10 of the Vietnam plant.

11 THE COURT: Okay. But let's just keep them separate
12 because they're two separate issues. Just tell me
13 specifically what you find problematic with the interconnect
14 agreement.

15 THE WITNESS: So there's a -- enforcement of that
16 agreement seems particularly weak to me. It was something
17 that jumped out at me when I first read the agreement, the
18 specific performance requirements. And then reading the FTC
19 studies, the FTC studies seemed to -- did suggest that the
20 FTC, because of the incentive issues with the supply
21 agreement, requires substantial damages, damages for profits
22 and lost sales.

23 So that is one aspect of it. The other aspect of it is
24 that supply agreements with competitors are simply risky.
25 It's often going to be hard to figure out exactly all the

1 circumstances that you're going to need to put into a supply
2 agreement. And so you want the supply agreement to be as
3 short as possible. And I think there's two issues here
4 relating to that.

5 One is what's the timing -- what's the real timing for
6 Fortune to be able to produce its own nexTouch and
7 interconnect?

8 We heard some evidence from Mr. Haldeman on what he was
9 told by some of the major suppliers of locks in the U.S. about
10 how long it would take them to develop a lock for him. It was
11 in closed session so I won't say exactly what he said, but I'm
12 sure you recall his testimony.

13 It seems difficult for me to believe that Fortune would be
14 able to do that faster than those established lock companies.
15 So that creates a concern in terms of the two-year time
16 agreement.

17 There are other issues with supply agreements that I think
18 are important to recognize. We're talking about, when you
19 have a supply -- when you're getting supplies from a -- inputs
20 from a supplier, you want that supplier to be a partner with
21 you because you want to be able to go to that supplier and
22 say, hey, I got a customer, needs a big order, needs it fast,
23 can we increase output and try to satisfy this?

24 And if the input supplier is a partner with you, that input
25 supplier has an incentive to make sure you're happy. If that

1 supplier is a competitor of yours, that means that you are
2 probably that competitor's worst customer, because the cost --
3 the prices that you're getting for that customer are not very
4 high, you're not making a profit, prices are at cost, and so
5 there's unlikely to be the same kind of cooperation that you
6 would have.

7 THE COURT: But let me -- how does that work? Because,
8 as I understand it -- and maybe I misunderstand it. As I
9 understand it, the factory that creates this interconnect
10 and will send it to Fortune is not where the combined Assa
11 Abloy-Spectrum will get its interconnect stuff from. They
12 will get it from someplace else.

13 THE WITNESS: So my -- what I've heard from the
14 testimony and what I understand from the facts is that there's
15 a factory in Guadalajara. And the way that things will work
16 is that there's an electronic piece that gets produced in
17 Vietnam that will be produced by Fortune. Fortune will send
18 that to Assa Abloy's -- to Guadalajara. Guadalajara will put
19 that together and produce the interconnect lock, and then ship
20 it to Fortune. Is that what you were asking?

21 THE COURT: Yeah, but where in that does the
22 Guadalajara factory become a competitor of Fortune?

23 THE WITNESS: Guadalajara factory is owned by Assa
24 Abloy, who is a competitor of Fortune, hopefully. That's
25 the goal.

1 THE COURT: Well, is it? Because the -- yes, Assa
2 Abloy-Spectrum I assume are going to have their own
3 interconnect locks. But do we know whether the -- do we know
4 whether the mechanics, the electronics, the putting together
5 of it is going to happen in the same factory? And if not, do
6 we know whether the factory that currently has the
7 interconnect locks has its own profit and loss statements?

8 THE WITNESS: So I don't know whether they have their
9 own profit and loss statements. That is -- you know, for
10 antitrust economists, for IO economists, we wouldn't
11 necessarily look at exactly what are the divisions within a
12 company and assume that each division is operating kind of
13 independent of the interests of the other divisions.

14 And I would assume that if Fortune is competing Yale lock
15 on a big -- say there's a big customer for multifamily, in the
16 scenario I was describing. And that big customer, it's a
17 large order, needs to be delivered quickly. Assa Abloy wants
18 that.

19 At the same time -- or I'm sorry. Fortune would like to --
20 at the same time, perhaps the Yale -- the Kwikset now owned by
21 Assa Abloy is talking to that same customer, and both Fortune
22 and the Assa Abloy multifamily go to the Guadalajara factory
23 and say hey, we've got this big customer --

24 THE COURT: But that's the key assumption, that they're
25 both going to the same factory. Do we know that they're both

1 going to the same factory?

2 THE WITNESS: I don't know. I'm assuming that they
3 would be.

4 THE COURT: Okay.

5 THE WITNESS: But even if they weren't, an antitrust
6 economist, without -- unless there were really good evidence
7 to the contrary, would assume that the factory in Guadalajara
8 is going to look after the interests of the overall company
9 and not just the P&L of the particular division.

10 THE COURT: Okay. And that's antitrust economists
11 versus a regular economist because I think a regular economist
12 would look at what the incentives were for the factory.
13 Right?

14 THE WITNESS: I think that all economists would assume
15 that the company is trying to maximize the profits of the
16 company, rather than each division trying to maximize the
17 profits of each division.

18 THE COURT: Okay.

19 THE WITNESS: I think that's universal across not just
20 antitrust economists but economists overall.

21 THE COURT: Okay.

22 BY MR. DONALDSON:

23 Q. Dr. Waehrer, have you seen evidence that Assa Abloy tries
24 to maximize profits at the corporate level, not the division
25 level?

1 A. Yes, I have. There's a document that I cite in my
2 initial report. I'm not sure I'm going to be able to find it
3 quickly. But it's an email exchange between Nico Delvaux, the
4 CEO of Assa Abloy, and the -- now I'm forgetting the name of
5 the Assa Abloy witness that was here first. What was...

6 Anyway, it was an email exchange between them, and Nico
7 Delvaux was in a discussion with him about the pricing in
8 North America. And they were looking together at a P&L
9 statement for the global residential smart lock group and not
10 just the North American smart lock group.

11 So it's not -- it's not that -- only that pricing is
12 being determined at a local level based on local P&Ls, but
13 here was an example of the CEO of the company discussing
14 pricing with this executive.

15 Q. I think we've located that document. We'll pull it up
16 momentarily. Dr. Waehrer, is this the --

17 A. Yeah. This is the document I was referring to. It was
18 Martin Huddart who was here testifying. And in this email
19 exchange Mr. Delvaux is discussing a number of things with
20 Mr. Huddart about the North American business, including
21 pricing decisions. And if you scroll -- is this the last
22 page or the first page? If you scroll down...

23 Q. This is PX 13 for the record.

24 A. If you keep going down, there should be a P&L statement
25 listed there. Right there.

1 So this is the P&L statement for the global residential
2 smart lock group, not the North American smart lock group.
3 So they're discussing pricing in the context of this P&L
4 statement.

5 Q. Okay. Dr. Waehrer, is there anything else on this
6 document that you...

7 A. No.

8 Q. Dr. Waehrer, with respect to the TSA and the supply
9 agreement --

10 THE COURT: Are you moving on from interconnect?

11 MR. DONALDSON: I was going to move on from this
12 document. I was going to stay with the TSA and the supply
13 agreement unless Your Honor has questions for Dr. Waehrer.

14 THE COURT: At some point I guess at the end of the
15 day my question is you've identified these issues with the
16 supply agreement. Is there a supply agreement that if it were
17 amended you would be comfortable with?

18 So, for example, stronger enforcement mechanisms, the
19 damages you discussed, a dispute resolution clause, longer
20 than two years, and, you know, some way to ensure that Fortune
21 would get what it needed from the company? Or in your view
22 does it not matter, you can't tinker on the edges, it just
23 doesn't work?

24 THE WITNESS: So I think you said longer than two
25 years, and that made the hairs on my neck stand up a little

1 bit, because I think the whole idea is to create an
2 independent competitor that is not dependent on the supply
3 of an important input from a competitor.

4 THE COURT: Right. But the only reason I mentioned
5 longer than two years was because you were concerned that it
6 might take more than two years.

7 THE WITNESS: And that creates a risk --

8 THE COURT: What if we just had a length of time that
9 it went as long as it took for Fortune to become independent
10 on this issue, with a strong enforcement mechanism?

11 THE WITNESS: So I would find that to be -- if we
12 thought it was going to take longer than two years, and we
13 extended it, I would find that to be problematic because I
14 don't think we want to have Fortune being supplied by a
15 competitor for longer than two years. There are just risks
16 associated with can you really write a contract that
17 anticipates issues that will come up over the course of a
18 longer period of time.

19 THE COURT: Okay. So in your -- let me ask it this
20 way: Is it your opinion that there are changes that could be
21 made to the supply agreement on interconnect that would make
22 you comfortable with it, the divestiture, or in your view is
23 it, it doesn't matter what you do with the supply agreement,
24 I just disagree that this will work?

25 THE WITNESS: So I think there's a couple moving parts

1 here, and there's one other aspect of the supply agreement
2 that I haven't touched on yet that I'd like to get to. But
3 I think --

4 THE COURT: With respect to interconnect or Vietnam?

5 THE WITNESS: With respect to interconnect and
6 nexTouch.

7 THE COURT: Okay. So what's the other issue? I'm
8 sorry.

9 THE WITNESS: So the other issue just is the pricing.
10 The pricing, in order for Fortune to be competitive, the
11 pricing in the supply agreement should be close to or at
12 marginal cost or average variable cost. And right now it
13 includes, I believe, fixed cost, and it may also include some
14 corporate overhead, which means that Fortune would be
15 operating -- so all of those then, the price would be
16 Fortune's -- Fortune's marginal costs would essentially
17 include these fixed costs and corporate overhead, whereas for
18 Assa Abloy, the company, their marginal costs would not
19 include those, so it would be at a competitive disadvantage
20 because of that cost difference.

21 THE COURT: So taking all that into account, in your
22 opinion, is it possible to make changes to the supply
23 agreement that would get you comfortable with it as part of
24 the divestiture, or is it just your view, can't make changes
25 to it because it's just fundamentally flawed from the get-go?

1 THE WITNESS: So I understand your question, and I
2 think it interacts with at what point will Fortune be able to
3 operate independently of the supply agreement. I mean, how
4 long do we think that's going to be. If there was evidence in
5 the record that it's going to take six months, it's going to
6 take a year, something relatively short and we were pretty
7 confident of that, then, you know, perhaps the supply
8 agreement isn't that bad, although, you know, even with that,
9 we're still in the world of looking at a deal of selected
10 assets and all the potential problems that that creates and
11 the risks that seem to be indicated by the FTC studies.

12 I do think it's difficult to craft a supply agreement
13 that's really bulletproof, but if it's just for a short period
14 of time, maybe it's something that could be lived with.

15 THE COURT: Okay.

16 BY MR. DONALDSON:

17 Q. Dr. Waehrer, when competitors supply each other with
18 products, are there information-sharing concerns that could
19 arise?

20 A. I'm sorry. Could you say --

21 Q. When competitors supply each other with products, are
22 there information-sharing concerns that can arise?

23 A. So, yeah. So in a supply agreement, there are
24 information issues. I mean, obviously, if Fortune goes to
25 the Guadalajara plant and says, hey, I've got an important

1 multifamily customer with a big order, can you produce this
2 for me quickly, the question is will that information get
3 passed on to the competing business at Assa Abloy.

4 There are some confidentiality provisions in the supply
5 agreement, but those seem to be pretty toothless, especially
6 given the enforcement terms of the supply agreement of
7 specific performance.

8 And just being able to detect the violations of those
9 kinds of information-sharing issues becomes somewhat difficult
10 also. And these just create -- to me it means that whenever
11 you are talking about supply of a competitor, you don't
12 necessarily want to have it go for very long.

13 And I think -- I mean, just to add one more thing to
14 this, I think -- you know, these supply agreements, there's
15 some significant failures in the past of these.

16 I mean, one notable failure is the Sprint/T-Mobile merger
17 where that merger was let through with a remedy that involved
18 a contract between T-Mobile and Dish, the divestiture buyer,
19 where T-Mobile would provide network services for dish for a
20 period of time until Dish was able to put up its own network.
21 And that was meant to extend -- it's now been going for more
22 than three years. But disputes between T-Mobile and Dish at a
23 certain point caused that to somewhat unravel, and then Dish
24 decided to go and negotiate for network services with AT&T.

25 That suggests a problem. You know, that supply agreement

1 for Dish was supposed to be at preferential prices, it was
2 supposed to allow them to compete as an independent supplier,
3 as if they were a network operator themselves.

4 And if you look at subscriber numbers for Dish versus
5 the other cell phone services, all the three big ones, AT&T,
6 Verizon, and T-Mobile, have been growing their subscriber
7 numbers, and since the divestiture, Dish has been shrinking.

8 BY MR. DONALDSON:

9 Q. Thank you, Dr. Waehrer. We jumped over the Vietnam
10 divestiture. I just want to loop back to that for a moment.

11 In your reply report you discuss the Vietnam facility.
12 Since that time, we received a Vietnamese -- new Vietnam
13 facility lease and implementation letter. Could you please
14 share with the Court your thoughts about those two documents.

15 A. Sure. So just to remind Your Honor, the Vietnam facility
16 is an important production facility, right? It's the place
17 where all the non-interconnect and nexTouch locks for the Yale
18 residential smart business are produced. And right now -- or
19 at the time of the original signing there was no timeline for
20 when there was supposed to be closure, and the agreement
21 required good-faith efforts to occur, which seem to me to be a
22 problem because --

23 THE COURT: We're past that now, right? There's a
24 lease. Why don't we get to the lease.

25 THE WITNESS: So there's a lease, and there's another

1 agreement. So my reading of the lease was that there's not
2 much of a commitment there. You know, the rent, I don't know
3 whether that's a confidential amount, but the rent is not very
4 high on a per-month basis, and they can, you know, get out of
5 the lease if they would like to. So --

6 THE COURT: Assa Abloy can?

7 THE WITNESS: Yes.

8 THE COURT: At that point they would have moved out
9 of the Vietnam facility.

10 THE WITNESS: So the question is, you know, how much
11 of a commitment does the lease create? What does it indicate
12 to us about the timing of the deal or the timing of the move?
13 And I'm suggesting at least to me it doesn't seem to indicate
14 very much.

15 There was also the implementation letter that was issued.
16 I think what's notable about the implementation letter is
17 what's not in the implementation letter, and that is some
18 kind of timeline for when the closing would happen, and/or
19 penalties for missing that timeline. So just the fact that
20 that's not present suggests to me that there's still
21 significant uncertainty about when exactly that is going to
22 close.

23 And then the other thing about the implementation letter is
24 they've changed how the plant is going to be operated in the
25 interim to the extent the closing is delayed. It was going to

1 be operated by Fortune with seconded employees. And now it's
2 going to be operated by Assa Abloy supposedly for the benefit
3 of Fortune. It's not exactly clear how a competitor operates
4 a factory for their competitor at the benefit of Fortune.
5 Seems quite unusual to me.

6 And of course the TSA, that seems to be the contract under
7 which all of this is happening, and that has its own
8 enforcement issues that are not unlike the supply agreement
9 enforcement issues.

10 BY MR. DONALDSON:

11 Q. Dr. Waehrer, you said the TSA had some enforcement
12 issues, I believe. Could you please share with the Court
13 what those issues would include?

14 A. So they're similar issues to the supply agreement. The
15 consequential damages are completely ruled out and the only
16 resource is -- here's -- I think that's a quote from the
17 supply agreement. But it's essentially the same.
18 Consequential damages ruled out. Specific performance is the
19 only enforcement provision.

20 And I think it's in the TSA itself that indicates that
21 the buyer really has no recourse at law, which at least as an
22 economist, that struck me as a very strange term to put into a
23 contract, but perhaps it's something that's standard.

24 Q. Dr. Waehrer, switching gears, you state that the proposed
25 divestiture increases the risk of coordination. Can you

1 please explain your analysis of the risk of coordination?

2 A. Sure. So we skipped over the coordinated effects section
3 of the competitive effects of the un-remedied deal, which I
4 think would have introduced to Your Honor kind of the concept
5 of coordinated effects.

6 Q. We can go back if you'd like.

7 THE COURT: I know. I understand the concept.

8 THE WITNESS: Okay. So the analysis is generally --
9 goes by a -- you ask a couple questions. So the starting
10 point is do we have a market that is vulnerable to
11 coordination? And then does the transaction increase that
12 vulnerability?

13 And in my original report, in my initial report, I
14 concluded that both these markets were vulnerable to
15 coordination. Both markets were concentrated. There was
16 evidence that there was tracking of pricing and that the
17 companies followed the pricing of each other. And all of
18 those things suggest an ability to detect deviations from a
19 tacit arrangement to raise price, and to respond to that, and
20 that allows for the tacit arrangement to develop and be
21 enforced.

22 So then the question is, what about the divestiture that
23 makes coordination more likely? In this case there's a couple
24 things. Probably most important is the fact that these
25 ongoing entanglements involving the TSA and the SA mean that

1 Fortune is in some sense dependent on Assa's goodwill, and if
2 you are at the mercy of a company's goodwill, you may decide
3 to pull your competitive punches. And so that creates a
4 problem.

5 So even if everything was going fine with the supply
6 agreement and the TSA, the fact that Fortune may believe that
7 at some point Assa would try to make some difficulty for them,
8 that would probably lead Fortune -- that would likely lead
9 Fortune to perhaps pull its competitive punches and not
10 compete as aggressively.

11 The other issue relates to the fact that we're talking
12 about now Fortune, the leadership of both Emtek -- I'm sorry.
13 Yes, Emtek at Fortune and the smart lock business at Fortune
14 knows the executives at Assa. Assa knows the executives of
15 those businesses. The fact that they have deep knowledge of
16 each other and have discussed how to respond to competitive
17 pricing initiatives suggests to me that an agreement would be
18 easier to come to.

19 And then Assa, of course, knows key competitive information
20 about costs, supply chain, key customers, discounts, margins,
21 those kinds of things. All of these suggest that there's an
22 increased likelihood of coordination.

23 And then Professor Collis's mutual forbearance theory,
24 that is in my view supported by the IO literature. He comes
25 to that theory bringing to the table corporate strategy to

1 explain why the kind of asymmetry that is kind of necessary,
2 is necessary for mutual forbearance to develop, would develop,
3 and I think that creates a significant additional risk
4 relating to coordinated effects, independent of the arguments
5 that I've just made that were in my reply report.

6 THE COURT: Do you cite that literature in your reply
7 report?

8 THE WITNESS: The mutual forbearance literature?

9 THE COURT: Yes, the industrial organization literature
10 that supports it?

11 THE WITNESS: I do not, but Professor Collis does, and
12 the key paper there is by Professors Bernheim and Whinston. I
13 believe it's 1990 RAND Journal of Economics. But it could be
14 1999.

15 THE COURT: Nothing more recent?

16 THE WITNESS: I think there is some more recent
17 literature but the basic theory that developed it is from that
18 paper, and then there are some empirical papers that
19 developed.

20 So when I was evaluating Professor Collis's theory, I was
21 looking at that paper because that's really kind of the IO,
22 you know, the initial paper that kind of talked about that
23 theory.

24 THE COURT: Okay. So in your bullet point here on
25 industrial organization literature, you're referring to that

1 Bernstein and Whinston article?

2 THE WITNESS: Correct.

3 THE COURT: Okay.

4 All right.

5 MR. DONALDSON: It's Bernheim and Whinston?

6 THE WITNESS: Bernheim and Whinston, yes.

7 MR. DONALDSON: Thank you.

8 BY MR. DONALDSON:

9 Q. Dr. Waehrer, have you analyzed potential smart lock entry
10 with respect to the proposed divestiture?

11 A. I did. So this slide, Your Honor, was really an attempt
12 to answer some of the questions that you had posed in one of
13 your hearings.

14 THE COURT: Yeah. I have another one, actually. I
15 have another one. In yesterday's *New York Times* crossword
16 puzzle there was a clue that said barrier to entry which was
17 I think five letters long. And I thought, I'll bet the
18 government's expert will be able to tell me what that is,
19 because I couldn't get it.

20 I did get -- there was another clue which was what it's
21 called in hockey when you're in the penalty box? But that's
22 because my partner's son plays hockey so I just asked him.
23 And it's sin bin. It's a great name.

24 THE WITNESS: I'm sorry, what was it?

25 THE COURT: It's called sin, S-I-N, bin. Sin bin.

1 THE WITNESS: Sin bin, okay.

2 THE COURT: The penalty box. Then I thought, now
3 I've got you and you'll solve it for me and I'll be done.

4 THE WITNESS: So unfortunately you have an economist
5 who is terrible at word games. Barrier to entry, five
6 letters.

7 THE COURT: It might be six. Five or six, but I think
8 it's five. All right. Well, everyone think on that. If
9 anyone did the crossword puzzle yesterday, let me know.

10 Okay. Go ahead. Sorry.

11 THE WITNESS: As I was saying, Your Honor, this slide
12 that is mostly blacked out on the monitor, but you could look
13 at the printout, was mostly an attempt to answer questions
14 that you had teed up about entry. I know that there's been
15 some testimony in court about online entry and whether online
16 entry is really sufficient. And I'm happy to walk through
17 this if you still have those questions.

18 THE COURT: No. I got it. I got the points.

19 THE WITNESS: Okay.

20 MR. DONALDSON: Your Honor, this might be a good
21 breaking point.

22 THE COURT: Perfect. Okay. So why don't we come back
23 at 2:40. So 18 minutes.

24 (Recess from 2:22 p.m. to 2:41 p.m.)

25 THE COURT: All right.

1 MR. DONALDSON: Thank you, Your Honor.

2 BY MR. DONALDSON:

3 Q. Dr. Waehrer, what is a deadweight loss?

4 A. A deadweight loss relates to a welfare calculation, and
5 when there is a circumstance that leads to a decrease in
6 welfare -- well, whenever you have in economics, say, a
7 regulation that influence or some policy that changes welfare,
8 there can be a number of factors. And if it decreases
9 welfare, can have a few different things that happen.

10 There could be one party could be better off, one party
11 could be worse off, but if there's an inefficiency then it
12 creates what is called a deadweight loss. So that is just
13 defined as what's the loss in welfare in the calculation.

14 Q. Dr. Waehrer, what do you understand will be happening
15 with the Yale brand for commercial products in the U.S. if
16 this transaction goes forward?

17 A. So my understanding is that the Yale brand for commercial
18 in the U.S. will essentially be abandoned. So this is a brand
19 that presumably has some value in commercial in the U.S., and
20 it will no longer be used. And that I would describe as a
21 deadweight loss.

22 I think one can think of it in the following kind of
23 simple example. You buy a used car and -- maybe you don't buy
24 used cars, but suppose you did buy a used car and the seller
25 says I'm going to sell you this used car but without the spare

1 tire, and he takes the spare tire out of the car and throws it
2 into the dumpster. That's an example of a deadweight loss
3 where there's something of value that is being taken out of
4 the exchange.

5 And the fact that the commercial -- Yale commercial brand
6 is not part of the sale when I think Fortune indicated some
7 interest in it suggests something about how Assa Abloy was
8 really defining the boundary of the divestiture very carefully
9 to only include items in the relevant market and very
10 carefully trying to exclude aspects that might be related to
11 the commercial business.

12 Q. Dr. Waehrer, what's your understanding with respect to
13 what will happen with the residential, the Yale residential
14 mechanical business if this transaction goes forward?

15 A. So, similar to the Yale commercial brand, my
16 understanding is that the mechanical business will also
17 disappear. That might be similar to taking -- also taking the
18 bike rack off the car and throwing that away in this kind of
19 transaction. So that Yale commercial business -- I mean,
20 sorry, the Yale mechanical business seemed to be something
21 that Fortune had some interest in, at least according to an
22 email that involved Mr. Partington and his testimony the other
23 day. And yet it's not part of the transaction and not going
24 to Fortune.

25 Q. Dr. Waehrer, does Assa Abloy have other commercial lock

1 brands beyond Yale?

2 A. Yes. So, in the U.S., my understanding is that they have
3 a large -- somewhat of a large business in commercial locks
4 with a number of brands, including Sargent and others and Yale
5 is a part of that or at least another brand. So they have
6 commercial locks other than the Yale brand that they sell in
7 the U.S.

8 Q. Can you think of a company that's well positioned to
9 quickly develop interconnect and nexTouch replacement
10 products?

11 A. So because of the commercial business, the Yale's
12 commercial business that they would retain, I would think that
13 they would be able to develop replacement interconnect and
14 nexTouch much quicker than Fortune would be able to without
15 those businesses. So Fortune wouldn't have any commercial
16 business, the Assa Abloy would continue to retain significant
17 commercial brands and would be in a much better position to
18 develop nexTouch and interconnect than Fortune would.

19 Q. Dr. Waehrer, have you given thought to what a sufficient
20 divestiture might look like here?

21 MR. BERNICK: I'll object, Your Honor. I believe it's
22 outside the scope of his report. As was the stuff about
23 deadweight loss. I'm trying to let this go but it's way
24 beyond the scope of the report.

25 THE COURT: Yeah. I would say that deadweight loss was

1 nowhere in his reports. And this is -- I don't remember him
2 giving an opinion as to what a sufficient divestiture would
3 look like. Can you point me to somewhere in his report where
4 it says that?

5 MR. DAHLQUIST: Your Honor, we understood we would have
6 some leeway with our experts in order to put on responsive
7 items to Dr. Bailey, Mr. Galante's surreply reports. This is
8 part of that. So we agree it's not in the initial report and
9 we request that it be heard really to respond to some of the
10 items that we've heard.

11 THE COURT: But what is it responding to -- I don't
12 understand why he couldn't have testified to this in his reply
13 report. What was new in Dr. Bailey's last report that would
14 only now have him come up with this issue of what a sufficient
15 divestiture would look like?

16 MR. DAHLQUIST: I think it goes to that core question,
17 Your Honor, as to what would be a sufficient divestiture.

18 THE COURT: No, I understand. But that was raised by
19 Dr. Bailey's first report. Why wasn't this in his initial
20 reply report?

21 MR. DAHLQUIST: Your Honor, we understand that it's
22 tied together with the surreply report. I don't want to speak
23 for Dr. Waehrer, but that's what we would offer it for,
24 Your Honor.

25 THE COURT: Okay. Well, what part of the surreply

1 report?

2 MR. DAHLQUIST: I'd have to grab it, Your Honor.

3 Your Honor, I apologize. I don't have it. I can get it at
4 a break.

5 MR. DONALDSON: I can move on.

6 THE COURT: Well, no, no. Why don't we do this. Why
7 don't we get the testimony in the record. Mr. Bernick, we'll
8 assess at some future date whether I strike the testimony as
9 being outside of his report. But I do take Mr. Dahlquist's
10 point that I did say I would give a lot of leeway given all
11 how all of this has shaken out.

12 So I'm going to hold your objection. Let's hear the
13 testimony. If I can't -- if I don't get from you all where in
14 the surreply it comes from, then I will strike it.

15 MR. DAHLQUIST: Understood, Your Honor. And I guess
16 the final point I'd add is a lot of this is also responsive to
17 Your Honor's questions as well. These are questions that you
18 had asked specifically: I want your experts to be prepared to
19 tell me what would a sufficient divestiture look like.

20 THE COURT: I did ask for that, Mr. Bernick. I did.
21 Now that he's reminding me.

22 MR. BERNICK: You did, Your Honor.

23 THE COURT: I know, I hear you.

24 MR. BERNICK: I want to make sure that if there's
25 flexibility afforded to the government's experts, that we

1 similarly have some flexibility. But I understand the issue.
2 We just reserve our objection.

3 THE COURT: Understood. So I'm going to overrule the
4 objection based on that point. Good job to the associate who
5 remembered that and handed you the note. And we'll go
6 forward.

7 But of course, Mr. Bernick, I'm going to allow your experts
8 to respond.

9 MR. BERNICK: Thank you, Your Honor.

10 MR. DAHLQUIST: Thank you, Your Honor.

11 MR. DONALDSON: Thank you, Your Honor. This also
12 relates to the FTC study where they looked at the asset
13 package of an ongoing business.

14 BY MR. DONALDSON:

15 Q. I guess the question is, Dr. Waehrer, are there any
16 guiding principles, whether from the FTC study or otherwise,
17 that you would look to with respect to crafting a sufficient
18 divestiture here?

19 A. So in response to your question, which was -- I could
20 have passed the note too, but I couldn't.

21 THE COURT: I'm apparently the only person who forgot
22 that I was the one who asked the question, so...

23 THE WITNESS: So I would -- the guiding principle that
24 I would suggest that Your Honor follow would be to try to
25 craft a divestiture that looks as close as possible to an

1 ongoing business. I think the divestiture as it stands now,
2 for reasons that I've already testified to, does not fit that
3 description. And so then the question is, obviously, what
4 would, and what would it need to include? We would need to
5 resolve the Vietnam uncertainty for the factory.

6 There's certain global economies of scope and scale that
7 are not central to my analysis; they're more central to some
8 of the other experts, so I'm just going to put those aside and
9 focus on the things that I've really focused on. And so
10 besides the Vietnam facility, then we have nexTouch and
11 interconnect. And I think to really have a divestiture of an
12 ongoing business there needs to be some sort of production of
13 nexTouch and interconnect.

14 And then the question is exactly what's the boundaries of
15 that divestiture that would include the production of nexTouch
16 and interconnect. And I don't have good insight into the
17 structure of Yale's commercial side of the U.S. business.
18 The focus of DOJ's investigation was during the HSR period and
19 even during the litigation has been on the residential side.
20 There's limited -- somewhat limited discovery on the commercial
21 side.

22 And it could be that the nexTouch and interconnect locks
23 depend quite a bit on being integrated with other parts of the
24 commercial business. And so it could be that it would just
25 simply be, the right choice would be to divest the Yale

1 commercial in the U.S. to Fortune, something that they were
2 interested in acquiring to begin with, it seemed as if.

3 And if that caused some problems because it was actually
4 creating a separation between assets within Assa Abloy, I think
5 Assa Abloy, because of its other commercial businesses, would
6 be in a better position to heal that wound, you might say, than
7 Fortune would be filling the gaps.

8 And so I can't -- I don't -- just to summarize, I don't know
9 what the right carving-out of the commercial business exactly.
10 It does seem to me that, based on the evidence, that nexTouch
11 and interconnect are important, Fortune should be getting some
12 sort of manufacturing facilities for those in order to have
13 really an ongoing -- divestiture of an ongoing business. But
14 how you detach that from the rest of Assa Abloy, I don't have
15 the information to provide you with.

16 MR. BERNICK: Your Honor, I move to reject the
17 testimony on other grounds, that it's not supported by
18 sufficient facts or data. He just testified he doesn't know
19 about the commercial business but said it needed to be
20 divested anyway. So I'm making an alternative objection,
21 Your Honor.

22 THE COURT: I'm going to overrule the objection, but
23 Mr. Bernick, as you know, and as I've asked both of the
24 experts to tie any opinions to evidence. So I will be looking
25 closely at all opinions and if they're tied to actual

1 evidence.

2 MR. BERNICK: Yes, Your Honor.

3 BY MR. DONALDSON:

4 Q. Just one followup question on that. The Yale commercial
5 business in the U.S. and the residential mechanical business,
6 those were the brands that were being abandoned, I think you
7 testified to previously. Is that right?

8 A. The Yale commercial trademark was being abandoned.
9 It's not clear that the Yale business was being abandoned just
10 simply because they could be producing the same locks but just
11 relabeling them Kwikset. But then I believe that the production
12 and sales of the Yale branded mechanical locks would be
13 discontinued.

14 Q. Okay. Thank you for the correction.

15 MR. DONALDSON: Your Honor, unless the Court has
16 additional questions, I have no further questions at this
17 time.

18 THE COURT: Thank you, Mr. Donaldson.

19 Mr. Bernick?

20 CROSS-EXAMINATION

21 BY MR. BERNICK:

22 Q. Dr. Waehrer, it's good to see you again. We met at your
23 deposition. How are you today, sir?

24 A. I'm good. How are you?

25 Q. I'm doing well.

1 I'm going to go back and talk about a few things that you
2 discussed with counsel for the government earlier today.
3 First of all, you talked about interconnected smart locks
4 during your direct examination. Is that right?

5 A. Yes.

6 Q. Is a Yale 400 series an example of a non-interconnected
7 residential smart lock?

8 A. I would have to go back and look at the models. I don't
9 know.

10 Q. How about an Assure Lock?

11 A. I believe Assure Lock has a version that's interconnected
12 and a version that's not.

13 Q. Okay. I'm just trying to establish some baseline
14 terminology. I'll refer to an interconnected smart lock and
15 a non-interconnected residential smart lock. Do you know what
16 I mean by those two things?

17 A. Yes.

18 Q. Okay. A non-interconnected residential smart lock and an
19 interconnected residential smart lock are not reasonably
20 interchangeable substitutes from the perspective of consumers.
21 Isn't that right, sir?

22 A. I believe that to be true. Correct.

23 Q. If building codes require an interconnected lock, then
24 consumers could not substitute a non-interconnected
25 residential smart lock. Is that right?

1 A. If you mean essentially install a non-interconnected
2 lock in a building where the code requires interconnected
3 lock. I would agree with you, yes.

4 Q. You're familiar with the Horizontal Merger Guidelines;
5 is that right, sir?

6 A. I am.

7 Q. Those guidelines describe the agency's approach to
8 product market definition; is that right?

9 A. They do.

10 THE COURT: These are the 2010 ones?

11 MR. BERNICK: That's correct, Your Honor.

12 BY MR. BERNICK:

13 Q. And you generally try to follow those merger guidelines.
14 Is that right, sir?

15 A. They're generally a good guide to follow, yes.

16 Q. And those merger guidelines state, "Market definition
17 focuses solely on demand substitution factors." Is that
18 right?

19 A. I believe they do, yes.

20 Q. The guidelines also define markets based on "customer's
21 ability and willingness to substitute away from one product to
22 another in response to a price increase." Right?

23 A. I believe they do. Yes.

24 Q. The hypothetical monopolist test is used in the
25 guidelines to define relevant product markets. Correct?

1 A. It's one of the ways in which markets are defined.

2 Correct.

3 Q. What is the hypothetical monopolist test, sir?

4 A. So you have a candidate set of products and the
5 hypothetical monopolist test says at -- well, for a horizontal
6 merger, you'd do it as follows:

7 You'd take current prices, and you'd say, if you had a
8 horizontal monopolist -- or you had a monopolist over those
9 products, would a monopolist find it profitable to increase
10 price by a small but significant nontransitory price increase,
11 usually referred to as a SSNIP, and that's usually taken in
12 most cases to be 5 percent, but it can be other sizes of price
13 effects depending on the industry.

14 Q. In this case you did not perform an analysis to determine
15 whether a market limited to residential smart locks but
16 excluding interconnected smart locks would satisfy the
17 hypothetical monopolist test, did you?

18 A. I did not.

19 Q. And interconnected smart locks are at least 5 percent
20 more expensive than non-interconnected residential smart
21 locks. Correct?

22 A. That would be correct. Yes.

23 Q. And if there was, to use your phrase, a SSNIP, a small
24 but significant nontransitory increase in price, if there
25 was a SSNIP on interconnected locks, customers would not

1 substitute to non-interconnected residential smart locks.

2 Correct?

3 A. I'm sorry. I'm just trying to parse your question
4 because it doesn't quite -- is not quite consistent with the
5 hypothetical monopolist test. But yes, I believe that's
6 correct.

7 Q. And if there was a SSNIP on non-interconnected
8 residential smart locks, customers would not substitute to
9 interconnected smart locks. Right?

10 A. Unlikely that very many people would switch.

11 Q. There is no market for interconnected smart locks alleged
12 in the complaint, is there, sir?

13 A. There is not.

14 Q. Instead, the alleged market here is for residential smart
15 locks. Correct?

16 A. There is.

17 Q. And you did not define a separate market for
18 interconnected locks in your report. Right?

19 A. I did not.

20 Q. And you did not evaluate harm to competition in a
21 separate market for interconnected locks. Isn't that right?

22 A. Not specifically, no.

23 Q. Not specifically or generally. Right, sir?

24 A. I am trying to determine whether or not if there is a --
25 if Fortune has a problem with the supply of smart locks,

1 whether what I've analyzed would suggest, if there was a
2 market for interconnected locks, a problem with that market,
3 and I think that what I have in the report would suggest that
4 there might be a problem in that market, yes.

5 Q. You were never even asked to evaluate harm to competition
6 in a separate market for interconnected locks. Right?

7 A. No. That was not part of my task.

8 Q. If Fortune Brands were to develop a new interconnected
9 lock, you agree that there would be no reduction in the number
10 of companies selling interconnected locks as a result of the
11 transaction. Right?

12 A. I believe that's accurate, yes.

13 Q. Switching to nexTouch, a nexTouch is a commercial grade
14 mortise lock. Right?

15 A. That's what has been suggested in the evidence, yes, in
16 court.

17 Q. For multifamily customers that we're talking about today,
18 a 400 series or Assure residential smart lock is not a
19 substitute for a nexTouch smart lock. Correct?

20 A. So I believe that Mr. Haldeman did suggest that there was
21 some competition with a mortise-style lock. I believe the
22 company was Latch that was installing mortise-style locks on
23 doors, retrofitting doors, suggesting that that company was
24 competing with them for mortise-style locks.

25 Q. So I'll ask the question again. I would just like a yes

1 or no answer to the question. For multifamily customers, a
2 400 series Assure residential smart lock is not a substitute
3 for a nexTouch smart lock. Correct? Yes or no, sir?

4 A. Well, the evidence --

5 THE COURT: It's a yes or no, or I don't know.
6 That's what he's asked for.

7 THE WITNESS: So I don't know, then.

8 THE COURT: Okay.

9 MR. BERNICK: Okay.

10 BY MR. BERNICK:

11 Q. In your deposition you knew. Right?

12 A. That was before Mr. Haldeman's testimony on this.

13 Q. If you could flip with me -- did you give a deposition
14 in this case, Your Honor? I'm sorry.

15 THE COURT: I did not.

16 (Laughter.)

17 MR. BERNICK: Dr. Waehrer.

18 THE COURT: I stay far away from you people.

19 THE WITNESS: I did. I did give a deposition.

20 BY MR. BERNICK:

21 Q. Did you tell the truth in this matter, in the deposition?

22 A. I was doing my best, yes.

23 Q. Could you flip in tab 3 --

24 THE COURT: I don't think we have binders.

25 MR. BERNICK: We're passing out some binders now.

1 It'll be at tab 3.

2 BY MR. BERNICK:

3 Q. Does tab 3 appear to be your deposition, sir?

4 A. Yes.

5 Q. If you could flip with me to page 71, row 6.

6 I'm going to read from your deposition:

7 "So for those downstream customers, apartment buildings,

8 a Yale Assure Lock is not a substitute for a nexTouch lock.

9 Right?"

10 Your answer at line 11: "I don't think they are. No."

11 Did I read that correctly, sir?

12 A. You did.

13 Q. From the perspective of a multifamily integrator like
14 SmartRent, a nexTouch lock is not a substitute for a 400
15 series or an Assure Lock. Right?

16 A. I believe that's consistent with Mr. Haldeman's
17 testimony. Yes.

18 Q. And you did not conduct a hypothetical monopolist test to
19 determine if commercial smart locks should be included or
20 excluded from the relevant market. Correct?

21 A. I did not.

22 Q. If there was a SSNIP on commercial smart locks, customers
23 would not switch to residential smart locks. Correct?

24 A. So I think that I need to answer I don't know again
25 simply because of Mr. Haldeman's testimony on this and the

1 fact that there was a supplier of mortise locks that seemed to
2 be retrofitting doors that would otherwise not take a mortise
3 lock. So if you're talking about the Latch mortise lock as
4 being part of commercial mortise locks, then it seemed like
5 they were being treated as substitutes with non-mortise locks.

6 Q. So is your answer "I don't know"?

7 A. I would say no -- I don't know. And I'm sorry, I should
8 have just said "I don't know." I apologize.

9 Q. But at the time of your deposition, your opinion was that
10 they were not substitutable?

11 A. I believe you could probably point me to the place in my
12 deposition where I said that, yes.

13 Q. If there was a SSNIP on residential smart locks,
14 customers would not switch to a commercial smart lock.
15 Correct?

16 A. Again, I'd have to say I don't know.

17 Q. But at the time of your deposition, you said they would
18 not switch. Right?

19 A. Correct.

20 Q. You did not include commercial smart locks in your market
21 share calculations. Correct?

22 A. That's correct.

23 Q. And you were not asked to evaluate whether there's harm
24 to competition in a product market for commercial smart locks.
25 Correct?

1 A. Correct.

2 Q. And you don't know whether Spectrum sells commercial
3 smart locks. Correct?

4 A. I don't believe they do, but I don't know for sure.

5 Q. And if Spectrum does not sell commercial smart locks,
6 you agree that the transaction will not reduce the number of
7 commercial smart lock sellers in the market today. Correct?

8 A. With the provision of "today," then I would agree with
9 you, yes.

10 Q. Your theory of harm, as I understand it, both from your
11 deposition and your testimony today, with respect to the
12 supply agreement, is that if Fortune loses the ability to sell
13 nexTouch and interconnected locks, Fortune will lose not only
14 sales of nexTouch and interconnected locks, but also
15 residential smart locks like the 400 or Assure series. That's
16 your opinion, sir, right?

17 A. Yes.

18 Q. And this theory is based on the fact that multifamily
19 integrators like SmartRent would substitute their entire
20 portfolio of products away from Yale if they cannot get a
21 nexTouch or interconnect lock. Correct?

22 A. Not exactly.

23 Q. That's not your testimony?

24 A. So my current view is informed by the testimony of
25 Mr. Haldeman on this point.

1 Q. Well, let me ask the question again. I just want a
2 yes or no answer. Your theory is based on the fact that
3 multifamily integrators like SmartRent would substitute their
4 entire portfolio of products away from Yale if they cannot get
5 nexTouch and interconnected locks. Correct?

6 A. No.

7 Q. That's not your opinion?

8 A. It's -- that's one mechanism, but not the only mechanism
9 that would lead to my conclusion.

10 Q. It is true, is it not, that no customer has testified
11 that they're going to cease purchasing Yale Assure locks if
12 they cannot also get nexTouch and interconnected locks.

13 Correct? Not a single one.

14 A. I have not heard testimony on that.

15 Q. In your presentation you quoted --

16 THE COURT: And, sir, have you been here for all of
17 the testimony?

18 THE WITNESS: I've tried to keep up with the
19 transcripts when I have not been in court.

20 THE COURT: Okay. So you know all of the testimony and
21 your answer to him is not that you've seen?

22 THE WITNESS: So what I have heard --

23 THE COURT: No, no. I just want to clarify, because he
24 asked you, there's been no testimony. And all I want to do is
25 clarify that you've heard or read the testimony so far.

1 THE WITNESS: Yes.

2 THE COURT: Okay.

3 BY MR. BERNICK:

4 Q. In your presentation today you quote testimony from
5 Jason Williams to support the theory regarding nexTouch and
6 interconnect locks. Correct?

7 A. Yes.

8 Q. But you chose to exclude language from his deposition
9 that was inconsistent with your opinion. Correct?

10 A. No.

11 Q. If you flip with me at tab 9, it's a copy of
12 Mr. Williams' deposition. I'm starting at page 276, line 17.
13 If you can follow along, the question is --

14 THE COURT: Hold on, Mr. Bernick.

15 Sir, are you there?

16 THE WITNESS: I am here.

17 BY MR. BERNICK:

18 Q. So line 276 -- page 276, line 17, the question: "Would
19 you be at a competitive disadvantage if you could not provide
20 both residential smart locks and nexTouch lock sets to a
21 customer that desired both?"

22 And then there's some objections.

23 The answer picks back up at 25: "If we could not have --
24 if we could not provide both things, there would be some
25 competitive advantage that, you know, maybe we lose. But

1 let's say it was nexTouch. We wouldn't lose the smart
2 residential business. Right? We'd lose the nexTouch business
3 if we didn't have it. I don't think there's anything -- well,
4 I'll keep it at that."

5 Did I read that correctly, sir?

6 A. Just give me a minute here.

7 MR. DONALDSON: Objection. Your Honor, I believe tab 9
8 is Professor Collis's transcript? I don't know if the binder
9 is the same as mine, but my No. 9 is Mr. Collis's transcript.

10 THE COURT: Mine is Mr. Williams's transcript. Hold
11 on. Let's make sure they have the right binder.

12 THE WITNESS: So you were asking me if that was an
13 accurate reading of the testimony, and I'd say yes.

14 BY MR. BERNICK:

15 Q. You previously admitted you cannot identify a company
16 other than Assa and maybe Allegion that sells a complete
17 portfolio in the multifamily channel. Correct?

18 A. I believe that's accurate. Yes.

19 Q. Spectrum also does not have a portfolio of products
20 today. Correct?

21 A. Not today. No.

22 Q. But companies that do not offer a complete portfolio
23 still sell to multifamily integrators like SmartRent.
24 Correct?

25 A. Yes.

1 Q. And companies without a portfolio can sell to multifamily
2 integrators because the type of lock that is required depends
3 on the type of job at issue. Correct?

4 A. I believe the answer to that is yes if I'm remembering
5 your question correctly. They can sell? Is that what the
6 question was?

7 Q. Yes.

8 A. Yes. Then yes.

9 Q. Customers are not required to buy residential smart
10 locks, interconnects and nexTouch locks from the same
11 supplier. Correct?

12 A. No, they're not required to.

13 Q. And in fact, customers can purchase those types of
14 products separately. Correct?

15 A. Yes.

16 Q. And you're not aware of any discount a customer would get
17 from purchasing the products together in a bundle. Right?

18 A. No.

19 Q. And you don't know --

20 THE COURT: I'm sorry. No, he's not right or yes,
21 he's right?

22 THE WITNESS: I'm not aware. I thought that was the
23 question.

24 THE COURT: Okay. So he's right you're not aware.

25 THE WITNESS: I'm sorry.

1 THE COURT: No, this is always hard.

2 BY MR. BERNICK:

3 Q. And you do not know if a multifamily integrator can use
4 its own software to make locks from different suppliers work
5 together, do you?

6 A. Well, with Mr. Haldeman's testimony, I do have some
7 awareness of that now.

8 Q. And in fact, it's true, an integrator can use software
9 to make products work together from different suppliers.

10 Correct?

11 A. I believe that was Mr. Haldeman's testimony.

12 Q. You testified that losing the ability to sell
13 interconnect and nexTouch locks would put Yale's sales at
14 risk. Correct?

15 A. Yes.

16 Q. But you haven't quantified how many sales would be lost?

17 A. The quantification I have is what I testified to in my
18 direct testimony.

19 Q. I didn't see a quantification in your direct testimony.
20 Did you quantify how many sales would be lost to Yale if it
21 lost the ability to sell interconnect and nexTouch locks?

22 A. Is that a yes-or-no question?

23 THE COURT: It's a yes or no.

24 THE WITNESS: Okay.

25 THE COURT: That's a yes, no, or I don't know.

1 THE WITNESS: Well, it depends on what you mean by
2 "quantify," I guess.

3 BY MR. BERNICK:

4 Q. Did you quantify the number of lost sales that Yale would
5 have if it lost the ability to sell interconnect and nexTouch
6 locks?

7 THE COURT: Do you not understand what he means by
8 "quantify"?

9 THE WITNESS: I'm sorry. I would say no, I did not
10 quantify that.

11 BY MR. BERNICK:

12 Q. And this might be what you're referring to. On slide 49
13 of your presentation, if we can pull that up, the last bullet,
14 you wrote, "Purchasers of nexTouch or interconnect who bought
15 at least one of these types of locks in all years from 2019 to
16 2022 account for" --

17 THE COURT: Account for blah.

18 BY MR. BERNICK:

19 Q. Blah, blah, blah of all Yale U.S. smart lock sales in
20 this period. I apologize. Got ahead of myself.

21 THE COURT: It's your competitive information. So I
22 think what you should be saying is "thank you."

23 (Laughter.)

24 MR. BERNICK: Saving me from myself.

25

1 BY MR. BERNICK:

2 Q. The question, Dr. Waehrer, first of all, did I read that
3 correctly, minus the omission?

4 A. I'm afraid I lost track with the bleep.

5 Q. Well, anyway, you see the last bullet, it's on the slide.

6 A. I do.

7 Q. And you state here that you used data from 2019 to 2022
8 to calculate the redacted percentage. Correct?

9 A. Correct.

10 Q. And you're aware that 2018 data was available in the
11 backup data and work papers that you provided. Correct?

12 A. Correct.

13 Q. But you did not use 2018 data here, did you?

14 A. No.

15 Q. Would it surprise you to know that this percent in your
16 bullet is cut by more than half if you include the 2018 data?

17 A. It would not surprise me at all.

18 Q. And Dr. Waehrer, in this bullet here you write, "At least
19 one of these types of locks." Correct?

20 A. Yes.

21 Q. And that means you count all of that customer's
22 residential smart lock sales in this percentage -- again
23 that's redacted -- if the customer purchased at least one
24 nexTouch or interconnect locks in each of those four years.
25 Correct?

1 A. That was the calculation.

2 Q. So if a Yale smart lock customer bought just one or two
3 nexTouch locks in 2019, that would be enough for you to count
4 all of that customer's Yale U.S. smart lock sales in that
5 percentage. Correct?

6 A. If there were such examples, that's the way it would have
7 come out, yes.

8 Q. Did you calculate what this percentage would be using
9 your same method if you just exclude SmartRent from the
10 numbers? I'm not asking for the percentage, but I'm asking if
11 you did it.

12 A. So as I indicated in my direct testimony, SmartRent is a
13 very large percentage of --

14 THE COURT: Can you just answer yes or no to his
15 question?

16 THE WITNESS: Oh, I'm sorry. Did I calculate it? Is
17 that the question?

18 BY MR. BERNICK:

19 Q. That's what I asked. Did you calculate it?

20 A. Well, I could, because I --

21 THE COURT: Did you or did you not?

22 THE WITNESS: I'm sorry. I think I did. Yes.

23 BY MR. BERNICK:

24 Q. And you know that number sitting here today?

25 A. With a little bit of math, I could call out that number,

1 yes.

2 Q. So your testimony is you could do the calculation but you
3 haven't?

4 A. It's a subtraction of two numbers that I don't remember
5 exactly what it is, but I did do the -- I mean, it would be a
6 straightforward calculation.

7 Q. It's not in your report?

8 A. No.

9 Q. You believe that losing a customer like SmartRent would
10 be a significant loss to Yale. Correct?

11 A. Yes.

12 Q. But you don't even know how many interconnect locks
13 SmartRent intends to purchase in the coming year, do you?

14 A. I do not.

15 Q. And you don't know what quantity of nexTouch locks
16 SmartRent plans to purchase from Yale in the coming year, do
17 you?

18 A. I do not.

19 Q. Are you aware of any company, sir, that Assa Abloy has
20 failed to supply with interconnects and nexTouch locks to
21 date?

22 A. No.

23 Q. You talked in your testimony about Assa Abloy being a
24 competitor with Fortune Brands is a significant issue with
25 respect to the supply agreement. Is that right?

1 A. Yes.

2 Q. But in fact Assa Abloy competes with SmartRent today.
3 Right?

4 A. I believe that is accurate.

5 Q. And they compete today through Assa Abloy's Accentra
6 platform that competes directly with SmartRent. Isn't that
7 right?

8 A. I would assume so, but I haven't seen direct evidence of
9 that.

10 Q. And Assa Abloy, despite being a competitor, has supplied
11 SmartRent with nexTouch and interconnect locks for years.
12 Right?

13 A. I don't know for sure, but yes. I'm sorry. Yes, they
14 have.

15 Q. And they've supplied other multifamily integrators with
16 these products for years as well. Isn't that right?

17 A. Yes.

18 Q. At the time you submitted your report -- well, at the
19 time you were deposed in this matter, you did not know what
20 the corporate structure of Assa Abloy is, correct?

21 A. No.

22 Q. No, you did not know?

23 A. I had an awareness of the corporate structure, but not
24 an exact awareness.

25 Q. You believed in fact at your deposition that there was a

1 global smart residential business division. Right?

2 A. I was referring at the time to GSR. Yes.

3 Q. And you believed that after the transaction was proposed,
4 that smart residential business division was then split into
5 geographic regions. That was your testimony, sir. Right?

6 A. I believe it was, yes.

7 Q. And at the time you submitted your report, you didn't
8 know what portion of the U.S. smart residential business was
9 being divested to Fortune Brands, did you?

10 A. I'm sorry. Can you ask that question again?

11 Q. Yes. At the time you submitted your report, and when you
12 were deposed, you did not know what portion of the U.S. smart
13 residential business was being divested to Fortune Brands.
14 Correct?

15 A. I think I did know that.

16 Q. All right. You can turn back to tab 3. And I'm looking
17 at page 201 of your deposition transcript. Page 201, line 20.

18 "Question: Do you know what proportion of that business
19 division within the Americas that does smart locks is getting
20 divested to Fortune Brands?"

21 You said: "Can you say that question again."

22 "That business within the Americas, that's the U.S. smart
23 residential business, do you know what portion of that
24 business is being divested to Fortune Brands?"

25 "Answer: So I -- I don't."

1 Did I read that correctly, sir?

2 A. You did.

3 Q. At the time you submitted your report in this matter you
4 didn't know whether Assa Abloy had product development teams
5 for particular regions, did you?

6 A. I think I did know that, and we discussed that in my
7 deposition.

8 Q. Okay. Well, we can keep your deposition handy. We'll
9 look at page 203, row 1 through 14.

10 "Question: It's not exactly what I mean that they have
11 different product development teams serving product
12 development for products in particular regions. Do you know
13 whether that's true or not?

14 "Answer: I don't know one way or another."

15 Did I read that correctly, sir?

16 A. Well, there's more to the answer there. Can I just take
17 a minute to read that?

18 Q. You may. The question is just whether I read that
19 correctly.

20 (Witness reviewing document.)

21 A. You read that first couple lines correctly, yes.

22 Q. At the time you submitted your report, you didn't know
23 how similar or dissimilar Assa Abloy's smart locks were around
24 the world, did you?

25 A. I did have an understanding of the differences.

1 Q. I'll move on. You believe joint R&D shared across the
2 regions is important at Assa Abloy. Correct?

3 A. Yes.

4 Q. But at the time you were deposed, you didn't know what
5 portion of total product development costs for smart
6 residential business actually were shared globally. You had
7 no idea, did you, sir?

8 A. I did not.

9 Q. And at the time you submitted your report, you didn't
10 know whether each Assa business in each region had its own
11 sales and marketing team, did you?

12 A. I do recall discussing that, and I thought that I replied
13 that they probably did. But maybe you're going to point me to
14 my deposition.

15 Q. I could, but I think we get the point here.

16 At the time you submitted your report, you didn't know
17 whether each business leader was responsible for his or her
18 own P&L, did you, sir?

19 A. Again, we discussed that. I think it's a question of --
20 well --

21 Q. Yes or no, sir.

22 A. I mean, I'm getting hung up on the word "responsible."
23 So maybe you can tell me what you mean by "responsible."

24 Q. I'll just ask the question again: At the time of your
25 deposition, you didn't know whether each business leader was

1 responsible for his or her own P&L. Correct?

2 THE COURT: Why don't we do this, because I made
3 Mr. Dahlquist do this. Why don't you ask him a question, and
4 if he testifies contrary to his deposition, you can impeach
5 him. But this isn't a memory test as to what he knew or
6 didn't know at his deposition.

7 MR. BERNICK: Well, I'll change the time period, then,
8 because I think what's important to understand is what he knew
9 when he submitted his report and formulated his opinions,
10 versus what he might have heard in court from a different
11 witness. And that's what I'm trying to establish.

12 THE COURT: Well, that's fair. But just -- I guess
13 that's fair and different than what Mr. Dahlquist was doing.

14 MR. BERNICK: I'll move on from this question. That
15 was the last in that series.

16 THE COURT: Okay.

17 BY MR. BERNICK:

18 Q. You ran several quantitative analyses in your initial
19 report. Correct, Dr. Waehrer?

20 A. I did.

21 Q. A diversion ratio analysis, a GUPPI analysis, and a
22 merger simulation. Is that right?

23 A. Yes.

24 Q. And you've not updated those analyses from your initial
25 report to account for the divestiture?

1 A. I have not.

2 Q. But you agree that assuming Assa Abloy's share in the
3 relevant markets transfers to Fortune, those quantitative
4 analyses do not generate any price effects once the
5 divestiture is included. Isn't that right?

6 A. It would require additional assumptions besides just
7 holding share constant.

8 Q. Okay. We can take a look at your deposition testimony on
9 this. Page 156. If you look at row 15.

10 "Question: You have quantitative analyses, diversion
11 ratios, the GUPPI analysis, the merger simulation. You've not
12 updated those analyses to take into account the divestiture.
13 Is that right?

14 "I've not updated my analyses to incorporate the
15 divestiture, the -- the analyses of the un-remedied merger to
16 take into account the divestiture.

17 "Question: Dr. Bailey did so, right? She updated those
18 analyses?

19 "She reran my analyses assuming that Fortune Brands would
20 have the same share as divested business -- well, as the
21 divested business.

22 "Question: That's right. With that assumption,
23 rerunning the analyses, those updated analyses do not show any
24 price effects following the divestiture. Right?

25 "I think I agree with you, but -- but yeah, simply

1 assuming a transfer of share won't tend to generate any price
2 effects."

3 Did I read that correctly, sir?

4 A. You did.

5 Q. But you claim that those analyses are the wrong analyses
6 to run when evaluating a divestiture. Is that right?

7 A. In this particular case, yes.

8 Q. You believe a divestiture requires a different set of
9 analyses?

10 A. In this case, yes.

11 Q. The ones that you ran in your reply report?

12 A. It's the analysis in the reply report, yes.

13 Q. And one of those analyses that you performed in your
14 reply report was whether Fortune would be successful with the
15 divested assets. Is that right?

16 A. That's certainly discussed in my reply report. Yes.

17 Q. And you did not conduct any quantitative analysis of
18 Fortune Brands having reduced economies of scale or scope
19 relative to Assa Abloy with respect to the divested assets.
20 Right?

21 A. I did not quantify that, no.

22 Q. You believe it is likely that Fortune Brands will have
23 higher costs, and as a result set higher prices. Is that
24 right, sir?

25 A. Yes.

1 Q. But you cannot quantify an increase in cost of the
2 divested assets under Fortune Brands. Right?

3 A. I did not quantify that.

4 Q. And you did not quantify any price increase. Right?

5 A. I did not.

6 Q. And in fact you agree that the smart lock market is a
7 kind of market where you expect to see prices declining over
8 time. Isn't that right?

9 A. Here again, I'm getting hung up on the language, the
10 generality of the language, and I apologize.

11 Q. It's a simple question. This is the kind of market where
12 you would expect prices to be declining over time. Yes or no?

13 A. Yes.

14 Q. You agree that a substantial lessening of competition
15 from an economics perspective generally requires at least a
16 5 percent price increase. Right?

17 A. Yes.

18 Q. You assume in your analysis that Assa Abloy must benefit
19 from joint procurement. Correct?

20 A. I don't think that I'm assuming it, no.

21 Q. You don't know what that benefit is? You haven't
22 quantified it?

23 A. I have not quantified it.

24 Q. And you don't know one way or the other whether Assa
25 Abloy's existing supply contracts contain volume discounts.

1 Right?

2 A. I do not know.

3 Q. And you haven't tried to estimate how much supply costs
4 could increase after the divestiture, have you, sir?

5 A. I have not quantified it.

6 Q. In fact, you don't know one way or the other whether the
7 U.S. smart residential business costs would be higher after
8 the divestiture, do you, sir?

9 A. Well, that's the subject of my reply report, and I think
10 I'm suggesting that it would be higher.

11 Q. You have no idea what any increased costs would actually
12 be, do you, sir, as you sit here today?

13 A. I have not quantified it, no.

14 Q. You agree that global scale is not necessary to compete
15 for the sale of smart locks. Correct?

16 A. Yes, I agree.

17 Q. Fortune's business plan contains a discussion of revenue
18 and cost synergies. Right?

19 A. I believe that's true, yes.

20 Q. A synergy is the same thing as an efficiency, correct?

21 A. If you mean by efficiency according to the merger
22 guidelines, then I would say no.

23 Q. So a synergy is not the same thing as an efficiency.

24 A. No.

25 Q. And you do not believe that Fortune's claimed synergies

1 are merger-specific. Right?

2 A. That was certainly not part of Dr. Galante's analysis
3 from what I read, no.

4 Q. I'm asking you about your analysis, sir. You do not
5 believe that Fortune's claimed synergies are merger-specific,
6 do you?

7 A. No, I don't.

8 Q. And therefore, you do not believe those synergies should
9 be considered in the merger analysis at all. Isn't that
10 right?

11 A. I don't think that's accurate. No.

12 Q. Where in your report do you actually take into account
13 the synergies that Fortune Brands expects to obtain?

14 A. So they're part of the discussion in my reply report.
15 They are not quantified as the cost to -- neither the
16 synergies nor the economies of scale are quantified.

17 Q. So you don't calculate the costs of the transaction or
18 the benefits of the transaction and quantify them. Right?

19 A. They are not quantified.

20 Q. And you don't know one way or the other as you sit here
21 today whether the U.S. smart residential business subsidizes
22 the global Yale software platform. Correct?

23 A. So you did ask me about this in my deposition, and I went
24 back and read some of the discussion and heard some of the
25 testimony. So if you're asking me as I sit here today, I

1 think I have some understanding of the subsidization you're
2 referring to.

3 Q. So you agree with me, then, that the U.S. smart
4 residential business does subsidize the global Yale software
5 platform today. Right?

6 A. Depends on what you mean by "subsidize." There's -- I
7 believe the testimony suggested --

8 Q. This is a simple yes-or-no question, sir.

9 A. Well, it depends on what you mean by "subsidized," so
10 I don't know how to answer the question.

11 Q. So you don't know?

12 A. As I said, I don't know how to answer the question.

13 Q. You agree that if Yale was in fact subsidizing the other
14 smart residential businesses, that removing that subsidy would
15 make Yale more profitable under Fortune Brands. Right?

16 A. So that depends on a lot of factors, not just the --
17 reversing the subsidy.

18 Q. Holding all other factors equal, sir, you agree that if
19 Yale was in fact subsidizing the other smart residential
20 businesses, that removing that subsidy would make Yale more
21 profitable, correct?

22 A. All else equal, yes.

23 Q. The divestiture retrospective studies you cited are not
24 peer reviewed. Correct?

25 A. No.

1 THE COURT: I'm sorry. What was not peer reviewed?

2 MR. BERNICK: The divestiture retrospective studies.

3 THE COURT: Is that the FTC studies?

4 MR. BERNICK: Yes. The FTC studies.

5 BY MR. BERNICK:

6 Q. And with respect to the 2017 FTC study, you did not
7 independently analyze the divestitures that that study
8 surveys. Correct?

9 A. The data is not available, no.

10 Q. And therefore you have no basis to dispute the FTC's
11 finding that a hundred percent of divestitures of ongoing
12 businesses were successful. Correct?

13 A. I do not dispute that, no.

14 Q. I want to take a look at that 2017 study. It should be
15 in your binder at tab 10. And we'll look at page 3.

16 A. Say the page again.

17 Q. Page 3. And I believe you testified earlier, sir, that
18 divestitures -- that the success rate for divestitures in
19 ongoing business were quite good. Do you recall that
20 testimony, sir?

21 A. Yes.

22 Q. And here in footnote 8 on page 3, there's a footnote that
23 describes how the FTC defines an ongoing business. Is that
24 right?

25 A. Yes.

1 Q. And I'm going to read part of this.

2 THE COURT: Just read slowly.

3 MR. BERNICK: I will.

4 THE COURT: Otherwise, I'm going to get in trouble.

5 MR. BERNICK: I'm sorry.

6 BY MR. BERNICK:

7 Q. "The assets include most typically an established
8 customer base, a fully staffed facility of some sort (a
9 manufacturing facility or retail operation) or an otherwise
10 self-contained business unit that may have product contract
11 packed, a manufacturing and/or sales force, perhaps a research
12 and development team, and other assets that are included in
13 the business, including ancillary agreements and third party
14 contracts."

15 Do you see that?

16 A. I do.

17 Q. And so you'd agree if those factors are satisfied, the
18 business would qualify as an ongoing business. Correct?

19 A. Properly interpreted, yes.

20 Q. And in your deposition you couldn't identify any other
21 factors that would be necessary for the definition of an
22 ongoing business. Correct?

23 A. Correct.

24 Q. The FTC criteria for divestiture being an ongoing
25 business are satisfied with respect to the Emtex premium

1 mechanical divestiture. Correct?

2 A. I have not seen evidence to the contrary. Correct.

3 Q. In fact, you agree that the only potential competitive
4 concern in the premium mechanical market is the potential for
5 coordinated effects. Correct?

6 A. Correct.

7 Q. So shifting gears to coordinated effects. For both the
8 premium mechanical and smart residential markets you believe
9 there could be harm to competition from coordinated effects.
10 Correct?

11 A. Yes.

12 Q. But you do not believe that coordination is more likely
13 as a result of the post-transaction markets becoming more
14 concentrated. Right?

15 A. They don't become more concentrated, so yes, that's
16 correct.

17 Q. And if Fortune's share in the relevant markets declined
18 after the acquisition, you agree the risk of coordination
19 would decrease. Right?

20 A. So the risk to coordination that I identified in my
21 report would decrease, but it would be consistent with the
22 mutual forbearance theory.

23 Q. You talked in your testimony about executives at the
24 companies who previously worked together communicating.
25 Do you recall that testimony?

1 A. Yes.

2 Q. And in fact, that's one of your theories of coordinated
3 effects here?

4 A. That's one of the factors that increases risk, yes.

5 Q. But you didn't do any analysis to determine whether there
6 already were people today at Assa Abloy who previously worked
7 at competitors other than looking up a few employees on
8 LinkedIn. Right, sir?

9 A. I did not, no.

10 Q. And you can't recall which employees you looked up.
11 Right?

12 A. I don't recall.

13 Q. And at the time you submitted your report, you didn't
14 know that Jason Williams, the leader of the U.S. smart
15 residential business, previously worked at Spectrum HHI.
16 Right?

17 A. I don't think I knew that, no.

18 Q. And you couldn't identify any names of individuals who
19 would remain at Assa post-divestiture who were involved in
20 pricing decisions for smart locks other than CEO, Mr. Delvaux.
21 Isn't that right?

22 A. I believe that was my deposition testimony. Yes.

23 Q. And you also did not know the names of other individuals
24 involved in pricing decisions for premium mechanical locks
25 either, did you, sir?

1 A. I did not know the names, no.

2 Q. You just assumed these people exist because of general
3 corporate structure. Isn't that right, sir?

4 A. Correct.

5 Q. You believe in fact there's an increased likelihood of
6 coordination in every case in which the buyer of assets in a
7 transaction is also the seller of the assets being divested.
8 Isn't that right, sir?

9 A. I don't think that's accurate, no.

10 Q. All right. Let's flip back to your deposition
11 transcript, page 277.

12 A. What tab is that again?

13 Q. I apologize. It's tab 3. So on page 277, line 3.

14 "Question: So in any situation where the buyer is the
15 one divesting the assets, you believe there's an increased
16 likelihood of coordinated effects.

17 "Answer: I think there's an increase in likelihood of
18 coordination in such cases."

19 Did I read that correctly?

20 A. Just remind me what line number you're at again?

21 Q. Page 277, line 3.

22 A. You read that correctly.

23 Q. You opine that the transition service agreement with
24 respect to operating the Vietnam facility would make it easier
25 for Assa Abloy and Fortune Brands to enforce an agreement.

1 Is that right?

2 A. Yes.

3 Q. But you agree that if Assa Abloy and Fortune operated
4 in two separate Vietnam facilities following the transaction,
5 without a TSA, your concern about the information exchange
6 would disappear, right, with respect to Vietnam?

7 A. With respect to the TSA concern, yes.

8 Q. You'd agree, sir, that entry has taken a large bite out
9 of the market share in the smart lock market. Correct?

10 A. So I actually don't know what you mean by that. So I
11 can't agree or disagree.

12 Q. All right. Well, let's look at your testimony, then.
13 These are your words. Page 334 of your deposition, again
14 at tab 3, line 7.

15 "Question: There is eight --

16 "Answer: Yeah, okay.

17 "-- that went from zero to having market share?"

18 A. You're moving a little too fast for me. If you could --

19 Q. I'm sorry.

20 A. 334, 333?

21 Q. I'm sorry. 334, line 7.

22 "Question: There is eight --

23 "Answer: Yeah, okay.

24 "Question: -- that went from zero to having market share.

25 "I guess the point, though, there's a significant amount

1 of entry over the course of three years, right? Or not? Is
2 it trivial in your view, or is it significant?

3 "Answer: I think it depends on -- it certainly has taken
4 a large -- it seems to have taken a large bite out of
5 Schlage's share over the course of this period."

6 Did I read that correctly sir?

7 A. Yes. So I was referring to Schlage in particular rather
8 than a general bite, but yes.

9 THE COURT: I'm sorry. What is the "it"? What has
10 taken a large bite?

11 THE WITNESS: Are you asking me, Your Honor?

12 THE COURT: I'm asking you or Mr. Bernick.

13 THE WITNESS: I'm happy to try to explain --

14 THE COURT: I don't want you to explain. I just want
15 to know what "it" refers to.

16 THE WITNESS: I believe "it" refers to entry.

17 MR. BERNICK: That's how I interpret it too, Your
18 Honor.

19 THE COURT: Entry as in entity?

20 MR. BERNICK: Entry by the new competitors.

21 THE COURT: Oh, okay. Thank you. That's what I
22 needed. Okay.

23 BY MR. BERNICK:

24 Q. You agree, sir, that entry barriers are low to begin
25 competing on Amazon. Right?

1 A. Correct.

2 Q. But in your opinion, a company can't be a significant
3 competitor if it's only selling online. Right?

4 A. Unlikely to be a significant competitor, I would agree.

5 Q. And you do not know which smart lock market participants
6 use contract manufacturing to manufacture their smart locks.
7 Correct? You don't know one way or the other?

8 A. I do not.

9 Q. And you were not able to verify the contribution margins
10 that you reported for the smart lock entrants. Right?

11 A. We discussed this at my deposition, and I think I agreed
12 that as you were defining "verify," that I was not able to
13 verify those numbers. Correct.

14 Q. So you don't know one way or the other whether those
15 entrance margins were actually higher or lower than companies
16 with larger scale. Correct?

17 A. Well, I used what was reported, and that's the data.

18 Q. You don't believe that Assa Abloy retaining Valli & Valli
19 causes substantial lessening of competition. Correct?

20 A. Correct.

21 Q. And in your presentation earlier, you talked about buyers
22 potentially making mistakes in divestitures. Do you recall
23 that testimony?

24 A. Yes.

25 Q. But you're not aware of any mistakes that Fortune has

1 made in assessing this divestiture package. Correct?

2 A. I could point to some things that I think are probably
3 mistakes, but I have not pointed to -- well, I have pointed to
4 specific issues with various parts of the deal that --

5 THE COURT: No, no. He's just asking you if they had
6 made mistakes --

7 MR. BERNICK: Yes or no.

8 THE COURT: Yeah, with respect to -- well --

9 MR. BERNICK: I can reask the question if that would
10 be helpful.

11 THE COURT: Reask the question.

12 BY MR. BERNICK:

13 Q. Dr. Waehrer, you're not aware of any mistakes that
14 Fortune has made in assessing the divestiture package, are
15 you, sir?

16 A. Not specifically, no.

17 Q. And you did not have access to the entire discovery
18 record in this case, did you, sir?

19 A. Depends on what you mean by access, but I believe the
20 answer, based on the definition I think you would like to
21 apply, is no.

22 Q. In fact, you had to request categories of documents from
23 DOJ attorneys, and you relied on those DOJ attorneys to pick
24 the documents for you to review. Isn't that correct, sir?

25 A. Something along those lines. I requested documents on

1 topics, and I received the documents from the DOJ on those
2 topics.

3 Q. And DOJ provided you with about 5,000 documents to
4 review? Is that right?

5 A. Something along those lines, I think, if not more.

6 Q. And Assa Abloy alone produced over 1.8 million documents
7 in this case. Isn't that right, sir?

8 A. I don't know one way or another.

9 Q. In your initial report you evaluated a combination of
10 Assa Abloy and Spectrum HHI assets that will never occur.
11 Correct?

12 A. I mean, that depends on contract interpretation that
13 I'm not sure I'm qualified to do.

14 Q. And those analyses, therefore, are not useful in
15 predicting the future state of competition. Correct?

16 THE COURT: I'm sorry. What contract interpretation is
17 needed?

18 THE WITNESS: Just -- I don't know -- so there's in my
19 mind, and the reason why I said I don't know is there seems to
20 me to be a complicated interaction perhaps between what you
21 find in this case and the divestiture in the deal.

22 THE COURT: Well, I think his question is assuming I'm
23 not just going to allow them to merge without divesting, which
24 would be a solid assumption, then assume that and then answer
25 his question.

1 THE WITNESS: Okay.

2 THE COURT: So basically his question is a merger --
3 well, I'm sorry. I shouldn't ask your questions for you.
4 Go ahead.

5 BY MR. BERNICK:

6 Q. The analyses in your initial report are not useful in
7 predicting the future state of competition. Isn't that right,
8 sir?

9 A. Under the interpretation that we were just discussing,
10 I would say that's accurate.

11 Q. At the time of your deposition, you'd billed the
12 United States 2.5 million for your work in this matter.
13 Correct, sir?

14 A. That's accurate.

15 MR. BERNICK: I pass the witness.

16 THE COURT: Why don't we do this. Why don't we take a
17 break. Why don't we come back at -- why don't we give you 15
18 minutes -- well, let me ask, Mr. Donaldson, do you anticipate
19 having redirect?

20 MR. DONALDSON: I do.

21 THE COURT: So why don't we come back at 4:05.

22 (Recess from 3:50 p.m. to 4:05 p.m.)

23 THE COURT: A couple of announcements before we get
24 started. The right answer was not "scale." The right answer
25 was given by Christopher Demuth, who emailed in and is correct

1 that the right answer is stile, S-T-I-L-E, which is an
2 arrangement of steps that allows people but not animals to
3 climb over a fence or wall. So thank you, Mr. Demuth.

4 Secondly, I may have to move the start time for tomorrow,
5 so before anyone gets on the phone or leaves their house to
6 come to court, please check the docket to see if there's been
7 a change to the start time. If you don't see anything on the
8 docket, there has been no change, but it's a possibility, and
9 I wouldn't want a bunch of people here at 10 a.m. if the start
10 time is later. So you've been warned, please check.

11 All right. Mr. Donaldson?

12 MR. DONALDSON: Thank you, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. DONALDSON:

15 Q. Dr. Waehrer, a few follow-up questions from Mr. Bernick's
16 testimony. Mr. Bernick asked you if you had evaluated harm to
17 competition for interconnect locks specifically.

18 Have you assessed the competitive importance of
19 interconnect locks to Yale generally?

20 A. I have. That's certainly discussed in my reply report.

21 Q. And in a nutshell, how would you describe that
22 competitive importance?

23 A. As I indicated in my direct testimony, it's --
24 interconnect and nexTouch locks have been described as
25 critical to Yale's success, especially in the B2B segment or

1 what I'm taking to mean the multifamily segment. And all
2 indications are that it's a significant competitive advantage
3 for Yale to be able to sell the whole portfolio of locks.

4 Q. Mr. Bernick asked you if the proposed divestiture would
5 change the number of interconnect lock competitors. Do you
6 remember that testimony?

7 A. I do.

8 Q. That was a yes-no question?

9 A. It was, with a particular assumption, I believe.

10 Q. Is there anything that you'd like to add to your answer
11 at this time?

12 A. Well, I believe that Mr. Bernick asked me as of today,
13 and I think it's significant that Spectrum has a interconnect
14 lock that they will be introducing shortly. And so they will
15 have -- be a competitor -- so if the deal does not go through,
16 there will be two competitors, at least between the merging
17 parties. And there are other suppliers that have interconnect
18 smart locks that go into multifamily homes, but the two that
19 we're talking about are really the Kwikset and the Yale
20 brands.

21 If the deal does go through with the divestiture, and
22 Fortune is not successful either due to issues with the supply
23 agreement or the supply agreement runs out and they are not
24 able to create one of their own, then the number of
25 competitors would go down from two to one.

1 Q. Thank you. Mr. Bernick asked you about companies that
2 produce a full line of commercial and residential products.
3 Do you recall that?

4 A. I do.

5 Q. What impact do you believe it could have on Fortune if
6 Fortune's not able to sell a full line of products?

7 A. So I think the testimony that I've heard in court and the
8 evidence that I've read indicates that the effect on Fortune
9 or the Yale brand sales is broader than -- would necessarily
10 have to be broader than just the loss of sales for the
11 interconnect and nexTouch locks, because the sales of those
12 particular locks are not very large. Otherwise, it
13 couldn't -- it wouldn't be critical.

14 And the testimony was that it was a competitive
15 advantage, which means that a more general advantage, not just
16 an advantage of having that lock in particular.

17 Q. You were asked if you had heard of any testimony where a
18 customer said they would stop purchasing their entire supply
19 of interconnect locks from Yale.

20 Are you aware of testimony suggesting that a company
21 would not purchase something less than their entire supply
22 of interconnect locks from Yale?

23 A. So the testimony from Mr. Haldeman and the GoKeyless
24 deposition testimony that I presented in my direct to me
25 indicates that the end customers see putting like -- filling

1 in all of their apartment buildings with a consistent brand is
2 a benefit to them and they like to do it, it's a preference
3 of theirs, and if the Yale brand didn't have that as a
4 possibility, then they would -- then it seems likely to me,
5 given the testimony on the preference, and given the general
6 economics of such a situation, that Yale would lose sales of
7 locks more than just the nexTouch and the interconnect, but
8 the non -- I guess what's referred to as the ordinary
9 residential smart locks.

10 Q. You were asked about companies that don't sell a complete
11 portfolio of products and still are able to sell some products
12 to smart lock. Do you recall that testimony?

13 A. I do.

14 Q. Have you formed an opinion whether customers have a
15 preference for a full portfolio of products or otherwise?

16 A. Well, Mr. Haldeman's testimony on SmartRent was that
17 there was -- this was in closed session so I will try not to
18 reveal anything, but there was a relatively -- a very large
19 proportion of his purchases were of Yale, and there was a
20 relatively small proportion of another brand.

21 Q. You were asked whether you had quantified how much sales
22 would be lost if Yale couldn't sell interconnect or nexTouch
23 products. There was some discussion about your slides. Did
24 you quantify a percentage of potential sales that could be at
25 risk?

1 A. So I did. That was the number that was -- the number
2 that shall not be named that was listed on the slide.

3 Q. And just to be clear, the customers who did purchase
4 interconnect or nexTouch products that are referenced in that
5 number, for how many years did they purchase those products?
6 There's a time range. I believe it's 2018 --

7 A. 2019 through 2022.

8 Q. And how many of those years did the customers purchase
9 those products?

10 A. So in the calculation we did, they would need to purchase
11 interconnect and/or nexTouch lock in all of those years.

12 Q. All of the years. Thank you.

13 You testified you didn't know what the quantity of
14 interconnect and nexTouch locks SmartRent intended to purchase
15 in the coming year. Do you recall that testimony?

16 A. I do.

17 Q. Do you recall whether Mr. Haldeman, the CEO of SmartRent,
18 knew what quantity of interconnect and nexTouch locks
19 SmartRent intended to purchase in the coming year?

20 A. I do remember him being asked that question and not
21 knowing the answer.

22 Q. Dr. Waehrer, you were asked about Assa Abloy supplying
23 interconnect locks to multifamily integrators. Do you recall
24 that testimony?

25 A. Yes.

1 Q. Do you have an understanding whether Assa Abloy charges
2 profits on those sales to the multifamily integrators?

3 A. So I do have profit margin calculations for those sales,
4 and -- yes, so they do earn a profit on those sales.

5 Q. Dr. Waehrer, you were asked about your understanding of
6 Assa Abloy's R&D costs. Do you recall that testimony?

7 A. I do.

8 Q. What are some of the sources that you used in assessing
9 R&D costs for Assa Abloy?

10 A. So I read Ms. Hammer's report and the deposition --
11 various deposition testimony documents about sharing of R&D
12 resources.

13 Q. Okay. You were asked if business owners are responsible
14 for their own P&L at Assa Abloy. Do you recall that
15 testimony?

16 A. I think the question related to divisional heads or
17 something along those lines, or at least that's how I
18 interpreted it.

19 Q. I was a little unclear on the question myself. I guess
20 my question to you is, is there anything you wanted to add to
21 your response with respect to that question, which I believe
22 was a yes-or-no question.

23 A. Yeah, so in the analysis -- in the antitrust analysis, my
24 experience is companies will often have divisional P&Ls, but
25 just because a division calculates a P&L does not necessarily

1 mean that that's what the division is trying to do. You know,
2 companies need to create incentives for individuals, and so
3 perhaps measuring performance based on a divisional P&L is
4 important for that, but it's also important to, especially if
5 there's connections between the divisions, make sure that
6 they're working towards the greater good, and that's the role
7 of the more senior executives of a company. And that's how I
8 interpreted the email exchange that we talked about during my
9 direct between Mr. Delvaux and Huddart.

10 Q. Dr. Waehrer, would it be your understanding that the CEO
11 and the board of directors manages companies to increase the
12 bottom line of the company in total or individual divisions?

13 A. I would -- I think it's pretty clear that their interest
14 is in maximizing the overall profitability of the firm, not
15 just a collection of divisions.

16 Q. Is that a duty to shareholders, to maximize profits for
17 the corporation?

18 A. I understand that to be a fiduciary duty of a public
19 company, yes.

20 Q. Dr. Waehrer, you were asked about economies of scale and
21 scope. Can you tell us a little bit about the sources that
22 you used in making that assessment?

23 A. Again, these were -- this was deposition testimony and
24 documents that related to this, and then I was also informed
25 by the reports of Professor Collis and Ms. Hammer.

1 Q. Dr. Waehrer, you were asked about smart lock market
2 prices and whether you would expect those prices to be
3 going down over time. Do you recall that testimony?

4 A. I do.

5 Q. Can you tell us your thinking behind that answer?

6 A. So it's a technology market. And in these kinds of
7 markets, especially a newer technology like smart locks, as
8 it becomes more mass market, the average price is going to go
9 down in an attempt to expand the number of customers, and so
10 just for that purpose, holding everything else constant, I
11 would expect prices to be falling in this market.

12 But that's really not the relevant question for our
13 analysis here; it's really given that sectoral decline in
14 prices that we would be expecting, does the transaction with
15 the divestiture cause prices to decline less fast or even
16 perhaps increase. So that was the answer I was wanting to
17 give when I was being forced to say yes or no.

18 Q. Dr. Waehrer, do you have an opinion whether prices
19 would likely decrease more with or without the divestiture?

20 A. So my testimony is that I believe that there's a
21 significant risk of anticompetitive effects here from the
22 divestiture, which would suggest that prices would decline
23 less fast with this deal going through and the divestiture.

24 Q. Dr. Waehrer, you were asked about global scale and
25 whether it was necessary to compete for sale of smart locks.

1 Do you recall that testimony?

2 A. I do.

3 Q. Can you tell us a little bit more behind your thinking
4 behind that answer?

5 A. Sure. So for Yale it does seem -- the evidence does
6 suggest that Yale -- the Yale business does benefit from
7 global scale in terms of procurement and then R&D sharing,
8 but other companies in this space enjoy economies of scale
9 and scope in different ways, not necessarily global scale.

10 So, the notable example of that would be Kwikset, which
11 has a very significant mechanical hardware business, the
12 non-premium hardware business, something that, while Yale has
13 a mechanical hardware business, it is not even close to the
14 size and scale of Kwikset's.

15 And so Kwikset enjoys other advantages separate from
16 global scale. So that was what was in the back of my mind in
17 answering that.

18 Q. Thank you. Are there any other companies that operate
19 primarily in the U.S. or U.S. and Canada with respect to smart
20 locks?

21 A. I believe Schlage is mostly in the U.S., and there would
22 be -- they would have a similar situation as Kwikset, with a
23 very substantial mechanical hardware business that Yale does
24 not have.

25 Q. To your knowledge, where does August operate?

1 A. I believe mostly in the U.S., but I'm not positive.

2 Q. Do you recall if August has been profitable in recent
3 years?

4 A. I believe that the division that's --

5 MR. BERNICK: Objection.

6 THE COURT: This is way beyond his exam. Where are
7 we in August and profitability? Was that going to be your
8 objection?

9 MR. BERNICK: I was going to let it go. I was making
10 an objection on confidentiality grounds. The profit and
11 losses of August are not publicly disclosed.

12 MR. DONALDSON: We'll move on.

13 THE COURT: Okay.

14 BY MR. DONALDSON:

15 Q. Dr. Waehrer, you were asked if the U.S. smart residential
16 business subsidizes the global smart locks business. Do you
17 recall that testimony?

18 A. Yes, I do.

19 THE COURT: That wasn't -- no. The question I think
20 was specific on the software application, not in general.

21 MR. DONALDSON: Okay.

22 BY MR. DONALDSON:

23 Q. With respect to software application --

24 THE COURT: That was your question, right, Mr. Bernick?

25 MR. BERNICK: It was, Your Honor.

1 THE COURT: Okay.

2 BY MR. DONALDSON:

3 Q. My only question was did you have anything additional you
4 wanted to add. That was a yes-or-no question. I was
5 wondering if there was anything else you wanted to add to your
6 response.

7 A. Yes. So if the only effect was to undo a subsidy, then
8 yes, that would make the Yale division look more profitable on
9 paper, although, when you're talking about the profitability
10 of a division, as an economist I'm not sure how to think about
11 that because really it's the profitability of the company
12 overall that matters, and I think -- and my reading of
13 Ms. Hammer's report -- and she or someone will be testifying
14 to answer this question -- but I believe she took that subsidy
15 into account and still found issues with the profitability.

16 So whatever reversal of the subsidy was, it was not
17 enough to make Yale overall look better under Fortune than
18 Assa.

19 Q. Dr. Waehrer, you were asked if the FTC studies were peer
20 reviewed. Do you recall that testimony?

21 A. I do.

22 Q. Did the fact that the FTC studies are not peer reviewed
23 play an important role in your analysis of those studies with
24 respect to this transaction?

25 A. It did not.

1 Q. Why not?

2 A. Well, as I indicated, when I read the description of how
3 the sample was collected, how the information was collected,
4 and then the fact that the FTC relies on the study for its own
5 policymaking, and there were really no papers that I found
6 that were really critical of the methodology, the fact that it
7 wasn't peer reviewed didn't really impact my opinion.

8 Q. Dr. Waehrer, you were asked about the role of entry in
9 the smart locks market. Do you recall that?

10 A. Yes.

11 Q. The smart lock market has a few different parts to it,
12 multifamily, retail, online. I'm wondering if you can share
13 your thoughts with respect to the effective entry on each of
14 those segments.

15 A. So in my discussion of entry in my initial report I
16 discuss significant barriers to entry in the retail channel or
17 the DIY channel, so that would be Home Depot and Lowes and
18 some other large big-box stores, and then also significant
19 entry in the multifamily or integrator segment, a segment that
20 Spectrum refers to as RAS. And there are significant barriers
21 to entry in those. And we -- the data doesn't appear to bear
22 out that the small entrants have made much penetration into
23 either of those segments.

24 Q. I think we've discussed the multifamily segment enough
25 today. With respect to retail and DIY, is there any

1 particular evidence or testimony that you found particularly
2 informative with respect to entry in that segment?

3 A. So I think the testimony from the witness from Wyze was
4 informative, and then the witness from Home Depot also was
5 pretty informative on that topic.

6 Q. With respect to smart lock sales online, has that entry
7 had a significant effect on the shares of Assa Abloy and
8 Spectrum in the past few years?

9 A. So if you look at my -- the data for that would be in
10 my reply report, which is tab 2 of the binder, "Plaintiff
11 Examination, Keith Waehrer, Ph.D." And that appears in
12 Appendix B, on B-1. And if you look at -- if we would just
13 look at the quantity shares -- I don't know if -- are you in
14 the right place or...

15 Q. I don't think those are public so if you could just
16 allude to where --

17 A. I wasn't going to call out the --

18 THE COURT: So where are you?

19 THE WITNESS: So in my reply report, it's Appendix B,
20 and the page is B-1.

21 THE COURT: Okay. I'm there.

22 THE WITNESS: So you can see there's two panels,
23 revenue shares and quantity shares. And I'll be looking at
24 the quantity shares, but we can talk about the revenue shares
25 if you'd like. So you can see that from 2019 to 2020, if you

1 look at Assa Abloy's share, there was a change there that I
2 won't call out, but a change there.

3 But then, if you look at 2020 to 2022, relatively not
4 much of a share change. If you dig down into that a little
5 bit by looking at the individual brands listed there, so in
6 particular Yale and August, you can see that Yale is going in
7 a different direction than August.

8 THE COURT: Yep.

9 THE WITNESS: And then if you look at Spectrum's share
10 over this period, there's not much of a change. And so
11 this -- just looking at the dynamics of this market indicated
12 to me, except for that one year which I discuss in my initial
13 report and reply report, the entry that was happening was not
14 having a significant impact on the shares of the two merging
15 parties.

16 BY MR. DONALDSON:

17 Q. Dr. Waehrer, which competitor in particular was it having
18 an effect on?

19 A. That would be Schlage or the Allegion brand.

20 Q. Thank you. And offhand, do you recall where you discuss
21 this trend in your reply report?

22 A. So this is discussed in Section VIII.A of my reply
23 report.

24 Q. Thank you. Dr. Waehrer, you were asked about contract
25 manufacturing. Do you recall that?

1 A. I do.

2 Q. To your knowledge, do contract manufacturers charge a
3 profit margin on the products that they supply to their
4 purchasers?

5 A. That's my understanding, yes.

6 Q. You were asked about contribution margins, Dr. Waehrer.
7 Do you recall that testimony?

8 A. I do.

9 Q. Okay. Where did you get your contribution margin
10 information from?

11 A. So this was data that was requested by the Department of
12 Justice of third parties.

13 Q. Okay. And did you compare that contribution margin
14 information from third parties against the margins for Assa
15 Abloy and Spectrum?

16 A. I did. There's a table of those in my reply report.
17 Probably in the same section we were just talking about.

18 Q. Is it perhaps page 42?

19 A. Yes. Thank you.

20 So if you look at -- the point of this table was to
21 compare the contribution margins of the two larger players in
22 the market. So those would be Assa and Schlage. And compare
23 them to the smaller competitors. And I won't call out any
24 numbers, but I think the difference there is somewhat obvious.

25 Q. Dr. Waehrer, you were asked about your access to the

1 production record in this case. Do you recall that testimony?

2 A. I do.

3 Q. Did you request particularly good or particularly bad
4 documents from the DOJ?

5 A. Of course not. As an expert, I need to see what the
6 record is in an accurate way. Otherwise, I would be in
7 trouble sitting here, I'm sure.

8 Q. Okay. But you did request categories of documents from
9 the DOJ?

10 A. I did.

11 Q. And do you have any reason to believe you didn't receive
12 the requested information from the --

13 A. I have no reason to believe that, no.

14 Q. Dr. Waehrer, do you understand whether SmartRent intends
15 to continue purchasing Yale products from both Assa and
16 Fortune if the divestiture is completed?

17 A. I'm sorry. Can you ask the question again?

18 Q. Yes. I'm curious if you have an understanding, if the
19 divestiture were to go forward, whether it would be
20 SmartRent's intention to continue purchasing Yale products
21 from both Fortune and Assa Abloy.

22 A. So I'm confused by the question, because if the
23 transaction goes through with the divestiture --

24 Q. With the divestiture, without the interconnect locks.
25 I should have been clear on that. Without the divestiture

1 of the interconnect locks.

2 A. But you were asking about Yale-branded locks from Assa
3 and Fortune, and I believe that if the deal goes through, the
4 Yale-branded locks would only be available through Fortune.

5 Q. Okay, yes. Sorry. Poorly worded question.

6 Do you understand whether SmartRent would intend to
7 purchase Yale products from Fortune and interconnect locks
8 from Assa Abloy?

9 MR. BERNICK: Objection.

10 THE COURT: Can't I just rely on the SmartRent person's
11 testimony on this? That's relevant to his opinion somehow?

12 MR. DONALDSON: Yes, Your Honor.

13 BY MR. DONALDSON:

14 Q. Dr. Waehrer, do you believe that the proposed divestiture
15 in this case is a stand-alone business?

16 A. I do not.

17 MR. BERNICK: Object to scope.

18 BY MR. DONALDSON:

19 Q. Briefly, why?

20 THE COURT: You did ask him about -- I guess you only
21 asked him about Emtek. Yeah, you're right.

22 MR. DONALDSON: No, he quoted from this.

23 THE COURT: He quoted from it, but then he only asked
24 specifically about Emtek, as I recall. I was expecting him to
25 ask -- the reason I remember is I was expecting the question

1 about smart locks, and it didn't come.

2 MR. DONALDSON: Okay. I believe it's in Dr. Waehrer's
3 report anyway.

4 THE COURT: Okay.

5 BY MR. DONALDSON:

6 Q. Dr. Waehrer, you were asked some questions about the
7 horizontal merger guidelines and the definition of product
8 markets under the merger guidelines, what's known as the
9 narrowest market principle. Do you recall that testimony?

10 A. I don't remember --

11 MR. BERNICK: I don't believe I asked about the
12 narrowest market principle, Your Honor.

13 THE COURT: I don't recall that either.

14 BY MR. DONALDSON:

15 Q. Well, it's -- are you familiar with the narrowest market
16 principle?

17 THE COURT: Let's see where this goes, just one moment.
18 But get ready to stand up.

19 BY MR. DONALDSON:

20 Q. Mr. Bernick asked you questions about whether
21 interconnect locks constitute a separate relevant market under
22 the merger guidelines. Do you recall that testimony?

23 A. Yes, I do.

24 Q. That question? Okay. Is it ever appropriate to define a
25 market more broadly than a single product?

1 A. So by "single product," I'm assuming you mean like a --
2 for example, a particular lock?

3 Q. Yes.

4 A. So in a market that involves a lot of differentiation,
5 it's usually the case that a market would not be defined based
6 on a single product as I think you're referring to,
7 Mr. Donaldson.

8 Q. Okay.

9 MR. DONALDSON: Thank you, Dr. Waehrer. I have nothing
10 further.

11 THE COURT: Any re-cross?

12 MR. BERNICK: If I could, just a couple of quick
13 questions.

14 RE-CROSS-EXAMINATION

15 BY MR. BERNICK:

16 Q. Dr. Waehrer, Spectrum Brands offers a residential smart
17 lock today. Right?

18 A. Yes.

19 Q. And you also testified just a moment ago that they're
20 planning to introduce an interconnected smart lock. Is that
21 right?

22 A. Yes.

23 Q. But Spectrum does not offer a commercial smart lock.
24 Right?

25 A. By commercial, do you mean mortise, like a nexTouch-type

1 lock?

2 Q. Correct.

3 A. Just to be clear?

4 Q. Correct. Let me rephrase the question so the record's
5 clear. Spectrum does not offer a commercial grade mortise
6 smart lock. Correct?

7 A. Not that I know of, no.

8 Q. And so Spectrum does not offer a full portfolio of all
9 three types of products we're talking about, residential smart
10 lock, interconnect, and commercial mortise. Right?

11 A. Correct.

12 Q. You also mentioned Mr. Haldeman's testimony. He never
13 testified that he would stop buying Yale residential smart
14 locks if the interconnects were unavailable, did he, sir?

15 A. I don't recall him saying that, no.

16 Q. In fact, Mr. Haldeman testified that he couldn't find a
17 company other than Yale that offered a complete portfolio of
18 products today. Isn't that correct?

19 A. For his purposes, I believe that's correct.

20 Q. So if Mr. Haldeman lost access to the interconnect and
21 nexTouch locks, he couldn't switch his portfolio away from
22 Yale to a single supplier of an alternative portfolio. Isn't
23 that correct, sir?

24 A. He did not seem to have an option for a single supplier
25 for all three types of locks that we've been talking about.

1 THE COURT: So the answer is yes.

2 THE WITNESS: Okay. Sorry. I'm getting mixed up with
3 the yeses and noes.

4 MR. BERNICK: That's all I have.

5 THE COURT: Dr. Waehrer, thank you for your testimony
6 and all of your good work, which is very helpful. You work at
7 Secretariat Economists?

8 THE WITNESS: Yes.

9 THE COURT: You've only been there for two years so you
10 may not know, but do you know a Jonathan Walker?

11 THE WITNESS: Yes.

12 THE COURT: Jonathan and I worked together when I was a
13 baby tyke associate on a very complicated international
14 arbitration and I got to know him quite well. Could you
15 please pass along my well wishes and that I say hello?

16 THE WITNESS: I will.

17 THE COURT: Okay. Thank you.

18 Anything else? All right. You can step down, sir.
19 Thank you.

20 THE WITNESS: Thank you.

21 (Witness steps down.)

22 MR. DAHLQUIST: Your Honor, we have our next witness,
23 another expert witness, Professor David Collis.

24 THE COURT: Does it make sense to -- given the lateness
25 of the hour, to just move Mr. Collis to tomorrow?

1 MR. DAHLQUIST: I think that would probably be
2 preferred by Mr. Collis.

3 THE COURT: All right. Is that okay with you,
4 Mr. Bernick?

5 MR. BERNICK: Yes, Your Honor.

6 THE COURT: Okay. Why don't we do that. Anything else
7 we should discuss today?

8 MR. DAHLQUIST: Nothing else, Your Honor.

9 THE COURT: So just as a reminder to everyone, please
10 check the docket before you make arrangements to be in court
11 tomorrow because the time might change. If there's no docket
12 entry, then we will meet again at 10 a.m. tomorrow. Thank
13 you.

14 (Proceedings adjourned at 4:40 p.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Bryan A. Wayne
Bryan A. Wayne

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