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6 **IN THE COMPETITION**  
7 **APPEAL TRIBUNAL**  
8  
9

Case No: 1745/5/7/25 (T)

10 Salisbury Square House  
11 8 Salisbury Square  
12 London EC4Y 8AP

13 Wednesday 17<sup>th</sup> December 2025  
14

15 Before:  
16

17 Andrew Lykiardopoulos KC  
18

19 (Sitting as a Tribunal in England and Wales)  
20  
21

22 BETWEEN:  
23

Claimants

24 **Roadget Business Pte. Ltd. and Shein Distribution  
25 UK Limited**

26 V  
27

28 **Defendant**  
29

30 **Whaleco UK Limited**  
31  
32

33 **A P P E A R A N C E S**  
34  
35  
36  
37

38 MARIE DEMETRIOU KC, TOM PASCOE & ALI AL-KARIM on behalf of Roadget  
39 Business Pte. Ltd. and Shein Distribution UK Limited

40 JOSH HOLMES KC & CHARLOTTE MCLEAN on behalf of Whaleco UK Limited  
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Wednesday, 17 December 2025

2 | (10.32 am)

## Housekeeping

4 THE CHAIRMAN: Good morning. Some of you are joining us via livestream on our  
5 website, so I will start with the customary warning. An official recording is being made  
6 and an authorised transcript will be produced, but it is strictly prohibited for anyone  
7 else to make an unauthorised recording, whether audio or visual of the proceedings,  
8 and breach of that provision is punishable as a contempt of court.

9 Well, good morning. I think, Mr Holmes, it's you that's kicking off; is that right?

10 MR HOLMES: That's right, if it's convenient with you. I don't know if you need  
11 attendances -- introductions for the purposes of a hearing like this, I think you're well  
12 familiar with the cast of people appearing before you?

13 THE CHAIRMAN: You can assume I'm familiar with you all and know who's here.

14 MR HOLMES: I'm grateful.

15 THE CHAIRMAN: And who you're acting for.

16 MR HOLMES: Just to check in on bundles, I'm afraid there's, as usual, rather an array.  
17 I hope you have four bundles at least, spread over six volumes. The first is  
18 a three- volume CMC bundle. Do you have that, sir?

19 THE CHAIRMAN: Yes, yes.

20 MR HOLMES: That contains some outer ring confidential material. For my part,  
21 I would hope that we can manage in open session. If, however, we did need to explore  
22 anything in closed session, just to note that it may be necessary to adjust the Teams  
23 link to confine it to individuals in the outer confidentiality ring. But we could perhaps  
24 see how we go.

25 THE CHAIRMAN: Okay.

26 MR HOLMES: The second is a bundle containing the two skeleton arguments for

1 today; the third is a very slim authorities bundle; and the fourth is a supplemental  
2 bundle of some materials that were identified in the run up to the hearing.

3 THE CHAIRMAN: I have those.

4 MR HOLMES: I'm grateful.

5 THE CHAIRMAN: And I also thank whoever has prepared them, it's very helpful for  
6 me to have hard copy bundles, so thank you.

7 MR HOLMES: I'm glad that they were of use.

8 There is an agreed agenda in the first half of the CMC bundle, volume 1 at page 11.

9 If you're content, sir, I propose just to take matters in the order of the agenda.

10 THE CHAIRMAN: Yes. I was hoping we might be able to go through them faster than  
11 the agenda suggests, but let's see how we go.

12 MR HOLMES: Yes. That would also be my hope and expectation, sir, but as you  
13 say, let's see how we go.

14

15 Request for further information application by Whaleco

16 Submissions by MR HOLMES

17 The first application is Whaleco's request for information, and that's for the names of  
18 the suppliers who entered into supplier attestations, or loyalty oaths, since  
19 August 2022. These are, as you'll appreciate, sir, one of the multiple strands of  
20 conduct which Whaleco alleges to infringe the chapter 1 and chapter 2 prohibitions.

21 We know that the attestations were used for a two month period between  
22 December 2022 and January 2023. We also know that around 450 suppliers signed  
23 attestations. This is as a result of responses to requests for information. We do not  
24 know who those suppliers were, and my client, Whaleco, will not find out through  
25 Shein's disclosure.

26 We say that the information is needed so that Whaleco can investigate the effects of

1 the supplier attestations and disclose relevant data and documents ahead of the  
2 evidence stage. The information will allow Whaleco to see how the suppliers' (audio  
3 distortion) were affected by the attestations by looking at relevant product listing data  
4 before and after the attestations. It will also enable Whaleco to undertake a broader  
5 internal investigation of its relations with the suppliers in question by speaking with  
6 individuals in its corporate group that have been involved in managing the relationship.  
7 Shein does not say that it would be in any way costly or difficult to respond to the  
8 request. Witness evidence which addresses this application does not point to any  
9 practical difficulties at all. Instead, Shein's main objection is to say that Whaleco's  
10 application has already been considered and definitively rejected by  
11 Mrs Justice Bacon at an earlier CMC. We say that is an incorrect reading of what  
12 happened at the prior CMC. Mrs Justice Bacon expressly adopted a staged approach,  
13 and she left the door open for Whaleco to revisit the question of what it needed to  
14 prove its case on effects.

15 Given the timetable that has since been ordered to trial, the effect is supplier names  
16 are needed now so that we can gather data and documents to assess the effects of  
17 the attestations in time for consideration by the witnesses of fact and the experts.

18 Those are the headline points. Subject to any immediate questions, I propose to  
19 develop those points in the following way: first, I will address you on the pleadings and  
20 procedural context; second, I will explain why the information is needed by Whaleco  
21 in a little greater depth; and third, I will deal briefly with Shein's objections to the  
22 provision of the information sought.

23 If I could go first to the counterclaim that's in volume 1 of the bundle. At tab 14,  
24 page 276. (Pause)

25 Can I ask you, please, to review paragraph 46, which concerns the attestations or  
26 oaths. (Pause)

1 THE CHAIRMAN: Yes.

2 MR HOLMES: So suppliers are required to attest that they have not supplied infringing  
3 products to Temu or uploaded images of such products. Such products are defined  
4 to include not only products supplied to Shein, but also other highly similar products.  
5 If you turn to tab 19 at page 460, there is an example of a supplier attestation, which  
6 is what Whaleco has available to it and served as the basis for it to plead its claim.

7 THE CHAIRMAN: Could you give me that reference again?

8 MR HOLMES: Tab 19.

9 THE CHAIRMAN: 19, yes.

10 MR HOLMES: Page 461. Sir, if I could ask you just to review the first paragraph of  
11 that document, please.

12 THE CHAIRMAN: Yes.

13 MR HOLMES: In the final sentence, the attestation states that:

14 "... it has recently been [disclosed] that [products developed for Shein] or other highly  
15 similar products ... and related product images have appeared on the [Temu]  
16 website ..."

17 Then in the next paragraph, the supplier is required to attest that it has never  
18 cooperated with Temu on the production and sales of the infringing products, defined  
19 to include highly similar products; it hasn't provided them to Temu; and also to accept  
20 that the products on the Temu website violate Shein's legitimate rights and interests;  
21 and to inform Shein if the supplier knows the source of the products.

22 If any of the statements is untrue, the supplier states that it is willing to bear the  
23 corresponding legal liability.

24 Then, looking at the final paragraph on the page, you see that the agreement is stated  
25 to be confidential and any disclosure will be a breach of contract.

26 That is the type of document that we are dealing with. If we could go next to Shein's

1 defence to the counterclaim at tab 15 at page 334. This is where Shein pleads back  
2 to paragraph 46, which I showed you in the counterclaim. You see at (a), it denies  
3 that anything in the sample loyalty oath at annex (d) requires loyalty to Shein in the  
4 sense of precluding the supplier from dealing with Temu.

5 Over the page at (b), it criticises Whaleco for failing to particularise which suppliers  
6 signed loyalty oaths -- the information which it is now refusing to provide pursuant to  
7 this request.

8 Then at (d), we see that the purpose of the loyalty oaths is said to have been to reduce  
9 the increasing number of infringements of Shein's IP rights on other platforms,  
10 including Temu's. The strategy was, however, ineffective and was discontinued in  
11 January 2023.

12 Some further information has been provided subsequently, in response to requests for  
13 information by Whaleco. If we could go to volume 2 of the CMC bundle, tab 26, and  
14 pick up that document at page 585 of the rolling numbering. (Pause)

15 Do you have that, sir?

16 THE CHAIRMAN: Yes.

17 MR HOLMES: You see that various questions were posed by Whaleco in relation to  
18 paragraph 39 of Shein's defence. They include paragraph 31, a request to know when  
19 the practice of asking suppliers to sign loyalty oaths commenced, and at paragraph 34,  
20 the question:

21 "Did Shein ask all ... suppliers ... it believed also dealt with other platforms to sign  
22 Loyalty Oaths? If not:

23 "a. Which suppliers, or categories of suppliers, were asked to sign the Loyal Oaths?"

24 "b. What were the reasons for not requiring Loyalty Oaths [for the remainder]?"

25 Over the page at question 35, you see the same question, but asked specifically in  
26 relation to suppliers that Shein believed also dealt with Temu.

1 Then the responses begin at the foot of page 586. The answer to question 31: the  
2 practice of asking suppliers to sign loyalty oaths, began in December 2022.

3 You'll recall the practice is said to have concluded in January 2023, so we are here  
4 considering a very confined period of at most two months.

5 Then on page 586 and page 587, the responses to questions 34 and 35. Shein says:  
6 "... the identification of suppliers that signed so-called Loyalty Oaths is not  
7 necessary ... [to understand Shein's case]. The matters referred to in request 34 ...  
8 and [35] will be matters for disclosure and factual evidence, as appropriate, in due  
9 course."

10 So in November 2024, Shein's position was that the question of which suppliers were  
11 affected by the loyalty oaths should be dealt with by way of disclosure and factual  
12 evidence in due course.

13 There was then a CMC at which Shein was ordered to provide a fuller response in  
14 relation to the question of how the suppliers were asked to sign loyalty oaths were  
15 selected, and the response is at volume 2, tab 28, page 605.

16 You see that in relation to paragraph 39(d) of the counterclaim defence, one of the  
17 questions requiring a fuller response was question 34:

18 "a. Which [Temu] suppliers, or categories of [Temu] suppliers, were asked to sign the  
19 Loyalty Oaths?

20 "b. What were the reasons for [not] requiring Loyalty Oaths [from the remainder]?"

21 The responses at the foot of the page:

22 "... the selection of suppliers that Shein liaised with to sign supplier attestation was not  
23 based on whether those suppliers had dealt with other platforms. The suppliers were  
24 selected based on the level of total supplier purchases that Shein had made from  
25 those suppliers, with higher-level suppliers being prioritised."

26 So the suppliers that were asked to sign the loyalty oaths were apparently not selected

1 on the basis that they had dealt on other platforms at all; they were simply the big  
2 suppliers. That is odd, in view of the content of the loyalty oath that we saw.

3 As you saw, it states that products highly similar to those supplied to Shein by the  
4 supplier in question had been found on the Temu website. It required the supplier to  
5 give an assurance that it had not supplied the products in question to Temu, with the  
6 threat of legal action if its answer was found to be incorrect.

7 Now, it's hard to understand why Shein asked suppliers to attest that their products  
8 had been found on another platform, if they were selected based simply on their size  
9 and not their dealings with other platforms.

10 In any event, given Shein's indication that the question of which suppliers were asked  
11 to sign loyalty oaths would be a matter for disclosure and factual evidence in due  
12 course, the matter was not addressed further until the CMC in July 2025 before  
13 Mrs Justice Bacon, when the disclosure review document was being negotiated.

14 By this point, it had become clear that Shein's position was that it should only have to  
15 give custodian-based disclosure model D disclosure in relation to the 30 or so  
16 suppliers that were the subject of other strands of conduct complained of by Whaleco:  
17 namely, the interviews in November and December 2023 at Guangzhou, Shein's  
18 offices, and the penalty notices published on Shein's supplier bulletin board.

19 Now, in an effort to cut through matters, Whaleco therefore pursued a twin-track at  
20 that CMC: on the one hand, it requested information about the identities of the  
21 suppliers with which Shein had liaised in relation to the attestations; and on the other  
22 hand, it requested that Shein should give disclosure from a wider sample than just the  
23 30 relevant suppliers, including a sample of suppliers affected by the supplier  
24 attestations. Those matters --

25 THE CHAIRMAN: Can I just ask you, just to get it straight in my head, are you aware  
26 of how many of the relevant suppliers also signed attestation documents?

1 MR HOLMES: No, we do not know how many of the relevant suppliers also signed  
2 attestations. That's not information that Shein has provided to date.

3 THE CHAIRMAN: Do you know if any did?

4 MR HOLMES: Perhaps Ms Demetriou can assist. We don't know whether any did.  
5 We don't know how many did. It could be an extremely small sample. I'll come to the  
6 point in a moment.

7 But the other difficulty is that the evolution, the performance of those suppliers on the  
8 platform will be affected by several strands of conduct. It will therefore be difficult with  
9 a very small sample to determine whether there was any impact from the supplier  
10 attestations and how that impact developed across time, given that there were  
11 subsequent interventions which we're also testing for effects. That's one of the  
12 difficulties that we face. But we simply don't know how many, if any, of those 30  
13 suppliers were affected by the attestations.

14 Now, at the July CMC in 2025, Mrs Justice Bacon considered both the RFI for the  
15 identities of the attestation suppliers -- if I can call them that -- and the question of the  
16 scope of model D disclosure. It was common ground at that CMC that a staged  
17 approach was appropriate in relation to effects. The judge made clear that the  
18 categories of information provided to Whaleco by Shein could be revisited  
19 subsequently.

20 So let me show you that in the transcript. It's in the CMC bundle, volume 1 at tab 5.  
21 If we could pick it up, please, at page 54 and look at page 162 of the transcript in the  
22 bottom right-hand corner. Could I please ask you to review from line 4 of page 162 to  
23 line 20 of the following transcript page. (Pause)

24 THE CHAIRMAN: Yes.

25 MR HOLMES: So you see that Ms Demetriou emphasised the appropriateness of  
26 a staged approach to disclosure. Disclosure would be given in relation to 30 suppliers

1 who were subject to other different conduct; the interviews and the penalty notices.  
2 She then addressed request 2, and her argument was that the supplier names were  
3 not needed by Whaleco for the purposes of pleading.

4 Mrs Justice Bacon was particularly interested, in questioning, to understand the  
5 numbers of suppliers that were affected by the attestations. She was told by Shein's  
6 counsel that it was "probably around the thousands"; it's in lines 11 to 12. Then, an  
7 estimate was offered of "around a thousand"; that's in line 18.

8 Turning on to page 56 of the bundle at page 169, starting at line 15, you see that  
9 Mrs Justice Bacon explained that her inclination was that the numbers were sufficient  
10 for request 2, and she then proceeded to rule accordingly.

11 But that ruling, in our submission, needs to be seen in the context of what she  
12 subsequently said when considering the scope of disclosure. If you turn to page 65 of  
13 the bundle and look at page 205 of the transcript. Can I ask you, please, to review  
14 lines 10 to 19. (Pause)

15 Then on page 66, can I ask you to review lines 7 to 12.

16 THE CHAIRMAN: Of what page?

17 MR HOLMES: On page 207, at the top of the page. (Pause)

18 In the first of those passages, Mrs Justice Bacon made clear that on the effects of the  
19 supplier attestations, the categories of information could be revisited. That specifically  
20 included the question of the effects on the supplier attestations, as you see from the  
21 second passage on page 207.

22 Now, as it turned out, when Shein gave its answer on the number of suppliers who  
23 entered into attestations, it was under half the figure that was suggested to Mrs Justice  
24 Bacon at the hearing: 450, and not a thousand or more. In assembling the number,  
25 the affected suppliers must somehow have been identified, and we do say that it's  
26 telling that there is no suggestion that it would now be onerous to provide the names.

1 So the proportionality of providing the names has been brought into sharper relief  
2 since the July CMC. The case has also been transferred to the CAT. It is set upon  
3 a tight timetable to trial, with looming deadlines for factual and expert evidence. Since  
4 transfer, Shein has also been pressing Whaleco to explain how it proposes to show  
5 the effects of the various types of conduct. You'll recall at the last CMC that led to  
6 Mr Fred Ji's witness statement being ordered, sir, to explore that question. Whaleco  
7 has given careful consideration in preparing that witness statement to the question of  
8 effects.

9 That brings me now to the second part of my submissions: why the names are needed  
10 now. This is addressed in the witness statement of Mr Fred Ji. It is at the CMC bundle,  
11 volume 2, tab 58, starting at page 884. Turning to page 888, you see the heading,  
12 halfway down the page or towards the foot of the page, "Part 2", in which he discusses  
13 the effect of infringing conduct on sellers or suppliers and their UFF, ultra-fast fashion,  
14 product offering.

15 On page 889, paragraph 20, he explains that:

16 "... Whaleco has relied on and intends to disclose data relating to product listings which  
17 demonstrate the effects of the infringing Conduct on sellers' willingness to list ...  
18 products for sale ... on [the Temu] platform and, consequently, the range of ... products  
19 offered for sale to consumers on that platform."

20 In the remainder of the paragraph, he explains that a sample-based review has been  
21 conducted of suppliers affected by other types of conduct than the supplier  
22 attestations, namely the takedown notices and the interviews conducted by Shein.

23 Pausing there, the reason why Whaleco has been able to analyse those suppliers is  
24 because their identity is known, at least in the case of those that were interviewed  
25 within the confines of the confidentiality ring.

26 As Mr Ji explains, the data indicates that the infringing conduct impacted Temu's

1 business, resulting in a reduction in the number of products listed for sale on the  
2 platform.

3 Then, turning over the page, at paragraph 22, Mr Ji says that:

4 "Whaleco will also seek to identify and disclose equivalent ... information in relation to  
5 a reasonable and proportionate sample of stores that were required by Shein to sign  
6 Loyalty Oaths [the supplier attestations]. Shein has indicated that there were 450 such  
7 suppliers ... However, the Claimants have not provided the names of these suppliers  
8 in the proceedings to date. [And he foreshadows the present application.]"

9 So in other words, Whaleco seeks the names in order to test the effects of the loyalty  
10 oaths.

11 It has been able to apply analysis to assess the effects of other types of conduct, but  
12 not the attestations. To assess the attestations, it needs to know which suppliers were  
13 affected. It doesn't know the identities of any affected suppliers as yet. Following  
14 disclosure, it will find out whether any of the 30 suppliers were affected by supplier  
15 attestations, but in their case, their performance will have been affected by multiple  
16 strands of conduct, and the sample will in any event be very limited. Shein has not so  
17 far told us how large; under 30, in any event. That will not provide a clean answer to  
18 the specific and discrete effects of the supplier attestations.

19 Given the short time remaining to prepare a case for trial, Whaleco felt compelled to  
20 apply now to allow the opportunity to collect and disclose data that can be analysed  
21 by the experts. As well as the exercise identified by Mr Ji, having the names may also  
22 allow enquiries to be made internally with those who dealt with the suppliers in  
23 question to identify other qualitative disclosure or obtain factual evidence relevant to  
24 the effects of the supplier attestations on particular supplier relationships. So that is  
25 why we say the information is needed.

26 Shein makes --

1 THE CHAIRMAN: Can I just check with you -- just on the point you've just  
2 made -- I just want to understand the practicality of what you are suggesting. So you  
3 would like today or as soon as possible, the names to be given to you?

4 MR HOLMES: Yes.

5 THE CHAIRMAN: I hadn't really picked up -- I don't know whether you are asking  
6 that -- under what confidentiality regime are you asking that to be given to you?

7 MR HOLMES: Well, so the claimants have been willing to plead the names of  
8 particular suppliers with whom they do business in open materials on the IP side of  
9 the case. It's not therefore apparent that the identities of the suppliers, in itself, is  
10 material that would qualify as confidential for the purposes of the confidentiality ring.

11 THE CHAIRMAN: Assume I'm against you on that. What would you be requesting?  
12 Would the outer ring be sufficient for your purposes?

13 MR HOLMES: The outer ring would at least allow us to interrogate the data, as we  
14 have done with the other names in the outer confidentiality ring, the 22 suppliers or  
15 the 30 suppliers -- it's only 22 that are confidential; those that attended the interviews.  
16 You saw the evidence of Mr Ji, that analysis has been undertaken on those. That can  
17 be dealt with in the outer confidentiality ring. We would be in more difficulty  
18 undertaking the broader investigation if the material were confined to the outer  
19 confidentiality ring, but we could still do the first, and that in itself would be a valuable  
20 and an important step in enabling us to prepare to prove our case at trial.

21 THE CHAIRMAN: My next question -- just on understanding what you're  
22 requesting -- is at the moment, we did have a date for disclosure of 12 December.  
23 Now, that's been pushed back, obviously, and I think at the end, we're going to discuss  
24 sort of how far it's been pushed back. I've not got my head entirely around what all  
25 the parties are requesting, but I know there's a general request for a little bit more time  
26 for disclosure.

1 You've shown me just now the evidence of Mr Ji who says that what you want is the  
2 document -- the names -- now. You would then do internal searches and  
3 interrogations of your platform. Then he says that the idea is that you would then do  
4 a reasonable and proportionate sample.

5 Do I understand it that that would then be done in time for whatever the disclosure  
6 date is that we're going to decide at the end of this hearing?

7 MR HOLMES: So it would obviously be done as rapidly as possible. At this stage, I'm  
8 not in a position to give you any assurance that that would be possible by 9 January,  
9 particularly with the intervening holiday period. I can take instructions to see whether  
10 at this stage we're in a position to suggest another date, but if we start now, we'll at  
11 least be able to get it across in good time for it to be considered ahead of evidence.  
12 That, we say, is the important point and it's why we've pulled the trigger on this  
13 application now.

14 THE CHAIRMAN: Right, it's going to have to be well in advance of evidence, isn't it?

15 MR HOLMES: Yes.

16 THE CHAIRMAN: Witness evidence. That's March, isn't it?

17 MR HOLMES: Yes.

18 THE CHAIRMAN: 27 March.

19 The other thing, the reasonable and proportionate sample. I'm going to hear, obviously  
20 from Ms Demetriou, but if I was to say yes to what you're suggesting and you get 450  
21 names or thereabouts, I understand you're not going to then deluge everybody with  
22 450 -- or using all 450 and get data points from all 450; what you're saying is you're  
23 going to take a sample of that. Has that -- I'm just trying to work out how that works.  
24 You're picking the ones that effectively suit your case, are you? How is it working?

25 MR HOLMES: No, sir, it wouldn't be our intention to cherry-pick. The sample would  
26 be selected on the basis that we would be able to defend it at trial and in consultation

1 with experts.

2 THE CHAIRMAN: I don't quite see how that's not cherry picking. Sorry, I'm just --

3 MR HOLMES: Because the experts would ensure that the sample was selected on a  
4 basis that was fair and on a transparent, a basis which could be explained.

5 THE CHAIRMAN: And then obviously, I can see how it's rather difficult at this stage  
6 to be prescriptive about what is meant by a reasonable and proportionate sample. Do  
7 you have any idea what that means in terms of numbers, or is that --

8 MR HOLMES: I'm afraid, sir, I can't enlighten you on that. It may partly depend on  
9 what statistical analysis is possible with a given sample. It's not something I'm afraid  
10 that I can address before you now.

11 THE CHAIRMAN: I mean, one way that sometimes this is done is that the other party  
12 gets their own ability to ask for choice of -- or the underlying data for the samples. Do  
13 you know what I mean?

14 MR HOLMES: Yes.

15 THE CHAIRMAN: So one side selects and the other side can equal that, if you like,  
16 with their own selection and ask you to interrogate. Would that be something that your  
17 client would be opposed to or not? I'm just trying to ensure that, if we did what you're  
18 asking, and obviously I don't know if we are going to yet, but if we did, I'm just trying  
19 to work out the practicalities of it and the fairness of it.

20 MR HOLMES: Yes. Well, sir, we're obviously alive on our side to the requirement to  
21 ensure that whatever is put forward has sufficient probative force to be useful. And if  
22 there were any risk of cherry picking, that was obviously a point that would be prayed  
23 in aid against us at trial in relation to a matter that is for us to prove our case on. So,  
24 you know, we'll obviously be careful in the methodology. We're very open to exploring  
25 other possibilities but I don't want, on my feet, to propose a protocol for that without  
26 having taken instructions.

1 The important point is that there is a sufficiently objective sample, and if the sample is  
2 sufficiently objective, that might obviate the need for and provide something more  
3 useful than a situation in which each side cherry-picked particular examples and  
4 offered two equally unhelpful samples. But it would be a matter, I think, that could be  
5 discussed and explored between the parties.

6 THE CHAIRMAN: Right.

7 MR HOLMES: Does that address your question, sir?

8 THE CHAIRMAN: Yes.

9 MR HOLMES: I'm grateful. So, just very briefly -- I mean, I think you've got the meat  
10 of the application?

11 THE CHAIRMAN: I think I've got the meat of this. I think it might be -- I mean, please,  
12 I'm not trying to shut you down, but I probably need to hear now from Ms Demetriou.

13 MR HOLMES: Very good, I'll hand over.

14 THE CHAIRMAN: Unless you have something -- I don't want to shut you down if you  
15 had something important you wanted to show me or say. Don't get me wrong.

16 MR HOLMES: Well, I will take a moment just to address the points in the skeleton.  
17 The first point is that we say Mrs Justice Bacon hasn't definitively determined this. She  
18 left the door open to further enquiries and further disclosure, if appropriate. And you,  
19 as the current custodian for managing the case, can do what you think is fair and right  
20 in the circumstances.

21 Second, this isn't an attempt to unravel the model D disclosure approach that was  
22 adopted at the hearing. We're not looking for any disclosure from Shein.

23 Third, it's not correct that Mr Ji's evidence shows that Whaleco can already test effects.  
24 What he describes doesn't relate to the supplier attestations.

25 Fourthly, the other wider investigations, if they were possible -- which would depend,  
26 I think, on the confidentiality protocol of the disclosure -- isn't bootstrapping; it's just

1 another reason why we say disclosure should be given.

2 And finally, Whaleco is not able to investigate the effects of Shein's conduct. Shein  
3 doesn't explain how the effects of the supplier attestations can be investigated without  
4 the provision of this information. So in short, this is readily available information. It  
5 should be provided now so that Whaleco can fairly develop its case on the effects of  
6 the supplier attestations.

7 Those are my submissions on the first application.

8 THE CHAIRMAN: Thank you. Ms Demetriou.

9 Submissions by MS DEMETRIOU

10 MS DEMETRIOU: Sir, you've heard from Mr Holmes and there is essentially no plan  
11 that's been put forward by Whaleco for what it's going to do with these names. What's  
12 going on here is that this is really a blatant attempt to unravel the carefully staged  
13 approach that the Tribunal arrived at at the July CMC. It is, of course, very important  
14 that these are Shein's top suppliers, so the information could not be more commercially  
15 confidential.

16 Can I just show you Mr Democratis' thirteenth witness statement on that. Now, I'm  
17 afraid my bundles are organised -- I think the tabs are the same, but I've got fewer  
18 volumes, but it's in tab 61 of the CMC bundle, page 939. If you could look at  
19 paragraph 25, he says there that the "450 suppliers constitute Shein's most valuable  
20 suppliers" and "this is self-evidently information of the utmost commercial sensitivity".  
21 And it plainly is. These are the crown jewels in terms of commercially sensitive  
22 information that a competitor should not have access to. And I was extremely  
23 surprised to hear my learned friend say that he didn't understand on what basis Shein's  
24 top 450 suppliers could be commercially confidential information.

25 THE CHAIRMAN: But that would be dealt with, would it not, by the confidentiality  
26 order. I think it's called outer ring, is it, confidentiality; that would be dealt with by that,

1 would it?

2 MS DEMETRIOU: So, we would strongly say that if this disclosure is going to be  
3 made, which I'm going to explain why we say it shouldn't be, then only the inner ring  
4 would suffice, because the outer ring contains Shein's team or employees and so more  
5 is required. The existence of the inner ring is precisely to protect very, very  
6 commercially confidential information like this between competitors.

7 Now, thinking back to what happened at the July CMC, what happened at the July  
8 CMC is that Temu strenuously advocated a sampling-based approach and that was  
9 rejected. I want to show you what they said in their skeleton argument for the CMC to  
10 show you what was rejected by the Tribunal and how this proposal is much worse than  
11 the proposal they had then. So if you could go to the supplementary bundle, please,  
12 behind tab 5 and if you could go to page 111, this is Temu's skeleton argument for the  
13 July CMC. And you can see there, if you have that -- do you have the heading,  
14 "Sampling and scope of disclosure"?

15 THE CHAIRMAN: Yes.

16 MS DEMETRIOU: What you can see here, if you look at paragraphs 92 and 93 is that:  
17 "Whaleco contends that searches should be carried out by reference to the  
18 Defendant's Proposed Relevant Suppliers, which comprises:"

19 And you can see (a), (b), and (c):

20 "A reasonable and proportionate sample of other suppliers, to be negotiated and  
21 agreed between the parties."

22 If you go on, for example, to paragraph 98 on page 113, you see there references to  
23 the arguments -- this had all been thrashed out in correspondence -- made by Shein  
24 against having sample based disclosure, which were essentially arguments of  
25 proportionality.

26 Now, pausing here to note that the sampling approach that was being suggested by

1 Temu at that stage was more modest than analysing 450 suppliers, so we didn't  
2 understand it to be analysing 450 suppliers. Now, consistently with their preferred  
3 sampling approach, Temu made an RFI application at the July CMC, as Mr Holmes  
4 has told you, for the names of suppliers which had signed the attestations. That RFI  
5 application was rejected and the Tribunal declined to proceed on the basis of sampling  
6 and instead, as my learned friend has explained to you, adopted a different approach.  
7 It ordered Shein to provide model C disclosure in respect of various categories and  
8 model D disclosure in respect of the 32 suppliers who had been identified in the  
9 pleading. Consistently with this, the Tribunal also rejected the RFI application for the  
10 names of suppliers who had signed attestations, instead ordering Shein to provide the  
11 number of such suppliers.

12 Now, I'm not going to take you back to the parts of the transcript that my learned friend  
13 took you to, but you saw when he took you to those parts of the transcript that what  
14 the judge had in mind at that stage was model D disclosure from the 32 suppliers  
15 without shutting out the ability of Temu to revert to the Tribunal if, having reviewed  
16 that disclosure, it considered that it needed more. So that was the staged approach.  
17 Of course, at this point in time, disclosure has not been provided. So Temu is very  
18 much jumping the gun in terms of what the judge had in mind at the July CMC.

19 Now, the Tribunal has heard that my learned friend relies heavily on Mr Ji's statement  
20 in support of his submission that disclosure of the names of the 450 suppliers is  
21 necessary and proportionate. And before turning to Mr Ji's statement, the  
22 proportionality question is not, as my learned friend puts it: is it disproportionate for  
23 Shein to gather the names and supply them? That's not the point. The proportionality  
24 question is what happens as a result of what is it that Temu is proposing to do once it  
25 gets the names? It's those further steps which are completely disproportionate in the  
26 context of a claim which is worth around, at the moment, £4 million.

1 Now, turning, please, to Mr Ji's statement. If we could go to that, it's behind tab 58.  
2 It's in my second bundle. Can we take it, please, from paragraph 20 at page 889,  
3 paragraphs 20 and 21 which my learned friend has shown you.

4 THE CHAIRMAN: Yes.

5 MS DEMETRIOU: What you can see from these paragraphs is that Temu has already  
6 conducted some analysis of product sales following takedown notices. You can see  
7 here that it considers that it's got more than enough data in respect of takedown  
8 notices, because it recognises, you can see there at 21(a):

9 "As the takedown notices affected several thousands of Temu sellers, and it would be  
10 disproportionate to provide data for each of them, Whaleco intends to disclose the  
11 above data in relation to a reasonable and proportionate sample of such sellers."

12 So pausing there, in respect of takedown notices, the proposal is to select  
13 a reasonable and proportionate sample. Now, we haven't had any proposals from  
14 Temu at all in relation to how it's going to go about that. We are very concerned with  
15 what Mr Holmes has just said in answer to your question, sir, about how it's going to  
16 do it because, unlike its sampling proposal that it put forward at the July CMC, which  
17 did involve transparency and each side picking samples, it appears from Mr Holmes's  
18 submissions that that's not what they've got in mind at all; they are going to pick  
19 examples. And the only comfort he provides to us is, "Oh well, you can challenge us  
20 at the trial if you don't think that they've been fairly picked". That's obviously an  
21 insufficient answer because unless we have all the data, we're not going to be in  
22 a position to determine whether the representative samples have been fairly picked.

23 So, in terms of what they've done so far, the process has been inadequate and there  
24 will need to be, very speedily, proposals from Temu and disclosure in relation to the  
25 takedown notices which you can see at 20 to 21.

26 Now, at paragraph 22, Mr Ji says that Whaleco is also proposing to use the suppliers

1 who signed attestations to conduct a similar effects analysis. But again, Temu is not  
2 proposing to use all 450 suppliers. Again, it recognises this would be disproportionate.  
3 Instead, again, it's proposing to identify and disclose product listing information in  
4 respect of a reasonable and proportionate sample of stores that were required to sign  
5 attestations. We can see that from the first and the final sentence of paragraph 22.  
6 You can also see it on page 895 at paragraph 35. The same point is made there.

7 Now, I'd like to make four submissions about all of this. The first is that the Tribunal  
8 can see that Temu is proposing to use some data relating to products which it alleges  
9 were affected by Shein's conduct in order to ascertain whether or not there was a drop  
10 in sales. And it appears that Temu's thinking about this is at an early stage, and we  
11 have been pressing them, as the Tribunal will be aware from the last hearing, for a long  
12 time. Because they've got to show not only that a product was removed from the  
13 Temu site as a result of the allegedly infringing conduct, but that, as a result of that  
14 product being removed, there was an effect on sales. So sales weren't simply made  
15 up by sales from the other millions of suppliers that operate on the Temu website. It's  
16 a two-stage process that they need to address.

17 And it does appear from Mr Ji's statement that unfortunately, Temu's thinking is at  
18 a very early stage. It hasn't yet said anything about how it's going to select the  
19 products for which it will provide data. Obviously, that needs to be thought through. It  
20 can't be for Temu to cherry pick data. There will need to be transparent criteria and  
21 the data will need to be disclosed to Shein when Temu provides its disclosure. So  
22 there will need to be transparent criteria for selection of samples in which Shein has  
23 input and which is policed by the Tribunal if there's any dispute. It really can't be for  
24 Temu to engage in this exercise, cherry pick the data it wants and then says, "Well,  
25 here you go; if you want to, you can make any points you want about fairness" in  
26 circumstances where obviously Shein won't be in a position to do that properly

1 because it won't have access to all of Temu's data. So we're completely in the dark  
2 as to what these proposals are that Temu is going to put forward, when they're going  
3 to be put forward and how disclosure by Temu is going to evolve.  
4 Thirdly, we say that it's obviously the case that products sold by the 32 suppliers are,  
5 in a sense, going to be Temu's best case on effects, because the 32 suppliers were  
6 not only brought in for interviews but they were also subject to some of the other  
7 allegations made by Temu in its counterclaim. And so you've seen that Temu alleges  
8 that the individuals were ordered to attend Shein's offices and were subjected to  
9 intimidatory action. That's its allegation; we don't accept that, but that allegation  
10 relates to these suppliers. In addition, all of the 32 suppliers were signatories to the  
11 exclusivity agreements that Temu complains about. Further, about half of those  
12 suppliers signed attestations. So really, this is a case, as a question that, sir, you  
13 asked and I can tell you, that around half, I think it's 14, signed attestations. And so  
14 this really does come back to the Tribunal's staged approach.

15 THE CHAIRMAN: Was that something that the other side, Mr Holmes, knew or had  
16 forgotten he knew, or is that new evidence -- new information?

17 MS DEMETRIOU: That's new information; they haven't even asked it. So they've  
18 rushed straight into making this application for the 450 suppliers. We have now been,  
19 obviously, gathering the disclosure that we have to provide. So it's information which  
20 we can now share.

21 THE CHAIRMAN: Can I just have that again -- you said 14 ...

22 MS DEMETRIOU: 14 signed attestations. Sir, pausing here and going back to the  
23 staged approach of the Tribunal, this is precisely what Mrs Justice Bacon had in mind.  
24 There are 14 that signed attestations. Have a look at those 14. The attestations were  
25 signed over a very short period of time. Mr Holmes says, "Well, we want to look to  
26 see whether there was any effect in the immediate aftermath of signing the

1 attestation". They can do that. If they say that that sample is not big enough, they  
2 can come back with a reasoned request for why they need more.

3 Some of the 32 were also subject to the penalty notices that Temu complains about at  
4 paragraph 47 of its counterclaim, and some of them were recipients of the takedown  
5 notices that Temu complains about. Thinking back to the two stages of the loss  
6 analysis -- the effects analysis that Temu is going to have to grapple with -- one might  
7 think that if Temu can't establish an effects case on the basis of these 32 suppliers,  
8 then it's unlikely to be able to do so in respect of other suppliers that weren't in the  
9 position of these 32.

10 We say that it's obviously the case that the 32 suppliers are going to yield information  
11 which will enable Temu, if necessary, to come back and ask for more. But there's  
12 a further and very important point, which is the point at paragraphs 20 and 21 of Mr Ji's  
13 statement, which is that Temu is already conducting analysis in respect of the  
14 takedown notices.

15 Now, again, thinking about the issues that Temu is going to have to grapple with in  
16 proving an effects case, there is a clean causative link -- at least for stage 1 of the  
17 analysis -- between a takedown notice and the removal of a product. So unlike  
18 a supplier who signed an attestation where Temu will have to ascertain whether  
19 products were even taken down following signing the attestation, in relation to  
20 a takedown notice, by definition, we know that products were removed. So stage 1 is  
21 ticked.

22 The next question for Temu will be to demonstrate that that led to an effect in the  
23 sense that those lost sales of those products weren't simply made up for by sales from  
24 one of the other millions of suppliers that sell similar products on Temu's site.

25 Takedown notices --

26 THE CHAIRMAN: May I ask, I presume your clients wouldn't object to giving the

1 14 names now?

2 MS DEMETRIOU: So that's the -- Sorry, the 14 names --

3 THE CHAIRMAN: The 14 of the 32.

4 MS DEMETRIOU: Yes, we can of course do that. We don't object to that. In fact, we

5 can do better than that. We can provide them with a table which shows, as it were,

6 which of the 32 suppliers signed attestations, which were the subject of penalty

7 notices, and which were the subject of takedown notices. We can provide that

8 information which we think will be of assistance to Temu in analysing its own data.

9 Now, of course takedown --

10 THE CHAIRMAN: Would you insist there on inner ring confidentiality, or would you be

11 prepared to use outer ring confidentiality?

12 MS DEMETRIOU: Outer ring confidentiality, yes.

13 THE CHAIRMAN: Just making sure I'm not using the phrases wrongly; my

14 understanding is -- that wasn't an order I made, I don't think so -- inner ring

15 confidentiality is effectively what I would think of as EEO, so just external, or is it --

16 MS DEMETRIOU: Yes. Inner ring is just external advisers.

17 THE CHAIRMAN: External advisers, and then outer ring is external advisers plus

18 named individuals from the clients? I think in my draft order I don't have the named

19 individuals; it's blank. But I'm assuming that named individuals from both sides; is that

20 right?

21 MS DEMETRIOU: I think that's correct, yes. Somebody will tell me if that's wrong.

22 No, it's correct. I'm seeing nods in the room.

23 THE CHAIRMAN: Okay. Yes. Sorry about that.

24 MS DEMETRIOU: No, no, of course.

25 Now, takedown notices of course, can be used to match specific suppliers selling on

26 both Shein and Temu. So by definition, you're eliminating that complication. So by

1 definition, a product that was the subject of a takedown notice will have been sold by  
2 a supplier selling on both Shein and Temu.

3 Now, the fourth submission is that, by contrast, providing the names of suppliers who  
4 have signed attestations is inevitably going to give rise to significant further work, and  
5 further work for which Temu has no current plan.

6 The reason we say that is this: some of these suppliers may not have been selling on  
7 Temu at all. So step 1 is to work out which suppliers were also selling on Temu. Now,  
8 that's not necessarily a straightforward question, because what we've noticed -- what  
9 we've seen in this case is that it's very common for suppliers to sell under different  
10 trading names on Shein and Temu. So that first step of the process is complicated,  
11 and is likely to require further disclosure.

12 Now, once that subset of the 450 who were also selling on Temu has been  
13 identified -- which, as I say, is not in itself a straightforward exercise and will require  
14 further disclosure -- there will need to be a process of identifying what products they  
15 sold, and a further process to select a representative sample. That in itself is  
16 question-begging, because what is a representative sample of such sellers?

17 It seems inevitable that there'll need to be further disclosure designed to work out  
18 things like volumes of sales. So does "representative" mean sellers that sold a lot on  
19 Shein, or a lot on Temu or both? Or certain product categories? It's entirely not  
20 explained and my learned friend has put forward no plan. All of this is running into  
21 precisely the problem that the Tribunal sought to avoid when it rejected Temu's  
22 sampling proposal.

23 Temu is already apparently analysing data relating to the products of the 32 suppliers,  
24 and it's already analysing data relating to products which were subject to takedown  
25 notices. That's more than sufficient, particularly in a claim of this modest size, and  
26 particularly in circumstances where Temu has not even put forward any proposals for

1 how it's going to select the subset of products that were the subject of takedown  
2 notices, or what it's going to disclose to us in terms of its data.

3 We say that the Tribunal should refuse this RFI application because it will put in train  
4 disproportionate steps in circumstances where Temu has no plan for how to deal with  
5 the 450 and what to do with them, and in circumstances where it has not even put  
6 forward a plan for its data in relation to the takedown notices.

7 As I say, the data relating to the 32 suppliers and the data relating to products that  
8 were actually taken down, following takedown notices, are likely to be the best means  
9 for Temu to try to establish anti-competitive effects. If, having formulated a proper  
10 proposal for its own disclosure, Temu thinks it needs more, then it can come back to  
11 the Tribunal as part of the staged approach that Mrs Justice Bacon was envisaging at  
12 the July CMC, but we say that that's unlikely to be the case.

13 Now, the only other thing that Temu says about this, so what does it say about why  
14 it's insufficient to rely on the data from the 32 and the takedown notice data? It says  
15 a couple of things. If you can go to their skeleton argument. I have it separately, sir,  
16 but if we could take paragraph 31 of their skeleton argument.

17 THE CHAIRMAN: Yes.

18 MS DEMETRIOU: Here, Whaleco is responding to Mr Democratis' suggestion which  
19 I've just been elaborating on --

20 THE CHAIRMAN: Yes.

21 MS DEMETRIOU: -- that Whaleco can use other data, including the takedown notice  
22 data and not data relating to supplier attestations. What's said about that is, "Well, his  
23 points are therefore irrelevant to the exercise proposed in J1 at paragraph 22".

24 Well, yes, in one sense, but obviously it's not for a witness to drive what disclosure  
25 takes place in this case; it's the other way round. It should be the Tribunal deciding  
26 what's proportionate, and then the experts conduct their analysis on the basis of that.

1 If it were the other way round, there would be no end to disclosure because, as we all  
2 know, expert economists always want as much data as they can get.

3 Then it says:

4 "For the reasons already given at paragraph 16 to 18, analysing the effects of the  
5 attestations, and not just the supplier interviews or the takedown notices, is important  
6 for the overall robustness of Whaleco's effects analysis."

7 If we go back to paragraph 16 and 18. 16 is really just assertion, saying we want to  
8 do as broad an analysis as possible, but that's not a good answer to all of the  
9 disproportionality points I've been making.

10 Then 17 is more of the same.

11 Then 18, I think, makes the only substantive point. And they say there that:

12 "Whaleco's assessment of the effects of the Infringing Conduct risks being impaired  
13 absent consideration of the supplier attestations, particularly given that Whaleco  
14 anticipates it could conduct a direct and efficient assessment of their effect by  
15 reference to the conduct of suppliers before and after they sign the attestations."

16 Now, they're going to be getting model D disclosure in respect of 14 suppliers that  
17 signed the attestations. What Mr Ji says is that because the attestations were signed  
18 over a very short two month period, it would be useful to look in the immediate  
19 aftermath of that two month period, which, of course, they'll be able to do with the 14.  
20 If they come back and they say, "Well, that's yielded a nil return", that will tell us that  
21 there is absolutely no point in going any further.

22 Now, they also say -- and this is paragraph 30 of their skeleton argument -- that it's  
23 important somehow to isolate the effects of the attestations from the other forms of  
24 infringing conduct that they rely on.

25 THE CHAIRMAN: Sorry to interrupt you.

26 MS DEMETRIOU: Yes.

1 THE CHAIRMAN: Could I just float something past you, because I'm trying to  
2 understand. We've got an issue that they, as we know, say they need this information  
3 and they need these 450 names. I've read your skeleton and I hear what you're saying  
4 now, and you're concerned about -- I think it's fair to say -- confidentiality and the  
5 effects of this going forward, if I put it that way.

6 MS DEMETRIOU: Yes.

7 THE CHAIRMAN: What you say is a lack of thought, perhaps, in how this reasonable  
8 and proportional search is going to be done and is going to be done fairly and the like.  
9 Just so I understand, I was shown by Mr Holmes one of the attestations, or an  
10 example, which he showed me just now in tab 19, page 461.

11 MS DEMETRIOU: Yes.

12 THE CHAIRMAN: I'm assuming this was given over because it's representative of all  
13 450-odd of them. Is that a fair understanding?

14 MS DEMETRIOU: Yes, that's correct.

15 THE CHAIRMAN: So you obviously have these 450 to hand because you know  
16 they've got 450 of them and there's no suggestion I picked up that there's difficulty in  
17 actually finding these things. If I understood it, if you were to hand over 450 of these  
18 documents -- I'm not suggesting I'm going to ask you to do that, I'm just trying to work  
19 out what they get is 450 pieces of paper that look like this, in effect, with a name at the  
20 top and a signature at the bottom. Just so I'm understanding the picture, is that right?

21 MS DEMETRIOU: Yes.

22 THE CHAIRMAN: Yes. So does that follow from that, that if the names were redacted  
23 as has been done here and they were numbered, he would get 450 of these numbered  
24 with no names?

25 MS DEMETRIOU: Correct.

26 THE CHAIRMAN: If he was to choose, randomly, 50 of those, would that not give him

1 a sample to look at and cut across your issues of having far too much, and 450 -- I'm  
2 just trying to understand the situation. Would that not cut across that?

3 MS DEMETRIOU: I think the problem --

4 THE CHAIRMAN: Would you oppose that?

5 MS DEMETRIOU: I think we would oppose that.

6 THE CHAIRMAN: In what ways?

7 MS DEMETRIOU: We would oppose it, because the -- well, for, for two reasons,  
8 really. The first is that it may well be that -- of the 50 -- none of the 50 operate on  
9 Temu's website. We just don't know at the moment the proportion that operate on  
10 Temu's website.

11 Now, one of the points made by Mr Holmes is, "Well, look at the wording of this  
12 document". But there's some nuance in the language and there may be a translation  
13 issue, because my instructions are that the paragraph at the beginning that Mr Holmes  
14 took you to is a general recital, that some suppliers, not necessarily the supplier  
15 signing the attestation, had been posting infringing products on Temu.

16 So you've seen our evidence that the 450 are the 450 top suppliers by value, and it  
17 doesn't follow at all from that. We don't know at the moment which of those, or how  
18 many or whether even a significant proportion were selling on Temu at all. The very  
19 endeavour of establishing that is complicated, because the typical situation is that  
20 suppliers operate under different trading names on the Shein and Temu platforms.

21 So unlike takedown notices, where you can easily say, "Well, here's a supplier that's  
22 been trading on both", this is not going to be an easy thing to do; it's not going to be  
23 easy to track whether or not these suppliers operate on Temu. So that's the first  
24 reason, sir.

25 The second reason is that this exercise and that the -- if I can put it -- inevitable satellite  
26 litigation on how we go about sampling is precisely why the Tribunal rejected the

1 sampling approach which was pressed in much more detail in Temu's witness  
2 evidence; they had a proposal for how sampling would happen. That's why it was  
3 rejected by the Tribunal at the July CMC. It's true you didn't shut out Temu from  
4 coming back, but deliberately chose to order model D disclosure in relation to the 32,  
5 and then said on that basis, "Once you've analysed that, then if appropriate, you can  
6 come back for more". So it was a staged approach in that sense, and of course that  
7 hasn't happened yet.

8 Then, thirdly, what we're now seeing is that Temu is analysing evidence in relation to  
9 the takedown notices, which is more tractable, for all the reasons I've given. Yet, in  
10 relation to that, we have a lacuna -- if I can put it that way -- in terms of a fair and  
11 transparent plan for how the reasonable and proportionate sample is going to take  
12 place. So we do say that this is unnecessary and in any event premature, because  
13 before those steps have been taken -- so the steps in relation to the 32 and discussion  
14 as to how the reasonable and proportionate sample of the takedown notices data is  
15 going to be agreed -- this is another stream of work which is by definition more  
16 complicated, for the reason I've made, in circumstances where we have a claim worth  
17 only £4 million and there is already a lot of work to do and no transparency over  
18 Temu's proposals.

19 Sir, really, the final point I wanted to make is that, this exercise that my learned friend  
20 places weight on, of somehow stripping out the effects of the attestations, we say that  
21 it's entirely unclear why it's said to be necessary. Because Temu's pleaded  
22 case -- I don't think we need to go back to it; I'll give you the reference -- is that the  
23 various acts of infringement it identifies, cumulatively or individually, have restricted  
24 suppliers from doing business with Temu. That's paragraph 48 of its pleading.

25 It doesn't need to show that the attestations had such an effect in isolation. If Temu is  
26 unable to show that a supplier who signed an attestation and who was also interviewed

1 and served a penalty notice and served a takedown notice was not restricted from  
2 doing business with Temu, then its case is not going to be improved by looking at  
3 suppliers who only signed an attestation.

4 Secondly, we say the exercise of isolating suppliers who only signed an attestation is  
5 really going to be next to impossible. That's because every supplier who signed an  
6 attestation also signed the supplier exclusivity agreements, which Temu also pleads  
7 as being anti-competitive. There are no suppliers who only signed the attestations.

8 Thirdly, even if it somehow were useful to isolate suppliers who had only done two  
9 things -- so signed an attestation and a supplier agreement -- but hadn't, for example,  
10 received a penalty notice, it's entirely unclear -- and this is an important point -- how  
11 Temu proposes to identify which of the 450 suppliers fall into that category. So that  
12 would be not easy at all; it would require further disclosure from Shein, which comes  
13 back to my point about lack of proportionality.

14 Sir, in short, Temu doesn't even have a plan for the work it's currently doing, which is  
15 based on the 32 suppliers and the takedown notice data. This idea of conducting  
16 further work in respect of the supplier attestations is completely unformed. They've  
17 come without a plan. It's bound to lead to disproportionate work in circumstances  
18 where this is a modest claim and we're operating to a compressed timetable.

19 None of the reasons given for seeking these names are good ones. In circumstances  
20 where the names are highly confidential, we don't say that the outer ring would be  
21 good enough. It's odd that Mr Holmes now says that it would have to be outer ring,  
22 because his skeleton argument rather hints at agreeing to -- that the inner ring would  
23 be sufficient. But in any event --

24 THE CHAIRMAN: Can you show me that?

25 MS DEMETRIOU: Well, at paragraph 35 of his skeleton argument, he says that the  
26 confidentiality concerns explained by Mr Democratis are moot because the names can

1 be disclosed into the inner ring. So that's how he seeks to brush off the confidentiality  
2 concerns there.

3 But today, he appeared to say that only the outer ring would do, which we very, very  
4 strenuously object to.

5 THE CHAIRMAN: Sorry, you're going too fast for me. I can't see where  
6 (Overspeaking).

7 MS DEMETRIOU: I'm so sorry.

8 THE CHAIRMAN: Where does it say it can go --

9 MS DEMETRIOU: Paragraph --

10 THE CHAIRMAN: -- in the inner ring?

11 MS DEMETRIOU: So paragraph 35, he says that:

12 "For the avoidance of doubt ... the information would be provided only to Whaleco's  
13 external legal and economic advisers who are in the appropriate confidentiality ring.

14 The concerns raised in Democratis 13 ... are therefore moot."

15 So he's saying the confidentiality concerns raised by my client are moot because the  
16 information could be disclosed into the inner ring. That's how that paragraph should  
17 be understood.

18 But then, of course, orally today, his opening gambit was that this information is not  
19 confidential at all, which is obviously hopeless.

20 Then his alternative submission was that it would need to be disclosed into the outer  
21 ring, which we strenuously object to. We don't understand the basis on which he says  
22 that the outer ring is necessary, when at paragraph 35, he's saying very clearly that  
23 Whaleco's external legal and economic advisers could conduct the analysis envisaged  
24 in Ji 1. That's what they say in their skeleton.

25 THE CHAIRMAN: And the external economic advisers are in the inner ring?

26 MS DEMETRIOU: Are in the inner ring, yes.

1 THE CHAIRMAN: I thought under instruction you said that in relation to the 14 relevant  
2 suppliers, your clients would be prepared for them to go outer ring. That's what you  
3 said.

4 MS DEMETRIOU: That's correct. That's a limited group of suppliers and we're  
5 providing model D -- so of course Temu has a separate application, which is that their  
6 names should be de-designated altogether --

7 THE CHAIRMAN: Yes, I've got that.

8 MS DEMETRIOU: -- but they're already in the outer ring. They're already in the outer  
9 ring.

10 THE CHAIRMAN: Right, they're already in the outer ring.

11 MS DEMETRIOU: The difference, really, sir, is that these are, as I say, the crown  
12 jewels in terms of being Shein's 450 most valuable suppliers.

13 THE CHAIRMAN: Yes, I've got that. I --

14 MS DEMETRIOU: So -- yes, sorry.

15 THE CHAIRMAN: I did want to ask you something that Mr Holmes showed me this  
16 morning. I just wanted -- and I'd seen myself.

17 MS DEMETRIOU: Yes.

18 THE CHAIRMAN: In the earlier RFI, it did appear to me that your clients had answered  
19 that this would all be a matter -- the names and the like -- for disclosure in due course.

20 MS DEMETRIOU: So I think we said, "As appropriate in due course", but we've also  
21 made very clear that the identity of the suppliers is simply not necessary for Temu to  
22 prove its case.

23 I think Mr Holmes also took you to our defence to the counterclaim at paragraph 39(b),  
24 where he interpreted that as being a complaint; that they hadn't particularised the  
25 names of the suppliers. But that's incorrect. The complaint we made there was that  
26 they had failed to particularise what they meant in their pleading by required or forced

1 suppliers to enter into the attestations. You can see there's a cross-reference to  
2 paragraph 33 that makes that clear. So it's never been my client's position that the  
3 names of these suppliers would be needed.

4 THE CHAIRMAN: I do need your help on this. If you go to page 587, so tab 26,  
5 page 587.

6 MS DEMETRIOU: Sorry, 587, tab ...?

7 Could you repeat the tab again, please, sir?

8 THE CHAIRMAN: Tab 26.

9 MS DEMETRIOU: 26.

10 THE CHAIRMAN: I think this is what Mr Holmes took me to.

11 MS DEMETRIOU: 587?

12 THE CHAIRMAN: 587. All I just want to have your response to is paragraph 34.

13 MS DEMETRIOU: Yes.

14 THE CHAIRMAN: That's where the identification of the suppliers who signed the  
15 so-called loyalty oaths, you say the matters there:

16 "... will be matters for disclosure and factual evidence, as appropriate, in due course."  
17 It did seem to read to me that it was one or the other, and I understand you're now  
18 saying neither. Is that right?

19 MS DEMETRIOU: Well, sir, two points to make about that. The first is when you look  
20 at paragraph 34, paragraph 34 is not only asking which suppliers or category of  
21 suppliers were asked to sign the loyalty oaths; it's asking, did Shein ask all of its  
22 suppliers and then what were the reasons for only requiring loyalty oaths from some  
23 suppliers? So it's not simply asking for the names. What we're responding to there at  
24 paragraph 35 is the entire request.

25 We say that the matters would be matters for disclosure and factual evidence as  
26 appropriate. What we meant there, as I apprehend it, is we didn't mean either

1 disclosure and factual evidence, but would be matters for collectively disclosure and  
2 factual evidence if appropriate, so as appropriate. So we're not there saying that it will  
3 be appropriate to give the names. Of course, sir, this was all before the Tribunal  
4 carefully calibrated its approach at the July CMC, rejecting a sampling approach, in  
5 part, of course, because we had made submissions about the complexity of the  
6 satellite disputes that would arise through choosing representative samples.

7 THE CHAIRMAN: All right. We're going to need to take a transcriber break quite  
8 soon. I don't know how much more you've got to go, Ms Demetriou, or are you done?

9 MS DEMETRIOU: I'm done, thank you.

10 THE CHAIRMAN: Yes. And Mr Holmes, have you got a lot before the transcriber  
11 break, or how much have you got to go?

12 MR HOLMES: I would say five minutes, probably, so I'm in your hands, sir.

13 THE CHAIRMAN: Assuming that I'm not getting a message that that's going to be too  
14 much, if you keep it to five minutes, it will make more sense to me for you to do your  
15 brief reply and then we have a short break.

16 MR HOLMES: I'm grateful.

17 THE CHAIRMAN: I apologise to the transcriber if they're furious with me for that, but  
18 I hope not.

19 Reply submissions by MR HOLMES

20 MR HOLMES: So the first point relates to your suggestion which, as I understood it,  
21 was that we might identify particular disclosed attestations which would have the  
22 names removed and the names might be unredacted from those attestations. The  
23 disclosure exercise will not include the signed attestations of the 450, because  
24 therefore we won't receive this material by way of disclosure, even in redacted form,  
25 under the terms that have been arrived at. So the only way that we will be able to  
26 obtain material information for the purposes of conducting a specific analysis of the

1 effects of the supplier attestations is through the disclosure of information at this point.

2 THE CHAIRMAN: No, I know that. My proposal actually was to --

3 MR HOLMES: Oh, sorry.

4 THE CHAIRMAN: I was trying to work out whether in fact they could be asked to  
5 provide it. I know that they're not at the moment.

6 MR HOLMES: I see, yes.

7 THE CHAIRMAN: And then from that you could select. I was trying to discuss with  
8 Ms Demetriou a way of meeting her concern, her client's concern of 450 and getting  
9 a smaller number, by trying to find a way of sampling that. But Ms Demetriou said that  
10 wouldn't work.

11 MR HOLMES: That can be considered, sir, if you were attracted by that. What we  
12 could simply do -- it's clear from what she says; they already have a list, you know,  
13 they have the 450; they know who they are. That could simply be provided to the  
14 Tribunal, which could select at random a number of those.

15 THE CHAIRMAN: Ms Demetriou has just said that actually, it's not clear that those  
16 would actually be necessarily anything to do with the Temu site at all, which I know is  
17 perhaps surprising when one reads the attestation document, but that's what  
18 Ms Demetriou has explained: that actually there may be -- and we don't know how  
19 many -- who may have nothing to do with Temu at all.

20 MR HOLMES: Well, we don't know. The problem is there's a huge asymmetry of  
21 information here. We don't know whether they can isolate those that do mention  
22 Temu; we don't know whether the supplier attestations that refer to Temu are known  
23 and have been isolated. We could have a sample that was of a size that would permit  
24 an interrogation of Temu systems to see whether equivalent -- if the suppliers also  
25 supplied the Temu site. Those things can all be dealt with.

26 The second point, is that it's said that we learned for the first time today from

1 Ms Demetriou during the course of her submissions that 14 of the 22 suppliers, or  
2 perhaps the 30 suppliers including those that were on the bulletin board, did enter into  
3 supplier attestations and it's said that we can analyse the effects on those 14 out of  
4 the 22 or 30, as the case may be. The difficulty that arises there is that it won't be  
5 possible to isolate the conduct -- you have my point about that -- in order to test the  
6 effect of the supplier attestations specifically. It's true that we plead that the conduct  
7 had either a cumulative or an independent effect taken conduct by conduct, but we  
8 won't be able to test the independent part of that allegation without disclosure. We  
9 have this information asymmetry that will simply prevent that.

10 Moreover, the 14 suppliers are going to be ones who were subjected to the supplier  
11 attestations at the beginning of 2023 and were then called in for interviews at the end  
12 of 2023. So they are a self-selecting sample of people who one assumes were not  
13 deterred from operating on the Temu platform by the attestations. That is why they  
14 were subjected then to the more extreme conduct which is alleged in relation to the  
15 interviews. So they are not a good sample on the basis of which to understand the  
16 effects of the supplier attestations; they are likely to be those who were not put off by  
17 the supplier attestations from dealing with Temu, hence the interviews which then took  
18 place under a year later.

19 Third point: as regards sampling, the contents of Fred Ji's statement has obviously  
20 been available since the 17 October, and that describes the exercise which has  
21 already been undertaken and no queries have been raised about the sampling since  
22 that date, although it's now presented as an urgent concern. The complaint is about  
23 a sampling exercise which we haven't yet undertaken because we don't yet have the  
24 names that will enable us to determine what would be an appropriate sample. If it  
25 assists, we would be happy to disclose data in relation to all 450 names or whatever  
26 other sample of those subject to supplier attestations you, sir, consider appropriate in

1 order to allow us to test the effects of this conduct. But at the moment, we're in the  
2 dark and the approach that Shein is taking is not conducive to enabling us fairly to  
3 prepare our case for trial. This is really the last opportunity at which steps can be  
4 taken that will allow us to test this effectively and that is why we are seeking the  
5 provision of the information now.

6 Fourth point: there was a suggestion that model C and model D disclosure had been  
7 determined on a particular footing, and this will unpick that. What was being  
8 debated --

9 THE CHAIRMAN: I don't want that.

10 MR HOLMES: Okay, I won't trouble you with that then.

11 The fifth point is it is said that there would be difficulty identifying if suppliers also  
12 supplied on Temu and that might require further disclosure. Well, it has been possible  
13 to undertake an exercise in relation to the 22 suppliers, and we apprehend that that  
14 will be possible also in the case of a wider sample of those affected by the supplier  
15 attestations, a list of their names. We're not seeking any disclosure of documents from  
16 Shein. Of course, even if there were a later request, that would be under the control  
17 of the court. The Tribunal should approach this request and determine the necessity  
18 and proportionality of this request now, not on the basis of other threatened or  
19 in terrorem submissions about future applications for disclosure which haven't been  
20 made.

21 The OCR or ICR point: the OCR is confined to those individuals who are lawyers in  
22 terms of the in-house members. So individuals who are qualified in law in a jurisdiction  
23 other than the People's Republic of China, either in Hong Kong or the US, that is the  
24 membership of the OCR. It was considered sufficiently secure for the 22 suppliers'  
25 names, and there is no reason why it should not equally be used in relation to the  
26 names of those who have given supplier attestations. They are under professional

1 duties --

2 THE CHAIRMAN: Very quickly, because I do want to bring this to a close, what did  
3 you mean in paragraph 35 of your skeleton argument?

4 MR HOLMES: That was -- it was an unfortunate error, sir, for which I apologise. We  
5 did not mean to suggest that it would be sufficient for external legal and economic  
6 advisers to see this. In order to interrogate the systems, we do need the internal  
7 lawyers at Temu, who are members of the confidentiality ring, to be able to deal with  
8 this material. It would severely hamper if not prevent us from undertaking the  
9 necessary analysis if they were not within the ring.

10 So what it should have said is that the information would be provided to Whaleco's  
11 external legal and economic advisers and the lawyers who represent Whaleco within  
12 the ring as internal members of the ring. That was an error for which, as I say, it's  
13 regrettable, but it was not considered; we were not meaning to suggest that the inner  
14 confidentiality ring would be sufficient.

15 The white T-shirt point there is just obfuscation. It's a point relating to a different stage  
16 of the analysis. These types of clothing are not generic white T-shirts; I was looking  
17 at the list of the products which are the subject of the sample for the trial of the IP part  
18 of the proceedings: it's things like "houndstooth skort", "floral jumpsuit". These are  
19 highly specific items of clothing which appeal to the evanescent and very specific  
20 tastes of consumers for a short period seasonally and according to the vagaries of  
21 fashion. If the products are gone from the website, there will not be straightforward  
22 and simple substitution as though we were dealing with generic or homogeneous  
23 products.

24 So, I don't think I need to address you on it and I don't need to take you there, but if  
25 you look at paragraph 33 of the defence to the counterclaim, it's tolerably clear that  
26 the complaint about particularisation did relate to the identities of the suppliers, as well

1 as any other matters. Equally, we think a fair reading of the response to the request  
2 for information is that the identities of the suppliers would be a matter for disclosure  
3 and evidence in due course as appropriate. That's certainly how we read it and  
4 understood it. But subject to any questions you have, sir, those are my reply  
5 submissions.

6 THE CHAIRMAN: No, that's very helpful. Thank you, both of you. Let's take a short  
7 break. Why don't we start again at 12.15.

8 MR HOLMES: Thank you.

9 (12.05 pm)

10 (A short break)

11 (12.16 pm)

12 THE CHAIRMAN: Is everybody there? Everyone ready?

13 MR HOLMES: Yes, sir. Ready when you are.

14 THE CHAIRMAN: I think what we'll do is I will make an order on that application and  
15 then we'll move to the next one. That means I can keep them in my head as we go  
16 through. So starting with this application.

17  
18 (12.16 pm)

## 20 **Ruling on RFI application by Whaleco**

21  
22 THE CHAIRMAN: I have before me an application by Temu to be given the names of  
23 all suppliers that entered into what are called "supplier attestations" since  
24 1 August 2022. I have been told that these were entered into for around a two month  
25 period between 2022 and 2023. There are around 450 suppliers, but Temu does not  
26 know their names, and Temu will not find that out under the current disclosure regime.

1 Temu says it needs the names to investigate the effects of those attestations and in  
2 order to look at product data, and interrogate effectively its own systems to support its  
3 case on effects.

4 Until today, Temu did not know how many signed attestation documents were signed  
5 by Relevant Suppliers (in respect of whom disclosure is being given). Ms Demetriou  
6 explained under instruction that there are 14 Relevant Suppliers who have signed  
7 attestation documents. Ms Demetriou explained that her client does not object to  
8 giving the names of those 14 suppliers, under "Outer Ring" confidentiality provisions  
9 (using the terminology from the Confidentiality Order made by Bacon J on 29 July  
10 2025).

11 I was shown the counterclaim where these points are raised, and I was shown an  
12 example of an attestation document. I was also shown a request for further  
13 information where Shein was asked about the names of suppliers, along with other  
14 information, and Shein accepted that this would be a matter for evidence or disclosure  
15 as appropriate in due course.

16 Today, Shein does not say it would be costly or difficult for them to provide the  
17 information. The main objection, other than a concern of confidentiality, is that this  
18 was rejected by Mrs Justice Bacon at an earlier CMC and would cut across a sampling  
19 approach to disclosure. Shein also has concerns as to where this may lead and that  
20 the information may derail matters as we proceed.

21 Against that, I have the evidence from Mr Ji from Temu who explains the need for the  
22 names in order to be able to track the potential effect on sales on the UK platform and  
23 then to provide data on a "reasonable and proportionate sample".

24 Dealing first with the 14 Relevant Suppliers. Disclosure of their names into the "Outer  
25 Confidentiality Ring" is not opposed and so I will direct that this is done.

26 That leaves the other names. I should say at the outset that I do not accept that Bacon

1 J at the earlier CMC was being in any way prescriptive about disclosure going forward.  
2 She was dealing with the position at that stage. I must look at the issue afresh today.  
3 I am concerned about the lack of thought, if I may put it that way, by Temu as to how  
4 the information will be used going forward. I am concerned about cherry picking data  
5 in a manner which is not transparent and about the potential for this to become satellite  
6 litigation. I therefore think some arguments from Ms Demetriou have force.  
7 However, Ms Demetriou did not seriously argue that the names are not relevant, and  
8 her client's proportionality concerns are not about the giving of the names *per se* but  
9 about what might happen down the line; it is a concern that might arise in the future.  
10 I think that is a matter that can be dealt with by case management.  
11 The principal issue is that the names are relevant to make sense of the supplier  
12 attestations. I struggle to see what, without the names, Temu can do with the  
13 attestation notices at all. I have seen one and I cannot see what can be done with it if  
14 one does not have the names. Although I have directed that 14 names will be  
15 disclosed, I take the point that 14 is not a big enough sample.  
16 I had thought I might be able to cut through this issue by directing that all 450  
17 attestation notices should be handed over, with names redacted, and then Temu could  
18 take a sample of 50 or 100 in order to interrogate its platform. That would meet  
19 Ms Demetriou's proportionality concerns. I put that to the parties, but the problem is  
20 that (as Ms Demetriou explained) it is not even known how many of the attestation  
21 notices are from suppliers of Temu (I should record that I find this surprising on the  
22 face of the Notice documents). Accordingly, sampling may not be fair because the  
23 sample may inadvertently omit the suppliers who also operate on the Temu platform.  
24 For those reasons, I will accede to Temu's request, and I will order that the names are  
25 to be disclosed.  
26 As regards confidentiality, in Temu's skeleton argument, it was suggested that the

1 names could be given an “Inner Ring” confidentiality protection (i.e. effectively external  
2 counsel and experts). Today, Mr Holmes KC admitted that that is an error in his  
3 skeleton argument. It seems to me that this is correct. When one looks at the  
4 underlying evidence that I have referred to from Mr Ji, it is clear that the people within  
5 the “Inner Ring” will not be able to undertake the sort of interrogation of the Temu  
6 website needed. I agree that confidentiality should be preserved and direct that the  
7 names should be disclosed in the basis of “Outer Ring” confidentiality, pursuant to  
8 paragraph 3.2 of the Confidentiality Order.

9 As regards protection for Shein, the whole point of the “Outer Ring” of confidentiality  
10 is to protect confidential information with it only being given (outside external counsel  
11 and experts) to certain named individuals at the respective clients who themselves  
12 have a legal background. Shein has suggested in its evidence that Temu has  
13 breached confidentiality in the past, but this evidence does not relate to any breach of  
14 the Confidentiality Order (this understanding was later confirmed by Ms Demetriou).  
15 In the circumstances of the present application, and having regard to the use that  
16 needs to be made of the disclosed names, it seems to me that “Outer Ring”  
17 confidentiality is the only practical option.

18 For those reasons, I will make the order requested. I will discuss with the parties the  
19 timing of when the disclosure of the names can take place.

20  
21 The Claimants request permission to appeal my Order that “Outer Ring” confidentiality  
22 should be applied to the 436 suppliers’ names (additional to the 14 Relevant Supplier  
23 names in respect of which the Claimants consented to “Outer Ring” confidentiality  
24 being applied).

25 I refuse permission to appeal. This is a case management decision. Further,  
26 confidentiality is adequately protected by “Outer Ring” confidentiality, whereas

1 restricting it to "Inner Ring" confidentiality could seriously hamper the purpose of the  
2 Order. There is no evidence of any alleged breach of the Confidentiality Order by the  
3 Defendant and those from the client in the "Outer Confidentiality Ring" are named and  
4 hold relevant legal qualifications.

5

6 Pending any application for permission to appeal (or any appeal) the information must  
7 only be provided under "Inner Ring" confidentiality. In light of the potential knock-on  
8 effect to the timetable of this action, I direct that any application for permission to  
9 appeal must be made by 4pm on 23 December 2025. The Claimants agreed to  
10 request expedition of any application for permission to appeal.

11

12 (12.23 pm)

13

14 MR HOLMES: Yes, sir. Well, so far as we're aware, there are no practical  
15 difficulties -- none have been identified -- so it's probably for Ms Demetriou to say  
16 what's possible.

17 MS DEMETRIOU: I'm just taking instructions on that point, sir, could you give me  
18 a moment?

19 THE CHAIRMAN: Yes, of course.

20 MS DEMETRIOU: Sir, I'm instructed that Shein wishes to appeal, particularly on the  
21 confidentiality point, because we hear what Mr Holmes has said about the error in the  
22 skeleton argument, but my clients do feel very strongly about this. There's been  
23 correspondence about the inadequacy of the outer ring. This is highly confidential  
24 information, and we haven't really been provided with any evidence as to why it can't  
25 be dealt with by the inner ring.

26 So my clients do wish to appeal, at least in relation to confidentiality, on which they

1 feel very strongly. I think that will be a constraining factor in terms of timing.  
2 I think in the meantime, it could be released to the inner ring, and I'm sure that could  
3 be done relatively quickly, in seven days.

4 MR HOLMES: This is a quintessential question of case management, and your  
5 reasoning was impeccable on the reasons why disclosure would be appropriate within  
6 the OCR rather than the ICR.

7 THE CHAIRMAN: Yes. Well, I refuse permission to appeal for the reason that I think  
8 it is a case management decision. I also think you haven't convinced me there's  
9 a serious question as to why the Court of Appeal would think otherwise. So I think  
10 you'll need to go to the appellate court for that.

11 In the interim, I will order that the documents are handed over on an inner  
12 confidentiality basis, and I will not allow this to derail the procedure going forward. So  
13 if you're going to make an application for permission to appeal, I will want to find out  
14 now, are you agreeing that you will do so on an expedited basis?

15 MS DEMETRIOU: Yes, it will. I absolutely accept it would have to be on an expedited  
16 basis, sir.

17 THE CHAIRMAN: In the interim, I think you can hand the names over on the inner  
18 confidentiality basis within seven days.

19 MR HOLMES: Sir, I'm grateful. I anticipate you'll probably want to deal with any costs  
20 issues at the conclusion of the hearing in the round, therefore --

21 THE CHAIRMAN: I was going to deal with costs in the round at the end. The other  
22 point I should say to you, Mr Holmes, is that I will -- I don't think it's fair today to make  
23 orders, because we've been trying to work out the best way forward. I am concerned  
24 about how this may impact going forward in terms of both openness, cherry picking  
25 and derailing. I put those three things there.

26 I think that can be dealt with by case management, but I am going to want you, to very

1 quickly give me an indication of what the plan is internally.

2 MR HOLMES: Yes.

3 THE CHAIRMAN: I want to know how you get to a reasonable selection, how it is  
4 going to be an open selection, so that maybe you're going to do it all via external  
5 advisers or experts, and how Ms Demetriou's clients are going to be able to satisfy  
6 themselves that what's been done with the data selection is fair and open, and how  
7 the Tribunal can be certain.

8 Those are all quite difficult matters. They are in your court, I think.

9 MR HOLMES: Yes.

10 THE CHAIRMAN: As you know, I'm not going to have things derailed, and if I feel  
11 things are going to get derailed, what will happen is they'll get stopped, because I'm  
12 not going to lose the trial date on this action for reasons that we've discussed in the  
13 past.

14 I just say that now because I don't feel it's fair to either of you to demand you come up  
15 with proposals today on your feet. But I do think, Mr Holmes, it's very much in your  
16 court to put those proposals forward and for Ms Demetriou's clients to look at them,  
17 and then if it can't be agreed, for me to look at them, so that we know where we're  
18 going. Does that make sense?

19 MR HOLMES: It makes perfect sense. We hear what you say. We will put our minds  
20 to this as a matter of priority.

21 Unless you tell me otherwise, sir, I propose that we submit correspondence or a note  
22 to the Tribunal updating you on the matters that you've raised.

23 THE CHAIRMAN: That sounds sensible.

24 MR HOLMES: Thank you.

25 MS DEMETRIOU: On that point, sir, we do respectfully endorse the Tribunal's  
26 request. Obviously, this feeds into the disclosure that Temu is going to have to be

1 providing -- disclosure of data. So ideally we'd be getting the proposal very, very soon,  
2 because disclosure has to follow thereafter. Obviously, we need disclosure of the  
3 data, whatever it is, well in advance of service of evidence. So the time is quite short.

4 THE CHAIRMAN: It is. I accept that, and I think Mr Holmes earlier on accepted that.  
5 I'm not going to make an order today, but what you say, if I may say, falls on fertile  
6 ground.

7 MR HOLMES: Thank you, sir, I think --

8 THE CHAIRMAN: That, I think, was one of the longer of the applications. I think we  
9 can now move to the next application.

10 Disclosure application by Whaleco

11 Submissions by MR HOLMES

12 MR HOLMES: Yes, we should be able to move very swiftly on the next one. That's  
13 the disclosure application of Whaleco. You'll have seen it has two limbs. The first was  
14 a request for a witness statement from Shein to explain if any member of Shein senior  
15 management holds documents relevant to the issues pleaded at paragraphs 47(a) to  
16 (c).

17 The second is for Shein to provide answers to a limited set of questions about the  
18 disclosure process being undertaken by GS, Guangzhou Shein. In view of the late  
19 responses provided since the application was lodged in their witness evidence and  
20 then in their skeleton argument, Whaleco is not pursuing either limb of this application  
21 at the CMC.

22 The reason is that Whaleco's application has essentially succeeded on both limbs.  
23 Both applications arose from Shein's unsatisfactory initial responses to paragraphs 1,  
24 2 and 4 of your order of 6 November 2025.

25 Shein has now belatedly, and only after Whaleco made these applications, provided  
26 further information and evidence, and Whaleco considers that it has now received the

1 essential information sought in its applications.

2 Now, if helpful, I can take the Tribunal briefly through the materials to show that the

3 information was elicited only after the application in the case of the first limb in the

4 witness evidence, and in the case of the second limb in the skeleton argument. But

5 that may not be a fruitful exercise, sir. Tell me if that would be helpful.

6 The only point to add is: we note that Shein suggested that Whaleco's application

7 should be dismissed in its skeleton argument. In circumstances where Whaleco has

8 prevailed in obtaining the core of the information requested, in its view, it doesn't

9 matter if the application is dismissed or not.

10 To be clear, however, and as Shein accepts, Whaleco will be able to revisit the

11 parameters of Shein's disclosure as regards both the custodians selected and the

12 position of Guangzhou Shein in the light of the materials that are disclosed, and the

13 disclosure statement provided with them.

14 We can also revisit the conduct as needed on the question of costs subsequently, but

15 I wouldn't propose to say more about the application now, subject to anything that you

16 or Ms Demetriou wishes to say.

17 THE CHAIRMAN: So just to understand it, I think in your skeleton, the custodians

18 ones had gone, but you still, in your skeleton, had the Guangzhou Shein one, but that's

19 also gone.

20 MR HOLMES: Yes, because of the skeleton; because we received simultaneously

21 the skeleton from my learned friend.

22 THE CHAIRMAN: Oh, I see. So it's what's in the -- just show me that very briefly

23 because I understand that the costs --

24 MR HOLMES: Yes, of course.

25 THE CHAIRMAN: I understand that the only reason it's relevant is will you be pushing

26 for costs?

1 MR HOLMES: Well, yes, of course. So the --

2 THE CHAIRMAN: If you're not, I don't see it's relevant, but if you are then I'll look at

3 it.

4 MR HOLMES: Well, sir, it rather depends how things come out in the wash. We do

5 say that the costs of the application could have been avoided if Shein had provided

6 clearer answers at an earlier point.

7 So in relation to Guangzhou Shein, the skeleton argument is where we say for the first

8 time that the matters were clarified. I can take you through the early materials, if that's

9 helpful.

10 THE CHAIRMAN: No, I think I've looked at those. Just show me the bit that's changed

11 your -- what's moved the dial on this and made you think, "I don't have to go push for

12 this"?

13 MR HOLMES: Yes, so tab 2, page 28 of the skeleton bundle is where you may find it.

14 Otherwise, if you have it loose, it's paragraphs 11 and 12. So paragraph 11.4 says

15 that Shein will conduct through its advisers a review of the Guangzhou Shein

16 disclosure. That will be done, as I say, through its legal advisers. This was not set

17 out in the letter of 14 November 2025. The letter only said --

18 THE CHAIRMAN: Even though it suggests it was, that's wrong, is it?

19 MR HOLMES: No, this is correct, but it's one of the factors which changes the balance,

20 in my submission. Whereas previously --

21 THE CHAIRMAN: I'm sorry, you're misunderstanding me. It said that Shein provided

22 this information in a letter on 14 November. In particular, it confirmed that at 11.4, so

23 it --

24 MR HOLMES: Sir, the letter --

25 THE CHAIRMAN: -- suggests that that was in the --

26 MR HOLMES: Apologies. The letter said only that the claimants will conduct

1 disclosure, not that that will be conducted through their legal advisers.

2 THE CHAIRMAN: Right, so that's the additional part. Okay.

3 MR HOLMES: Well, then, more importantly, at paragraph 12, you see what is said  
4 there. You see confirmations are given: Guangzhou Shein has not refused to hand  
5 over any documents in the proceedings, any relevant data held by Guangzhou Shein  
6 for model D disclosure has been extracted as a whole, the data is being reviewed by  
7 Shein's external lawyers in the normal way, and Guangzhou Shein has been asked to  
8 provide documents in relation to model C searches in the same way that Shein has.

9 So we say that that is new information. It's particularly important to know that  
10 Guangzhou Shein is co-operating and has not refused to hand over any documents.

11 Then at 13.2, Shein indicates that Whaleco does not require answers to its more  
12 detailed questions about disclosure from Guangzhou Shein. This is said to be  
13 because:

14 "... Guangzhou Shein has in fact responded to every request for documents [from  
15 Shein] ... (in both the IP proceedings and the competition proceedings."

16 Again, this is new information to Whaleco and in light of this new information, Whaleco  
17 agrees it does not need further answers to its questions at this stage.

18 Whaleco posed the questions it did to ensure that it had sufficient confidence that  
19 Shein would disclose all relevant documents from Guangzhou Shein. The application  
20 of those questions were only necessary because of Shein's unsatisfactory answers to  
21 the questions in the Tribunal's November order. Shein has belatedly provided more  
22 detailed responses. No reason is given as to why it could not provide this information  
23 at an earlier stage, and we say that Whaleco has therefore been successful in its  
24 application. The Tribunal and Whaleco can now have comfort that Guangzhou Shein  
25 will identify and disclose relevant documents in accordance with the Tribunal's rules  
26 and the DRD. We say that provides sufficient comfort. (Pause)

1 So that's what we say about the skeleton.

2 Submissions by MS DEMETRIOU

3 THE CHAIRMAN: Do you have anything to add? I have to say, Ms Demetriou, maybe

4 I have less comfort than Mr Holmes and his clients. At the moment, I hear he's not

5 going to press this application, but I am thinking of suggesting that when you give

6 disclosure -- when your clients give disclosure, I don't understand once you give

7 disclosure, why you can't give a straight and direct answer to my order, particularly for

8 (b) and (c) of my order.

9 At the moment, I read your answers and I basically put them as a "No", that you

10 weren't giving straight answers. You may say -- and I've read your skeleton and the

11 documents -- that there isn't an issue. What I can see, however, is once disclosure is

12 given, I cannot understand, unless you tell me otherwise, why it is. You cannot then

13 say that the disclosure includes relevant documents held by Guangzhou Shein and

14 that searches and disclosure undertaken in respect of those documents were

15 undertaken in accordance with the rules of the Tribunal. That obviously can be done

16 when you hand it over, because there's no reason then to qualify it with, "So far, so

17 good", which is how it's been qualified at the moment. Do you have any reason

18 why -- have any other --

19 MS DEMETRIOU: Certainly in respect of question 4(b), that's completely correct. Can

20 you just bear with me while I just ask my solicitors a question in relation to 4(c)?

21 THE CHAIRMAN: Yes, of course.

22 MS DEMETRIOU: Thank you. (Pause)

23 Yes. So the answer is yes in respect of both.

24 THE CHAIRMAN: I thought it might be. That would then bring this, hopefully, to an

25 end rather than -- Mr Holmes isn't pressing his application, but it seemed to me to keep

26 asking you the same questions. It might not assist. I see he's pointed to me -- and I'd

1 read anyway -- what you said in your skeleton, and I think with that direction that when  
2 you give the disclosure, you give a final answer to 4(b) and (c), hopefully that will sort  
3 this issue out. Unless you have anything further you wish to say, Ms Demetriou.

4 MS DEMETRIOU: No, I've got things to say about costs in relation to both  
5 applications, because we don't accept that their applications have succeeded.

6 THE CHAIRMAN: What I suggest --

7 MS DEMETRIOU: Could we just do that at the end?

8 THE CHAIRMAN: Can we do that, on costs -- Mr Holmes has given me -- I've got  
9 a feeling for what his clients are going to say about costs on these two  
10 disclosure -- well, I'm not sure they're disclosure applications, but  
11 anyway -- applications, and why don't we deal with costs at the end?

12 MS DEMETRIOU: Makes sense. Thank you.

13 THE CHAIRMAN: With that, I believe it might be your applications, and that's the end.  
14 Is that right?

15 De-designation application by Whaleco

16 Submissions by MR HOLMES

17 MR HOLMES: No, there's one more -- it's a quick one. It's the de-designation  
18 application in relation to the 22 supplier names.

19 THE CHAIRMAN: Oh, of course. Apologies, I've forgotten that.

20 MR HOLMES: Not at all. So, on this -- I think the principles are clear and I needn't  
21 trouble you with any authority -- the starting point when considering any confidentiality  
22 designation is that, in the Tribunal, proceedings should, so far as possible, be  
23 conducted in public. Confidentiality designations need to be justified and should be  
24 kept to a minimum. The claims to confidentiality in respect of these names is making  
25 life challenging in terms of Whaleco's ability to gather evidence internally from the  
26 Temu employees who worked with the relevant suppliers. The confidentiality claims

1 will also complicate matters at trial, adding to the difficulty and expense of the  
2 proceedings. Shein resists provision of the material outside the confidentiality ring on  
3 four main grounds.

4 First, it says that Mrs Justice Bacon has already decided confidentiality. That was in  
5 circumstances where Whaleco's solicitors had agreed to the information being placed  
6 in the outer confidentiality ring in the first instance. We accept that Mrs Justice Bacon  
7 placed the material in the OCR, but it's normal practice to revisit questions of  
8 confidentiality from time to time; it's an ongoing exercise with a view to narrowing  
9 claims to confidentiality as a case approaches trial.

10 Secondly, Shein says that the information is confidential because the interview notes  
11 reveal confidential details about the suppliers' businesses, such as their profitability,  
12 the dividends they pay, fallout with a former staff member, supplier cash flow issues  
13 and so on. That's on the basis that the interview notes, when combined with the  
14 supplier names, enable it to be understood which supplier is being referred to in the  
15 interview in relation to those various matters.

16 Now, there's obviously no evidence before you from a supplier indicating any particular  
17 concern that this material really does present serious confidentiality concerns,  
18 commercial sensitivities; the material is over two years old now. Nor is it clear how  
19 any of the information would really cause harm to Shein at all. The application is in  
20 respect of the names, and the issue can be addressed, if you're at all troubled by the  
21 confidentiality issue raised by Shein, by de-designating the list of suppliers' names in  
22 Shein's RFI response, setting them out separately from the interview notes  
23 themselves.

24 So just to show you that, that's in CMC bundle volume 2, I think, tab 30, page 615.

25 You see question 4:

26 "Please state the identities of the 22 suppliers ..."

1 Then the response, the names are given in English and Chinese, and are listed there.  
2 Those names could be disclosed without revealing which interview they related to in  
3 open.

4 Third, Shein suggests that there is a risk of retaliation by Temu. There's no basis for  
5 such an allegation. The claim that Temu has misused information emanating from this  
6 litigation is not well founded. It's not an allegation that Mrs Justice Bacon has  
7 endorsed at any point. It concerns Temu's investigation of the employment status of  
8 individuals working for photographic agencies. That was a relevant pleaded issue  
9 which Whaleco was entitled to investigate and address as it went to whether there was  
10 a chain of title in the photographs which are alleged to give rise to breach of copyright.  
11 There was no harassment or intimidation of parties, as Shein alleges, nor has any  
12 application been made before Mrs Justice Bacon alleging a breach of the collateral  
13 use restriction.

14 Fourth, Shein alleges inconsistency in the treatment of suppliers A and B. Those are  
15 the suppliers whose identities have been kept confidential in Whaleco's counterclaim.  
16 Now, in relation to those two suppliers, Mrs Justice Bacon found that there was  
17 credible evidence of a substantial risk that Shein might retaliate against them, causing  
18 them significant harm, with consequences for their livelihood and earnings. That was  
19 in her ruling of 21 July 2025, which is in CMC bundle volume 1, tab 6 at page 104. If  
20 I could briefly show you that, at paragraph 7. If I could please ask you to review that.

21 (Pause)

22 So despite Shein's repeated attempts to raise concerns in relation to Temu's legitimate  
23 investigations, there's no similar ruling from Mrs Justice Bacon in relation to Temu's  
24 conduct. We say that the names can and should be de-designated for the sake of  
25 orderly and efficient conduct of the trial, and so that we can properly investigate with  
26 the internal personnel who manage the relationships with the particular affected

1 suppliers within Temu. (Pause)

2 Unless you have any questions, sir, those are my submissions on the de-designation

3 application.

4 THE CHAIRMAN: I just wanted to ask you ... (Pause)

5 Sorry. (Pause)

6 I'll leave it. I think that's fine for the moment. Thank you.

7 MR HOLMES: Thank you, sir.

8 Submissions by MS DEMETRIOU

9 MS DEMETRIOU: Sir, we resist this application. First, the designation of the names

10 as outer confidentiality ring information is justified. Can I take you to the confidentiality

11 ring order; that's tab 8 of the first volume. It starts at page 121, but if you could go to

12 page 127.

13 THE CHAIRMAN: Yes.

14 MS DEMETRIOU: You can see at 2.2.3:

15 "Information may be designated as Inner Confidentiality Ring Information if it is: ...

16 "2.2.3. Commercial information, the disclosure of which could significantly harm the

17 legitimate business interest of the person(s) or undertaking(s) to which it relates;

18 "2.2.4. Information relating to private affairs ..."

19 And then over the page:

20 "2.2.5. Information which is likely to lead to the identification of a person, if

21 non-disclosure of that information is necessary to protect that person from risk of

22 retaliation and to secure the proper administration of justice."

23 Sir, we rely on all three of those paragraphs. As to 2.2.3, disclosure of both the names

24 of the suppliers and the details of the discussions at the interviews will give

25 a competitor, Temu, access to information that they should not be allowed to see. Can

26 I just take this from our skeleton if you've got that handy, so paragraph 43.1, we

1 explain --

2 THE CHAIRMAN: Can I just make sure I'm keeping track that the current names,

3 they're designated outer confidential at present, are they not?

4 MS DEMETRIOU: That's correct.

5 THE CHAIRMAN: Yes.

6 MS DEMETRIOU: We're not seeking to -- we're seeking to maintain the outer

7 confidentiality ring.

8 THE CHAIRMAN: Sorry, I didn't know if you were trying to get them to inner, but no.

9 Okay.

10 MS DEMETRIOU: Sorry, sir, I understand why you're asking the question. If you look

11 at page 128, 3.2 under "Outer confidentiality information".

12 THE CHAIRMAN: Yes.

13 MS DEMETRIOU: "Information may be designated as Outer Confidentiality Ring

14 Information if it is within paragraphs 2.2.1 to 2.2.5 ..."

15 And that's why I took you to those paragraphs. Sorry for not explaining.

16 THE CHAIRMAN: That's very helpful. No, thank you. That helps me. Yes.

17 MS DEMETRIOU: Just going to our skeleton, sir, so paragraph 43.1. We rely on harm

18 to the business interests, both of the suppliers themselves and of Shein. And we say

19 that disclosure of the names and the details of the discussions will give a competitor,

20 so Temu, access to information it shouldn't be allowed to see and we explain there

21 that the interviews cover topics such as the profitability of the suppliers, the dividends

22 paid to business partners, supplier cash flow issues, the possibility of certain suppliers

23 opening their own brand stores on Shein and suppliers' cross-supply relationships with

24 other suppliers.

25 We say that quintessentially, this is the kind of commercial information that should be

26 kept confidential from competitors; it's why we have confidentiality protections in the

1 proceedings.

2 Now, Temu, in fact -- in fact, before I leave paragraph 43.1, you've got the footnoted  
3 examples there but can I just show you some additional examples that we don't cover  
4 in the skeleton, just to give you a wider flavour. I won't do this at length, but it's just  
5 really to give you a flavour of some additional points. So if you go to tab 70.

6 THE CHAIRMAN: I have looked at the ones in your footnoted ones, just so you know.

7 MS DEMETRIOU: Thank you very much. These are just a couple of additional ones.  
8 So if you go to tab 68, page 1019, and at the top of the page you can see a reference  
9 to a standardised warehouse of the supplier that has been, that complies with Shein's  
10 requirements and you have details of the supplier's warehouse and the size of the  
11 warehouse and the size of the supplier.

12 Then if you could move on, please, to tab 72, 1051, bottom of the page to the top of  
13 page 1052, you have sensitive information about the average monthly order volumes  
14 from Shein of that supplier, and also the type of goods that the supplier provides.

15 Then tab 73, page 1063, if you just look at the middle of the page under "Answer",  
16 "SHEIN's business now accounts for 10 to 20 per cent" of that supplier's business. So  
17 the proportion of that supplier's business that that's accounted for by Shein.

18 And then similarly, tab 75, page 184, you see similar details on that page in relation to  
19 this different supplier of the volume of sales that it makes to Shein and what type of  
20 goods it supplies. Then further down the page, the Shein business accounts for about  
21 70 per cent and the remaining 30 per cent is another company.

22 And so these are all commercially sensitive details which should not go to  
23 a competitor. And Temu in fact says nothing against this. All they say in their skeleton  
24 argument about commercial confidentiality, at paragraph 63(a) of their skeleton, is  
25 they say:

26 "The concern is hard to understand given that these suppliers deal with Temu."

1 But it's a bad point because the confidentiality lies in the nature of their dealings with  
2 Shein which are set out in the interview notes in some detail. So a competitor shouldn't  
3 have access to details of these suppliers' commercial relationships with their direct  
4 competitor Shein.

5 Now, as to paragraph 2.2.5 of the confidentiality ring order, which was risk of  
6 retaliation, we also addressed that, if we could take it initially, please, from our skeleton  
7 argument -- in fact, let's take it from Mr Democratis' witness statement; it's set out more  
8 fully. So it's tab 60 of the CMC bundle and if we could take it please from page 916.  
9 I don't know if you've looked at this, sir, but, Mr Democratis here sets out in some detail  
10 evidence showing that there is a real basis for considering that there is a risk that  
11 Temu will use information about suppliers or third parties to instigate hostile acts  
12 outside of the litigation. There's a concrete example here in relation to material that  
13 they obtained in the IP proceedings leading to vexatious proceedings against  
14 a third-party photographic agency. And so that does, we say, provide, a real basis for  
15 suspecting that Temu will use this information and take retaliatory action outside of the  
16 litigation and so that's a further basis for the confidentiality of the names. Now, as to  
17 Mr --

18 THE CHAIRMAN: Could you -- sorry, I may have missed what the confidentiality  
19 regime was that was in place in those proceedings. Can you just show me, does it  
20 say here?

21 MS DEMETRIOU: It's the same -- it's the same --

22 THE CHAIRMAN: It's the same order.

23 MS DEMETRIOU: It's the same order.

24 THE CHAIRMAN: And so what's -- this is what I was trying to work out -- what he's  
25 saying here is that these were under -- the alleged breach is what? From outer  
26 confidentiality, inner confidentiality; what's the alleged breach from?

1 MR HOLMES: It's just the collateral use restriction, I think.

2 THE CHAIRMAN: That answers my question. Right.

3 MS DEMETRIOU: Exactly, it's a collateral use restriction.

4 THE CHAIRMAN: Right. So this isn't showing any breach of the orders that were  
5 made here; it's an alleged breach of the -- not to use documents in other proceedings  
6 which applies always in disclosures?

7 MS DEMETRIOU: Exactly. And so it's a reason, we say, for maintaining the names  
8 in the outer confidentiality ring to reduce the risk that similar retaliatory action will be  
9 taken against these suppliers. This provides evidence to suggest that it might be, and  
10 so that's why 2.2.5 provides a separate basis, separate from commercial  
11 confidentiality, for retention of the names of the suppliers in the outer ring because it  
12 obviously reduces the risk that people in the business will use the names to take  
13 retaliatory action against them. So that's really the point, sir, in relation to this piece  
14 of evidence.

15 THE CHAIRMAN: Okay.

16 MS DEMETRIOU: Now, all Temu says about that at paragraph 63(c) of its skeleton,  
17 it seeks to brush it aside by saying that the issue is a distraction. But it's not  
18 a distraction; there is clear evidence that Mr Democratis has set out that Temu is using  
19 material from the litigation to bring vexatious actions against third parties, presumably  
20 in some sort of wider battle against Shein. Now, that's the first point. So the first point  
21 and really the most important point is that the designation of the names as outer  
22 confidentiality material is justified on the basis of the order itself and that really is the  
23 start and end of the enquiry.

24 But the second point we make -- and I can take this from our skeleton argument if  
25 you've got that handy, so paragraph 38, we can take it from there -- is that this is  
26 another example of Temu relitigating decided issues and seeking to undercut an

1 earlier order. Now, my point is not limited -- of course, I'm not suggesting that  
2 confidentiality designations can never be revisited; that's not my submission. But the  
3 point is, and what we see from paragraph 38, that in persuading the Tribunal to order  
4 disclosure of the interview notes, my learned friend expressly prayed in aid the fact  
5 that the names of the suppliers would be kept confidential. You can see that in the  
6 excerpt here. Mr Holmes said:

7 "The 22 supplier names would be disclosed within the outer confidentiality ring. They  
8 could not be further disclosed."

9 Then, again, he says:

10 "The investigation can be carried out, always being careful to preserve confidentiality  
11 of the names."

12 So that was their position there. And they prayed in aid that point, as I say, in order to  
13 persuade the Tribunal to make disclosure. Then over the page, paragraph 39, you  
14 can see that, reflecting that submission, the Tribunal ordered disclosure of the names  
15 of the interviewed suppliers on the basis that the names would be within the  
16 confidentiality ring. And so that was all debated; Mr Holmes accepted that they should  
17 be kept confidential, and that was the basis on which the Tribunal ordered disclosure.

18 Then what we say at paragraph 40 is that, following disclosure of the names on those  
19 terms and disclosure of the interview notes, the parties corresponded with a view to  
20 narrow the redactions that Shein had initially made in relation to the notes. Shein  
21 approached that in a constructive manner and was persuaded by Whaleco to narrow  
22 the redactions on the express basis that the names of the interviewees would remain  
23 confidential, such that potentially harmful information about any specific suppliers  
24 would be kept confidential from Temu.

25 You can see there what HSFK said in their letter. Again, they were praying in aid the  
26 point about the names being kept confidential in order to persuade Shein to narrow

1 the redactions in the interview notes.

2 And so this really is, having got what they wanted, disclosure, on the basis that the

3 names would be kept confidential, this, we say, is an opportunistic volte-face and these

4 tactics shouldn't be encouraged by the Tribunal.

5 Now, the third point that we make -- and this is a point that Mr Holmes didn't really

6 press orally but they make the point in their skeleton argument -- is that two names of

7 suppliers are already public and they rely on the IP proceedings. But as Temu says

8 at paragraph 72 of its skeleton argument, those suppliers didn't overlap with the

9 suppliers here. The basis for finding that the names were not confidential was that

10 they were already public and the cat was already out of the bag. So you can't really

11 learn anything from the fact that two of the supplier names are in the public domain in

12 the IP proceedings. But as I say, it's not a point Mr Holmes has pressed. He refers to

13 practical hurdles --

14 THE CHAIRMAN: Sorry, I don't know how much you've got to go, but we're 1.03 pm.

15 Please finish that.

16 MS DEMETRIOU: I apologise for going over time. He refers to practical hurdles at

17 paragraph 65, but really, that is unevidenced conjecture and speculation. And, of

18 course, it's always going to be the case that material in a ring is going to cause some

19 more practical complication than if it were all in open, but that can't be a reason for

20 de-designating it when it is properly confidential material. So that's all I wanted to say.

21 THE CHAIRMAN: Thank you very much. I think what we'll do is we will break now

22 and we'll come back at 2 pm rather than five past or whatever it is now. So 2.00 pm

23 we will resume and hopefully we might get done a little early today.

24 MR HOLMES: Thank you, sir.

25 (1.02 pm)

26 (The short adjournment)

1 (1.59 pm)

2 THE CHAIRMAN: Ms Demetriou, just before Mr Holmes addresses the Tribunal on  
3 his reply, I just have one question that I wanted to ask you before I thought we'd run  
4 out of time.

5 MS DEMETRIOU: Of course.

6 THE CHAIRMAN: You referred to his skeleton paragraph 65(a).

7 MS DEMETRIOU: Yes.

8 THE CHAIRMAN: Well, you referred to paragraph 65 and said -- I think your point  
9 was that there wasn't evidence to support these matters, and they are rather general.

10 MS DEMETRIOU: Yes.

11 THE CHAIRMAN: A question in relation to 65(a): if I understand what is being said  
12 there -- and I don't think Mr Holmes went to this, and I'll obviously ask him in  
13 a moment -- is that the confidentiality restriction even means that OCR members can't  
14 contact one of the suppliers who is actually interviewed by Shein about their own  
15 interview, for the purposes of evidence or the like, and that can't affect confidentiality  
16 because that person is the person who's been interviewed, so there's no confidentiality  
17 issue there.

18 It did seem to me that had some force. It's unusual if one is looking to get evidence,  
19 or for any other reason, to have the information about a person who has been  
20 interviewed, and not then be able to talk to that person about it. Or if one does, one  
21 may be in difficulty on the confidentiality restriction. And I was --

22 MS DEMETRIOU: So I -- sorry.

23 THE CHAIRMAN: Sorry. No, no. Do help me with this point.

24 MS DEMETRIOU: No, it may be that I haven't fully understood the point, because  
25 I confess I've got a question mark next to 65(a), because the names are currently in  
26 the outer confidentiality ring. So that does mean that Shein in-house lawyers, in the

1 outer confidentiality ring, know who the suppliers are and interviewed them.

2 THE CHAIRMAN: Maybe I should hear from Mr Holmes -- but when I read the  
3 skeleton -- at least while you're still addressing me -- I assumed what was being said  
4 was that if you go to the schedule which sets out what you're allowed to do as  
5 a member of the outer confidentiality ring, is you can't disclose, discuss, copy,  
6 reproduce, or distribute the information to anyone who's not a confidentiality ring  
7 member. That includes using, disclosing or discussing.

8 So you'd have what might be thought of as a bit of an odd situation that the individual  
9 who was interviewed is not a confidentiality ring member, but obviously they know the  
10 information; so there's no confidentiality issue, but that somebody in the outer ring, put  
11 it that way, can't, or potentially is in danger of a breach.

12 One thing that was going through my mind, and I want to give you a chance to  
13 comment, is to what extent it may be permissible for someone who is in the outer  
14 confidentiality ring to speak to a supplier about their own supplier's interview and no  
15 more --

16 MS DEMETRIOU: Yes.

17 THE CHAIRMAN: -- and whether that is something that your clients would object to  
18 or not, and if you do object as to why? Because it doesn't seem to me that there's any  
19 confidentiality issue there; does that make sense?

20 MS DEMETRIOU: It makes perfect sense, and we do not object to that. So I have to  
21 confess, I had not understood that that would be a practical constraint. I can see the  
22 point and we do not object to that.

23 THE CHAIRMAN: Right, Mr Holmes. That's how I've understood that.

24 MR HOLMES: You understood the point correctly, and I should perhaps have dwelt  
25 on it in my opening submissions. This was a practical difficulty that we apprehended  
26 for the reasons that you give: on a strict reading of the confidentiality order, it isn't

1 possible to discuss the contents of the interview notes, even with the supplier to whom  
2 the interview relates. If it is common ground that that is permissible, that is an  
3 immediate and helpful indication, because it means that members of the outer ring will  
4 be able to speak with suppliers for the purposes of preparing our case.

5 THE CHAIRMAN: Right. Well, you've heard Ms Demetriou. I think perhaps your  
6 reasoning in 65(a) was quite compressed.

7 MR HOLMES: Yes.

8 THE CHAIRMAN: I certainly, like, Ms Demetriou, had a slight, "What's being said  
9 here?" But on reading it again and chasing down the annex, I think I see the point,  
10 and you've confirmed I have.

11 Okay, well, that's very helpful. Thank you, Ms Demetriou.

12 Is there anything else, Mr Holmes, you want to say in reply, briefly?

13 Reply submissions by MR HOLMES

14 MR HOLMES: Two terribly brief points. First of all, on commercially sensitive details,  
15 you have my point that the suppliers' names could be disclosed separately from the  
16 interview notes, which would enable internal enquiries to be made without revealing  
17 any of the supplier information, which is alleged by Ms Demetriou to be confidential.  
18 The names of the suppliers in themselves, it's very difficult to see why that is  
19 confidential, and certainly Shein has been happy to put the names of suppliers in open  
20 pleadings as part of their statement of case, in relation to the samples that will be  
21 determined at the IP trial.

22 Second point, in relation to the risk of retaliation. You hit the nail on the head, sir. That  
23 was not even an alleged breach of the orders of the Tribunal; it was a suggestion that  
24 there may have been some inappropriate collateral use, which is firmly resisted by my  
25 client. We say that legitimate investigations were conducted in order to be able to  
26 plead back to a particular allegation relating to the employment status of

1 photographers with photographic agencies, which is an issue in the case.  
2 Although this has been trailed before Mrs Justice Bacon on two occasions now by  
3 Shein, there has been no application to suggest a breach of the collateral use  
4 restriction, and no finding by the judge to that effect. So no weight should be attached  
5 to these allegations of a risk of retaliation by Temu. Those are my reply submissions.

6 THE CHAIRMAN: Thank you. Well, I'll rule on this now, and then we'll move on to the  
7 next one.

8 (2.06 pm)

9

10 **Ruling on de-designation application by Whaleco**

11

12 THE CHAIRMAN: This is an application by Temu to de-designate the confidentiality  
13 of the names of the 22 suppliers which are currently in the "Outer" confidentiality ring.  
14 Temu wishes that restriction to be removed.

15 Section 2.2.3 of the Confidentiality Order provides that confidentiality is appropriate  
16 for protection of, amongst other things, commercial information. Shein says that the  
17 interviews cover topics that are confidential, such as profitability, dividends, and other  
18 information with a quality of confidence about it, and I was shown some of that  
19 information by Ms Demetriou today. I accept that this is covered by s.2.2.3 of the  
20 Order. I accept that if the names are given together with the interview reports,  
21 commercially sensitive material could be disclosed.

22 Against that, Mr Holmes for Temu says that it puts his clients in a difficult position, and  
23 that either the names should be released separately, or that the names and interviews  
24 should be put together.

25 Two principal reasons are given in his skeleton. The first is that the restrictions mean  
26 they are unable to speak even to the individual suppliers even about their own

1 interviews. The second concerns ongoing resourcing issues within the Temu team.  
2 Ms Demetriou showed me that back in July and in September, Temu said that there  
3 was no risk of the names becoming non-confidential. That is a matter that should be  
4 taken into account.

5 I also was referred to Mr Democratis' 12th statement about what is alleged to have  
6 been a breach of confidentiality. It was confirmed by Ms Demetriou that it is not  
7 evidence of a breach of the Confidentiality Order, but an alleged breach of the  
8 underlying restriction of use of disclosure. I do not feel comfortable making any finding  
9 in relation to that, and I do not need to do so.

10 In my view, the application should fail and the de-designation should not be permitted.  
11 Part of the reason for that is that it emerged at the hearing that Shein do not object to  
12 people within the "Outer Confidentiality Ring" speaking to specific suppliers about their  
13 own specific interviews. It is important that this is recorded and that it is permitted.  
14 I consider that this was the principal practical impediment on Temu. The other issues  
15 raised by Temu were too general and nonspecific for me to agree that that they could  
16 outweigh legitimate confidentiality concerns of Shein.

17  
18 (2.10 pm)

19  
20 Quantum RFI application by Shein

21 Submissions by MR PASCOE

22 THE CHAIRMAN: I believe now it is the Shein's quantum RFI application, as Temu  
23 calls it, to go; is that right?

24 MS DEMETRIOU: Sir, that's right. So Mr Pascoe, I'm going to switch seats; he's  
25 going to open that application for Shein. Just give us a moment, please.

26 THE CHAIRMAN: Of course, of course. (Pause)

1 MR PASCOE: Sir, good afternoon.

2 THE CHAIRMAN: Good afternoon.

3 MR PASCOE: So, sir, I'm going to address Shein's one application for today, which  
4 seeks some further information about Whaleco's new claim for a new head of loss.

5 As you'll know, sir, the claim is brought in the name of an individual entity within the  
6 Temu group, Whaleco UK. It identifies itself as a corporate services provider; it has  
7 no employees; and it remits -- this is an important point -- it remits any money that  
8 comes its way to other group entities. That's presumably an efficient thing to do from  
9 a tax perspective.

10 But all that raises the question of whether Whaleco has itself, as an individual entity,  
11 suffered any loss at all as a result of the alleged infringements. We've been probing  
12 that question for several months with a view to assessing whether the claim for loss is  
13 strikeable.

14 As part of that process, you'll have seen, sir, from the skeletons, the Tribunal has made  
15 a number of orders against Whaleco to particularise what losses it has suffered, and  
16 also to give the Tribunal an estimate of the value of the claim. That's been a very  
17 valuable benchmark, and I'll return to that, if I may.

18 Now, what has happened between this CMC and the last is that Whaleco has wiped  
19 some of that slate clean by abandoning one of its two claims for loss and replacing it  
20 with something different.

21 Can I just show you that quickly, sir, at tab 14 of the main bundle, page 286?

22 THE CHAIRMAN: May I just ask. You said that it raises the question of whether  
23 Whaleco has suffered any loss at all.

24 MR PASCOE: Yes.

25 THE CHAIRMAN: Can I just check, is it your case that this affects the liability part of  
26 the proceedings?

1 MR PASCOE: Yes, it is. I'll expand on that, but it absolutely is. I believe it's common  
2 ground that one of the questions in the liability trial will be whether Whaleco has  
3 suffered any loss. That's obviously a distinct question to how much loss it has  
4 suffered.

5 The relevant paragraph is 69A. You'll see that has two heads of loss.

6 THE CHAIRMAN: Yes.

7 MR PASCOE: If I may, I'll just take them in reverse order. So the one that remains  
8 intact is the one at 69A.2. Let me just remind you, sir, what that claim is about,  
9 because it's important for understanding the new claim.

10 It's a claim for:

11 "Reduced distribution of revenue within Temu, the amount of such distribution  
12 depending in material part on the value of sales."

13 That rather compact description of the claim was expanded upon in a witness  
14 statement of Mr Shao that he gave some time ago. If I may, I'd like to just show you  
15 that. It's perhaps worth keeping the pleading open, because we'll come straight back  
16 to it.

17 It's at tab 52 of the main CMC bundle, page 786. Can I just ask you, sir, to read  
18 paragraphs 13 and 14. (Pause)

19 Have you got those paragraphs there?

20 THE CHAIRMAN: Yes, I'm sorry. Let me just make sure I understand what they're  
21 saying.

22 MR PASCOE: Of course. (Pause)

23 THE CHAIRMAN: Right. Okay.

24 MR PASCOE: So in a nutshell, sir, what is being said is that none of the funds from  
25 UK sales are kept within Whaleco, the services company; they're all diverted  
26 elsewhere. But Whaleco gets some intragroup payments in return. Those are called

1 distributions, or you'll also see, sir, in some documents they're called service fees.  
2 Mr Shao says those are determined by multifactorial assessment which takes into  
3 account multiple factors, including sales volumes and business needs. That's what  
4 you get from Shao 3.

5 We have been probing the nature of these distributions, and whether they can even  
6 arguably be linked with the alleged infringements, through RFIs. I think the only point  
7 I need to make for today's purposes on that is that this is a complicated, indirect and  
8 convoluted claim which faces issues of remoteness and causation.

9 However, that indirect claim for distributions has until very recently been paired with  
10 another, ostensibly more conventional claim, for what's called reduced takings.

11 Sir, if I could just take you back to the pleading at page 286 of the main bundle.

12 THE CHAIRMAN: Yes.

13 MR PASCOE: You'll see, sir, paragraph 69A.1, there was a claim for reduced takings  
14 in the UK, and it's that claim which has now been abandoned, struck through, and  
15 replaced with something called a claim for retained interest. Our RFI, which is the  
16 subject of this application, is about that new claim for retained interest.

17 Now, just pausing there, you'll see, sir, that the term "retained interest" isn't defined on  
18 the face of the pleading. In particular, the pleading doesn't say whether this claim is  
19 for the entirety of the interest that Whaleco earns on sales proceeds from the UK, or  
20 just part of it. In our submission, the plea is therefore something of a puzzle, which is  
21 why we've asked the questions that we have.

22 There's now a further formulation of the claim at paragraph 78 of my learned friend's  
23 skeleton argument. Could I ask you, sir, to take that up and read that one paragraph.

24 (Pause)

25 THE CHAIRMAN: Okay.

26 MR PASCOE: So this is the latest formulation following service of our RFI. I'll expand

1 on this, but at the very least, we submit, it raises more questions than it answers, in  
2 particular about the relationship between the claim for distributions, which has always  
3 been there, and the new claim for retained interest, which is expressed as an  
4 alternative or additional claim to that.

5 I'll go through our questions in detail, but I first need to meet a universal point that  
6 Whaleco puts forward as an answer to the RFI, which is that these are just questions  
7 of loss that can be punted off until trial 3. That's wrong for several reasons.

8 The first, sir -- and this comes back to your original question -- is that everybody,  
9 including Whaleco, as I understand it, accepts that Whaleco will have to prove at trial 2  
10 that it has suffered at least some loss. That's accepted in terms at paragraph 76 of  
11 my learned friend's skeleton argument. With one exception, which is the updated  
12 valuation of the claim, that is the issue that our questions go to. We're trying to assess  
13 whether Whaleco has any sustainable claim for loss. We're not trying to get into the  
14 nuts and bolts of individual figures at this stage.

15 Now, the second answer to the point is that the fact that quantum has been hived off  
16 to a further trial, that doesn't disentitle us from probing Whaleco's pleading in the  
17 normal way, in particular to assess whether the pleaded claim is a sustainable one in  
18 principle. Nor, of course, does it relieve Whaleco from the obligation of giving proper  
19 particulars of its claim. Of course, if some or all of the heads of loss are not  
20 sustainable, in our submission, that's the sort of issue that should be flushed out now,  
21 and indeed we might rightly be criticised if we kept potential strike-out points on  
22 quantum in our back pockets until we get into the weeds of trial 3.

23 The third answer to the point, sir, is that the fact that quantum has been hived off to  
24 trial 3 doesn't mean that every issue of remedy has been hived off to trial 3, and in  
25 particular, the claim for an injunction for injunctive relief has remained as part of trial 2.

26 For reference, that's paragraph 4(c) of the Tribunal's order of 8 October. So just

1 putting the point at its very lowest, the question of whether Whaleco has and is  
2 suffering any recoverable losses on an ongoing basis and the order of magnitude of  
3 those losses will, of course, be relevant to the Tribunal's discretion in deciding whether  
4 to grant an injunction if that question arises.

5 So those are my answers to the sort of universal point that these are all just issues of  
6 quantum and they can be kicked off down the road.

7 The RFI itself is at tab 23.

8 THE CHAIRMAN: Can you just unpack that last point you made for me again. Just  
9 explain again why that you say that it's relevant for an injunction, just so I have it --

10 MR PASCOE: Yes, so, sir, you have the point that the question of injunctive relief is  
11 part of trial 2.

12 THE CHAIRMAN: Yes, I've got that.

13 MR PASCOE: And clearly, if one gets to the stage where the Tribunal has found an  
14 infringement, is considering issuing an injunction, it will have a discretion. Part of that  
15 discretion will involve an assessment of what harm Whaleco is suffering on an ongoing  
16 basis. If it's suffering no harm -- and I put it no higher than this for the purpose of  
17 today -- that is at least a relevant consideration in exercising that discretion. That's  
18 the point I was making.

19 THE CHAIRMAN: Okay.

20 MR PASCOE: So, sir, I was just taking you to the RFI itself, which is at tab 23 of the  
21 main bundle. It starts at page 565. (Pause)

22 Can I just say at this stage -- I've told my learned friend this already -- we're pursuing  
23 the first four of these questions for today's purposes. I will say something extremely  
24 brief about the fifth question at the end.

25 THE CHAIRMAN: Just tell me the page number again.

26 MR PASCOE: It's 566. That's the substance --

1 THE CHAIRMAN: Oh, 566. Yes, I've got it.

2 MR PASCOE: If I may, I'm just going to take the four questions in turn for simplicity.

3 The first question requests an updated valuation of the claim in light of the

4 abandonment of the claim for reduced takings, and its replacement with a new claim

5 for retained interest. The genesis of this request, sir, is an order of Mrs Justice Bacon,

6 made on 22 July 2024: that Whaleco provide an estimate of the quantum of its claim.

7 Perhaps I can show you that at page 4 of the supplemental bundle. (Pause)

8 So you'll see, sir, paragraph 2(c) requires Whaleco to provide:

9 "An indicative range of the quantum of loss claimed by the Defendant in [these]

10 proceedings."

11 That estimate was initially given by Whaleco on 30 August last year, which valued the

12 claim at £1.2 million. I don't think we need to turn it up; it's page 7 of the supplemental

13 bundle.

14 That £1.2 million estimate was then updated by Whaleco on 18 October last year, and

15 the up-to-date valuation is at tab 90, 1203. Could we go there, please.

16 THE CHAIRMAN: Tab 90?

17 MR PASCOE: Tab 90. (Pause)

18 THE CHAIRMAN: Yes.

19 MR PASCOE: You'll see, sir, at paragraph 5 of that letter, the updated valuation is

20 one of £4.2 million. In my submission, that figure -- it's already been used several

21 times in today's hearing -- has provided an important reality check for these

22 proceedings, in particular for issues of case management.

23 But I don't think it can seriously be in dispute that the £4.2 million figure is now wrong,

24 likely, I would say, by a large margin, because it includes a claim for reduced takings,

25 the more direct and conventional claim, which is no longer pursued and has been

26 replaced by something else: a claim for retained interest.

1 Now, Whaleco must know how much of that figure is attributable to the abandoned  
2 claim. They must know that because they must have known how much the abandoned  
3 claim was worth in order to come up with the figure in the first place. Whaleco hasn't  
4 suggested that it would be impossible or disproportionate to strip that figure out and  
5 see how much is left.

6 Now, in the same way that an RFI response would have to be updated if a party  
7 changes its case, so too, we say, an estimate of this kind that has been required by  
8 order of the court. Of course, I've shown you, sir, that Whaleco has updated its  
9 valuation when it suits it. So the £4.2 million valuation was an update to its original  
10 valuation of £1.2 million. So when the claim goes up, Whaleco updates its valuation  
11 and tells us and the Tribunal about it. But when the claim goes down, as seems to  
12 have happened here, it shuts up shop.

13 One can see that vividly, sir, from a piece of evidence that Whaleco served earlier this  
14 year. Can I show you that, please? It's the sixth witness statement of Mr Shao at  
15 page 80 of the supplemental bundle. (Pause)

16 THE CHAIRMAN: Page 80 or tab 80?

17 MR PASCOE: Page 80.

18 THE CHAIRMAN: Oh, this is ...

19 Oh, the supplemental bundle.

20 MR PASCOE: Apologies, it's supplemental bundle. That's right.

21 THE CHAIRMAN: Right, yes, yes.

22 MR PASCOE: Tab 4, page 80. (Pause)

23 THE CHAIRMAN: Yes, I'm there.

24 MR PASCOE: The bit that I want to show you, sir, is at the very end of paragraph 10.  
25 You'll see that Mr Shao has given some background about the claim for loss. Then  
26 this is as of 7 July 2025, he says:

1 "I can confirm that steps are being taken to calculate this loss and damage, which is  
2 not a straightforward process, and once [the] relevant calculations have been carried  
3 out the Defendant will provide the details to the Claimants and the Court."

4 THE CHAIRMAN: Can you help me with the context of this? You showed me the  
5 order of Mrs Justice Bacon saying that that was of -- I can't remember the date of that  
6 order. That order was -- remind me again, the date.

7 MR PASCOE: The date ...

8 THE CHAIRMAN: Where you showed me the quantum of loss. I can't remember the  
9 date.

10 MR PASCOE: It's the date -- 22 July 2024. So the chronology --

11 THE CHAIRMAN: 7 July, so this statement was put in for the purposes of that hearing.

12 MR PASCOE: No, this is 7 July 2025, sir.

13 THE CHAIRMAN: Ah, okay. Yes.

14 MR PASCOE: So the order was made in July 2024.

15 THE CHAIRMAN: Right, you can see I was finding it difficult to know what where  
16 these things fit in. So, okay, this is a year later. Right.

17 MR PASCOE: Yes, of course, and to be clear, the purpose of this statement, as  
18 I understand it, was to support Whaleco's application to amend its pleading to  
19 introduce a new claim for negligent misstatement. So I don't take anything from the  
20 context or the substantive content of the statement, but what Mr Shao clearly said is  
21 that Whaleco was preparing an updated valuation and would share it, and so he says  
22 he --

23 THE CHAIRMAN: The purpose of my question was that you were relying on the fact  
24 that -- I think, as you put it -- they update it when it suits it, and I was just trying to work  
25 out why, in paragraph 10, did Mr Shao feel the need to say this. I just was trying to  
26 understand the context of why does he suddenly say: "Don't worry, I'm going to tell the

1 court about an updated ..." Just so I understand the context.  
2 MR PASCOE: Yes, well, I think the context, sir, is I think this was evidence in support  
3 of a new claim for which permission was ultimately denied in negligent misstatements.  
4 I think Mr Shao was trying to explain how Whaleco had suffered loss as a result of that  
5 negligent misstatement.

6 So to be clear -- because I don't want to say anything that's wrong or misleading -- this  
7 statement was not put in in response to Mrs Justice Bacon's order. All I take from it is  
8 the fact that an updated valuation was being prepared and that never has been shared  
9 with us or the court.

10 THE CHAIRMAN: Yes.

11 MR PASCOE: That's all I really want to say on request number 1. In summary, the  
12 estimated value of the claim is something that we and the Tribunal are entitled to know.  
13 It's useful information, which is why Mrs Justice Bacon ordered it in the first place. The  
14 figure currently on the records just must be wrong, and there can be no serious  
15 objection to providing an update.

16 That's what I want to say on question 1. I assume, sir, you'd like me to go through all  
17 of the questions in turn, rather than allowing Mr Holmes to reply.

18 THE CHAIRMAN: Yes, I think it makes sense to go through them all.

19 MR PASCOE: Yes. So we're back at the RFI, sir, which is tab 23, page 566. (Pause)

20 THE CHAIRMAN: Yes.

21 MR PASCOE: This was a simple request to confirm what is meant by the term  
22 "retained interest" in Whaleco's pleading. That is, of course, a proper and  
23 conventional use of the RFI procedure. There couldn't be -- and in fairness, it's not  
24 said that there's any proportionality objection to explaining what Whaleco meant when  
25 it added the words that it did in paragraph 69A of its pleading. Instead, Whaleco has  
26 had a go at elucidating its claim in its skeleton argument at paragraph 78.

1 I wonder -- with apologies for skipping around -- if we could pick that back up, because  
2 it's a very important passage. (Pause)

3 THE CHAIRMAN: Paragraph 78?

4 MR PASCOE: Paragraph 78 of the skeleton.

5 THE CHAIRMAN: Yes.

6 MR PASCOE: So I've already asked you to read that and we submit it's muddled in  
7 a number of respects, but for today's purposes, the key points are at (i) and (iv), which  
8 are, at (i), that the central measure of Whaleco's loss is the intragroup  
9 distributions -- referred to here as "service fees" -- and not the retained interest. Then  
10 at (iv), that the new claim for retained interest is for interest which is used in satisfaction  
11 of those distributions.

12 Now, just to unpack that slightly, as I've explained, the claim for distributions is a claim  
13 for payments made by another group company into Whaleco, based on a discretionary  
14 assessment. One doesn't see it in the skeleton, but Whaleco's case is that it has  
15 a contractual right to receive those payments. For reference, that's Whaleco's RFI  
16 response of 16 August 2024, para 4. What Whaleco now appears to be saying is that  
17 it earns some interest on some funds, we know not exactly how, and that this interest  
18 is used to pay down some of the other company's liability to pay Whaleco distributions.  
19 So, if we've read that correctly, it seems to us that the new claim for interest is entirely  
20 subsumed within the existing claim for distributions and we don't understand what  
21 additional work it's intended to do. It's akin to claiming for reduced distributions  
22 alongside the cash that is used to pay those distributions. They're just the same claim,  
23 if we've understood it correctly.

24 So in light of that new explanation of the claim, and I should say that none of this is  
25 apparent from the face of the pleading, we have refined our question to seek  
26 confirmation on two points as set out in para 52.2 of our skeleton. The first is what the

1 claimed loss mechanism actually is. Now, we infer and assume that what is being  
2 said is that the infringements caused a reduction in sales, which in turn caused  
3 a reduction in cash going through Whaleco's bank accounts, which in turn caused  
4 a reduction in interest. But that hasn't been confirmed in express terms, and it should  
5 be.

6 The second, more fundamental confirmation that we seek is whether Whaleco's case  
7 is that the claim for retained interest actually adds anything to the claim for distributions  
8 at all, and if so, why? On our reading of Whaleco's skeleton, this new claim doesn't  
9 have any value independent of the claim expressed to be an alternative or additive  
10 claim for reduced distributions. And it's obviously relevant and helpful, both for us and  
11 the Tribunal, to know whether that's common ground or not; in particular, for us to  
12 assess whether the heads of loss are strikeable. In essence, we want to know whether  
13 Whaleco's position is that they stand or fall with each other, or it isn't and if not, on  
14 what basis, given their articulation of the claim. So, that's my submission, sir, on  
15 question 2.

16 THE CHAIRMAN: Okay.

17 MR PASCOE: So question 3 seeks information about the terms on which Whaleco --

18 THE CHAIRMAN: Am I going to question 3 in tab 23 or question 3 in your skeleton?  
19 Are they the same? I haven't quite worked out whether you've changed anything.

20 MR PASCOE: Perhaps we could take it from the RFI itself, which is tab 23, page 566  
21 of the main bundle.

22 THE CHAIRMAN: Just so I know, the one you've just shown me is a new request; the  
23 52.1 and 52.2 are not the same as was in your RFI; is that right?

24 MR PASCOE: That's right, we've refined the question. Because the question in the  
25 RFI is: "What is meant by the term retained interest"?

26 THE CHAIRMAN: Yes.

1 MR PASCOE: We do maintain that as the overall question, but in light of what we've  
2 seen from Whaleco since we asked that question, we're seeking the two specific  
3 confirmations that I've outlined.

4 THE CHAIRMAN: Right.

5 MR PASCOE: So, sir, I was on question 3, which is at page 566 of the bundle. We  
6 are asking Whaleco to identify the terms by which it is entitled to hold and earn interest  
7 on this cash. The premise of the new claim, as we understand it, is that Whaleco sits  
8 on sales proceeds for a period of time and earns interest on them and that's what gives  
9 rise to this new claim for retained interest. But that raises an immediate question of  
10 what gives Whaleco the entitlement to earn interest on those sales proceeds, when it  
11 now accepts that it cannot claim those proceeds in its own right as a claim for reduced  
12 takings, presumably because those proceeds don't belong to it. That claim has been  
13 abandoned.

14 It would be surprising, in my submission, if that problem can be circumnavigated  
15 simply by switching the claim from one for reduced takings to a claim for reduced  
16 interest earned on those takings. At the very least, that calls for an explanation. What  
17 we want to know is the basis on which Whaleco says that it's entitled to sit on these  
18 takings and earn interest on them. We've therefore asked Whaleco to identify those  
19 terms between it on the one hand and its sellers and the other group companies on  
20 the other. In my submission, they must know that information because they must have  
21 satisfied themselves in order to bring this new claim for reduced interest that they had  
22 an entitlement to earn that interest in the first place. So, the basis of the entitlement  
23 must be information that's at their fingertips.

24 Now, Whaleco has responded in a letter of last week -- I don't think we need to turn it  
25 up -- pointing us to a model supplier agreement which, on its face, sounds like  
26 a promising response to our question. But we've reviewed the document, and as far

1 as we can tell, it doesn't say anything about how long Whaleco is entitled to hold on to  
2 these sales proceeds before it remits them to the seller and even more fundamentally,  
3 it obviously doesn't say anything about the payment of the rest of the proceeds to the  
4 other group companies, because ultimately this whole operation, this tax structure, is  
5 to shed the sales proceeds that are coming in and receive an amount of distributions  
6 in the opposite direction.

7 So, to the extent that there are terms which show that Whaleco is entitled to earn  
8 interest for a particular period on these funds, they must be contained in some other  
9 document. So, what are we asking the Tribunal to do? Well, Whaleco has said in its  
10 skeleton that our request is one for disclosure, not an RFI and as I've said, has pointed  
11 us in the direction of one document, albeit we think it's the wrong one. So we are  
12 happy to drop this as a formal request for information, but only if Whaleco confirmed  
13 that it will disclose the right documents, containing the terms that we've requested, as  
14 part of its disclosure for trial 2. We've put that to Whaleco in our skeleton argument,  
15 and we'll see what my learned friend says about it. But to the extent that disclosure is  
16 resisted, we seek a response to the questions that we've asked in the RFI.

17 THE CHAIRMAN: Can I ask, is it question 3 -- I was trying to think in my mind how  
18 your questions relate to each other. Question 2 is what is meant by retained interest  
19 and you want to know whether or not that claim is in fact standalone or whether it adds  
20 anything to the distributions claim and as you put it, whether it's entirely subsumed by  
21 distributions.

22 MR PASCOE: Yes.

23 THE CHAIRMAN: If it was entirely subsumed by distributions, question 3 presumably  
24 doesn't arise; is that right?

25 MR PASCOE: I think it's fair to say if -- it probably depends on what is meant by the  
26 word subsumed. If Mr Holmes accepts that it doesn't add anything in the sense that

1 they stand or fall together, that's probably right. But I don't know if that is what  
2 Mr Holmes is going to say.

3 THE CHAIRMAN: Right.

4 MR PASCOE: At the moment, we are taking the new claim at face value and we're  
5 asking questions about that claim. We're not assuming anything about Whaleco's  
6 position as to whether it adds something and of course; we're not assuming at this  
7 stage that it's been struck out. It's there on the face of the pleading and we're asking  
8 questions about that claim as it's presented to us.

9 THE CHAIRMAN: And when the claim amendment was made, I believe it came in by  
10 consent, did it; is that right? I thought it did.

11 MR PASCOE: I'll just check, sir. (Pause)

12 I'm told we did consent, but with a specific reservation to ask questions, including  
13 about this new claim.

14 THE CHAIRMAN: Okay. Because my question was, perhaps it's surprising to consent  
15 to a claim that you now say you don't understand what it means. It's a sort of odd  
16 thing to consent to, is my question. But you're saying that the consent was done  
17 specifically by saying: "We consent but we're not sure we know what it means".

18 MR PASCOE: Yes, that's right, sir. That's right.

19 THE CHAIRMAN: Okay.

20 MR PASCOE: So, unless you had any other questions, that's our question 3.  
21 Our question four -- again, we're back at page 566 of the bundle -- asks Whaleco to  
22 explain what appears to be an inconsistency in its new case. Now, the inconsistency  
23 is that the retained interest funds are now said by Whaleco to constitute funds which  
24 are used to pay down distributions owed to it by the other group company. Now, the  
25 natural reading of that is that the interest funds must therefore belong to that other  
26 group company, in one sense. You cannot use Whaleco's own funds to discharge

1 a debt owed by another group company. So we've asked simply for Whaleco to state  
2 its case on whether the interest which it now claims belongs to it or to that other group  
3 company. And if Whaleco accepts that the interest belongs to that other group  
4 company, hence why it's being used to pay down that other company's liabilities, that  
5 would be an important piece of information in deciding whether the claim is strikeable.  
6 And I emphasise we're only asking Whaleco to state its case at this stage; it's not  
7 something that should be difficult or onerous to do and in fairness, Whaleco doesn't  
8 say otherwise. So we respectfully ask the Tribunal to order that a response to  
9 question 4 is provided.

10 I said I'd say something very brief about question 5. We're not pressing it at this  
11 hearing; that's not because we think it's an unimportant question but it's because the  
12 focus of our questions for today are on the new claim for retained interest. Question 5  
13 deals with the claim for distributions. We reserve our rights in respect of it, but we're  
14 not going to press it at today's hearing.

15 THE CHAIRMAN: Okay. Thank you. Mr Holmes.

16 Submissions by MR HOLMES

17 MR HOLMES: Thank you, sir. We say that the request is unwarranted and the  
18 application should be rejected. Whaleco's case on loss, as I hope to show you, has  
19 been sufficiently set out in its pleading, witness evidence and RFI responses. Shein  
20 has enough information to understand the case against it on the mechanism which  
21 causes loss to Whaleco.

22 A summary of Whaleco's case on loss is set out in the letter from Herbert Smith, my  
23 solicitors, dated 24 June 2025, which is at tab 92 of the main bundle, page 1212 and  
24 following. So if we could go there please. Picking it up on page 1213, could I ask you  
25 please to review paragraph 5 of the letter? (Pause)

26 THE CHAIRMAN: Okay.

1 MR HOLMES: So, this paragraph accords with the position set out in paragraph 78 of  
2 our skeleton argument, which was said by Mr Pascoe to be a wholly new account of  
3 Whaleco's case. That's not correct. In short, as explained here, in June 2025, the  
4 central measure of Whaleco's loss in this claim is the service fee to which Whaleco is  
5 entitled under the service contracts. Whaleco provides services to two other entities  
6 in the Temu group, the identities of which are outer ring confidential under the service  
7 contracts; that's at paragraph 5.1. Those services include the processing of payments  
8 made by retail consumers for products purchased through Temu's UK sub-page;  
9 again, paragraph 5.1. Whaleco incurs service costs providing those services; that's  
10 5.2. The bulk of the service costs are positively correlated with the number of sales  
11 transactions and gross merchandise value, the amount of money transacted on the  
12 UK platform, in particular the costs incurred for the processing of payments made by  
13 retail platform customers. The more they spend, the more the payment processing  
14 costs. Elsewhere -- I'll show you this -- Whaleco has explained that the costs also  
15 include promotion credits on Temu's UK platform and professional fees for legal and  
16 tax services. Whaleco earns a service fee for providing its services. The monthly  
17 service fee is calculated as the amount of service costs plus a markup percentage  
18 applied to those service costs; that's paragraph 5.3.  
19 The service fee is satisfied partly by payments from one of its counterparties under the  
20 service contracts and partly by interest accrued on sums that it receives. You see that  
21 at 5.4. The overall effect of the service fee calculation is that as service costs increase,  
22 so does the markup for profit on those service costs; the point at paragraph 5.5. And  
23 given that the bulk of the costs are directly correlated with GMV, the result is that if  
24 GMV is lower because of the conduct we allege to have infringed, then so also will be  
25 the profits earned by Whaleco. We say that's a simple and straightforward mechanism  
26 and it adequately explains the mechanism of loss.

1 THE CHAIRMAN: I'm sorry to stop you there. Is that therefore, just going back to your  
2 pleading, 69A this encompasses both 69A.2 and A.1, does it?

3 MR HOLMES: Yes, it does. Exactly.

4 THE CHAIRMAN: Yes, yes.

5 MR HOLMES: So you see that at 5.4. So the term "distributions" to describe money  
6 that is retained rather than handed across isn't apt. And 69A.1 was therefore intended  
7 to capture that portion of the service fee, which comes in the form of retained interest.  
8 So just to go, if I could take you for a moment back, I think you probably have it  
9 already, to the pleading on that point. 69A. So the reference to retained interest in  
10 69A.1 refers simply to the amount of interest which is retained in partial satisfaction of  
11 the service fee. I'll return to this in more detail by reference to Whaleco's RFI  
12 responses in a moment. And then 69A.2 refers to the monetary payments towards  
13 the service fee received from its counterparty under the service contract. But these  
14 are just two of the key elements of the service fee, the way in which the service fee is  
15 provided. We can see paragraph 72, just for completeness, is also seeking  
16 a declaration that the aforesaid agreements are void and unenforceable and also, at  
17 73, an injunction; I'll come back to that.

18 You were taken to Shao 3. He provides some further information about the service  
19 fee. If we could go to that again, that's at page 783 and this is from 7 June 2024.  
20 Paragraphs 10 to 17 explain how Shein's infringing conduct caused Whaleco loss. At  
21 paragraph 12, that's Temu's revenue, that's --

22 THE CHAIRMAN: Stop a moment, where should I be?

23 MR HOLMES: Yes, sorry. 785, tab 52. I guess that will probably be your second  
24 bundle, will it?

25 THE CHAIRMAN: Yes, I've found it. Which page?

26 MR HOLMES: So it starts 783, and I was on 785, "Loss to Whaleco", paragraphs 10

1 to 17.

2 You see at paragraph 12 that Temu -- that's the Temu group's revenue -- is

3 generated primarily by platform service fees paid by merchants.

4 Paragraph 13, you have the explanation that Whaleco acts as the contracting party for

5 users accessing services on Temu's UK sub-page. It's clear from this that the money

6 that comes from the UK consumers isn't retained by Whaleco. That's clear from the

7 very beginning. It's either handed out to the merchants after being held on deposit or

8 it's transferred within the Temu Group.

9 Paragraph 13 at the foot, you see that Temu makes periodic distributions to Whaleco,

10 and that is the service fee, as has been explained subsequently.

11 Paragraph 15, Whaleco's revenue from distributions is roughly in proportion with sales

12 volume on Temu's UK sub-page or app. That's because the bulk of the service costs

13 are correlated with GMV -- sales volume.

14 At paragraph 16, Whaleco incurs operating costs.

15 Paragraph 17:

16 "Where Shein's actions have had an impact on the sales made via Temu's UK

17 sub-page ... [that causes] Whaleco loss ... by reducing the sales revenues it collects

18 and therefore ... [the] distributions [it receives]."

19 Now, if we could then turn to tab 31, page 618. This is a response to an RFI of Shein

20 dated 26 June 2024. The response was provided on 16 August 2024. If we start on

21 page 619, the information highlighted is the names of the entities that are contractually

22 obliged to pay the service fee, and they're confidential, so I won't refer to them.

23 You can see the responses given to requests 1 to 8.

24 THE CHAIRMAN: Sorry, again, I don't seem to be in the same 690.

25 MR HOLMES: 619, my apologies. 6-1-9. (Pause)

26 Do you have that?

1 THE CHAIRMAN: Yes, I have it, yes.

2 MR HOLMES: So this is a response. The green text is just the names of the entities  
3 that are contractually bound to pay the service fee, and they're confidential, so I won't  
4 mention them.

5 But response 2, you see that one of those entities makes periodic distributions to the  
6 defendant.

7 Response 4, you see that this is a contractual legal entitlement. Now, Shein's  
8 assertion at paragraph 48.2 of its skeleton that Mr Pascoe repeated, that these  
9 distributions are discretionary, is not correct. It's clear that they are contractual  
10 entitlement.

11 At page 620, in response 7, you see the point that:

12 "An increase in GMV ... leads to an increase in revenue from service fees which in  
13 turn increases the distributions that the Defendant receives."

14 That's the mechanism that I described: as the costs go up, service fees go up, and the  
15 costs are correlated with GMV.

16 There was then another RFI from Shein dated 3 September 2024, and after an initial  
17 response, Whaleco provided further information on 10 December 2024, which is at  
18 tab 34, page 633. You see in the response at the foot of the page that:

19 "The Defendant [Whaleco] provides corporate support services to [the two entities]  
20 pursuant to written contracts."

21 Again, the point that this is a contractual entitlement.

22 "Those services primarily comprise procuring payment processing in respect of  
23 purchases made through the Temu UK website."

24 The point that you saw in the June 2025 letter, clear from at least December 2024.

25 "As well as other services ..."

26 And you see what those are. I mentioned them earlier, I don't believe they're now

1 confidential. So I think that's an erroneous marking: "marketing/promotion and  
2 procuring professional services".

3 Then the point that Whaleco is compensated in accordance with -- at the foot of the  
4 page -- with a "cost-plus transfer pricing methodology". That's the point that the  
5 service fee is calculated by the service costs, plus a defined percentage. So as the  
6 costs go down, the percentage markup goes down too.

7 Then over the page at 634, in the first complete paragraph, second paragraph on the  
8 page:

9 "The level of compensation received by the Defendant is substantially affected by the  
10 sales volume and value conducted through the Temu UK website ... If the sales  
11 volume and value [are] reduced, the Defendant's cost, profits and revenue will be  
12 lower."

13 Now, Shein sent yet another RFI. It's third on these issues on 26 March 2025.  
14 Whaleco responded on 24 June 2025. That's at tab 36, page 644. We can see in this  
15 response.

16 THE CHAIRMAN: That sorry, that's RFI, at which page?

17 MR HOLMES: 644. Sorry, I don't need you to go -- I just don't want to waste too long  
18 on this, but I do want to show you that this has been traversed in pleadings.

19 THE CHAIRMAN: No, no, it's me being slow rather than you being fast.

20 MR HOLMES: So 645, you see response at the foot of the page. Whaleco confirms  
21 again that the service fees which Whaleco receives are determined on a cost-plus  
22 basis, and you see the formula:

23 "Service costs x (1 + Mark-Up Percentage)= Service Fee."

24 It also explains on page 646 that the liability -- at the top of the page:

25 "Is satisfied by a combination of (i) the Defendant accruing interest on sums received  
26 in cash and cash equivalent; (ii) any foreign exchange gains [which are very minor];

1 and (iii) monetary payments by [the entity concerned to the defendant]."

2 So you can see from that that there's a very clear explanation of the components of  
3 the service fee, the way in which the service fee is paid, and it's satisfied by  
4 a combination of accruing interest on sums received in cash and cash equivalent, FX  
5 and monetary payments. That is the reason for the pleading in relation to retained  
6 interest; retained interest is relevant and only relevant as one of the means by which  
7 the contractual liability of the other Temu entity to Whaleco, in relation to the service  
8 fee, is satisfied.

9 Shein asked for yet more information in an RFI dated 16 October 2025. That's at  
10 tab 103, probably in the next bundle, page 1240. (Pause)

11 You see that Shein asked Whaleco nine questions. They included questions about  
12 the granular details of the correlation between the platform service fee payable by  
13 Temu's customers; merchants; distributions; costs; GMV; and sales volume.

14 Looking down the page, you see at question 1 an array of queries about who pays  
15 interest to Whaleco, the "terms" of the interest, the "instrument[s], deposit[s] and other  
16 arrangement[s]" used, who agrees the terms of the interest on which interest is paid;  
17 2, which sums interest is paid on; 3, what other interests might be earned; 4, the terms  
18 on which the Temu platforms pays its sellers, including the length of time that sums  
19 are held; 5, a question about the platform service fee payable by merchants to Temu,  
20 the question which is no longer maintained; at 6, a request for quantitative data on the  
21 interest retained by Whaleco across time, and so on.

22 Now, these are questions that might perhaps be relevant at the quantum stage, but  
23 they are not questions relevant to understanding the mechanism of loss.

24 The RFI subject to the application today is a later version of this RFI, and that's at  
25 tab 23. You've obviously seen it, but just to return to that, 566. It adds some questions,  
26 revises some and cuts others. So one is additional, and there are a number of

1 adjustments and changes to those that follow.

2 As you've seen, this is the latest in a long series of requests by Whaleco, which, from  
3 our perspective, ask for ever more granular detail about Whaleco's case on loss.  
4 Whaleco nevertheless sought to respond to the November RFI in order to clarify  
5 apparent misconceptions on the part of Shein concerning Whaleco's case. That  
6 response is at tab 113, page 1279.

7 That letter explains on page -- if we pick it up first at 1280 at 6.4 -- that the central  
8 measure for Whaleco's loss claim is the service fee. You see:

9 "Whaleco is entitled under the Service Contracts to be paid the Service Fee, and that  
10 amount is partially satisfied by the interest that has accrued in the course of Whaleco  
11 providing the services under the Service Contracts. Accordingly, the central measure  
12 for our client's loss claim is the Service Fee to which Whaleco is entitled under the  
13 Service Contracts."

14 Points that have been explained before but were repeated in response to this request  
15 in correspondence.

16 At paragraph 5, you see:

17 "The Service Fee to which Whaleco UK Limited is entitled under the Service Contracts  
18 is calculated based on the service costs incurred by Whaleco UK Limited, plus a mark-  
19 up."

20 And then paragraph --

21 THE CHAIRMAN: Just going through that, what's now being requested by Mr Pascoe  
22 and what you say you've answered.

23 MR HOLMES: Yes.

24 THE CHAIRMAN: Because I've got the impression that a lot of what you've been just  
25 addressing me on and it's been very helpful, but is effectively saying, "This has been  
26 answered".

1 MR HOLMES: Yes.

2 THE CHAIRMAN: I just want to now just probe quickly, how much that's right. So the

3 first question that they're pushing today is the quantum of loss.

4 MR HOLMES: Yes.

5 THE CHAIRMAN: The point made by Mr Pascoe is that you were ordered to do that

6 by Mrs Justice Bacon, obviously at a time when there wasn't a split trial.

7 MR HOLMES: Yes.

8 THE CHAIRMAN: And then you upped it to £4.2 million. The question is: has that

9 changed by the amendment to the pleading? You haven't actually answered that, as

10 far as I can see, and I didn't quite understand why.

11 MR HOLMES: Sir, let me address you on that. We say that this is a premature request

12 for an update to the quantum estimate. It's not the appropriate time to revise the

13 estimate, given where the parties are in the middle of a disclosure exercise, and there

14 are several other deadlines, and conducting a further quantum estimate will be time

15 consuming and distracting.

16 It's not quite correct to say that there have been updated estimates in any detail.

17 I mean, just to show you the correspondence on that, to see what --

18 THE CHAIRMAN: I don't know if I want to go into too much detail in the

19 correspondence. What I would like to know, though: do you accept, therefore, from

20 what you just said, that the amendment that you made from the defendants receiving

21 reduced takings in the UK, to the defendants receiving reduced retained interest in the

22 UK, could have affected, materially, the quantum?

23 MR HOLMES: No. That is because the quantum estimate was determined always by

24 reference to the income and the profits in fact earned by Whaleco. We may not have

25 expressed with perfect clarity to begin with what exactly was being claimed, but the

26 long and the short of it is it has always been a claim which arises from the service fee,

1 and the takings was always intended to refer to those monies which were  
2 retained -- now, the retained interest, which we amended to try to clarify that point -- in  
3 combination with the distributions that were made by way of the service fee. So that  
4 was --

5 THE CHAIRMAN: I'm not sure I understand your reasoning as to why you won't  
6 answer question 1. The reason I ask is because what you just submitted to me earlier  
7 was that it's a premature request, it's not appropriate, it would be very time consuming  
8 and distracting. But then you say that there's nothing to change here. Nothing to  
9 change.

10 MR HOLMES: No, no, no. Clearly, time has passed, right? Simply through the  
11 passage of time, the estimate will be different. There's going to be a -- this was never  
12 intended to be a roving exercise in providing quantum. You know, the judge explained  
13 that what she wanted was just an indicative estimate -- a ballpark figure, as she put it;  
14 we don't have the transcript here, but we can give you the references or provide them  
15 afterwards, if you like -- a ballpark figure: is the claim for £1,000 or £10 million? That  
16 was what we were addressing.

17 It came in two parts, because in August 2024, very early days, we were only able to  
18 calculate by a certain direct loss measure. We weren't able to calculate or estimate at  
19 that point how we thought sales of other items on the platform might have been  
20 affected from the loss of business. There was a sort of network effects consequence  
21 here; people who come to buy fast fashion might then buy something else as well.

22 We have attempted to estimate that in the higher figure, which was provided,  
23 only -- I think by my calculation -- six weeks later. The initial estimate came on  
24 30 August, was said to be provisional, and it was explained that it did not contain  
25 a number of elements.

26 Then that was updated on 18 October 2024 once we'd had time to form a view on

1 those other elements. But other than that, we say that it wouldn't be appropriate to  
2 update this estimate continually, or on a roving basis.

3 THE CHAIRMAN: Can I ask you this?

4 MR HOLMES: Yes.

5 THE CHAIRMAN: If I understand what you've just said, if on 18 October 2024, you  
6 had already made your pleading amendment, the estimate would have remained  
7 £4.2 million; is that right?

8 MR HOLMES: Yes, because it was calculated on the profits which in fact come into  
9 Whaleco, which are as a result of the service fee and the retained -- that portion of the  
10 service fee that comes by way of distribution, that portion that comes by way of  
11 retained interest. Those are the sources of income for Whaleco, and that was the  
12 basis on which the estimation was conducted. So we don't accept that there is a new  
13 case that will fundamentally revise the estimates.

14 THE CHAIRMAN: Okay. Question 2.

15 MR HOLMES: Sir, question 2, we've already --

16 THE CHAIRMAN: The question was -- well, what was put was that you haven't  
17 explained what is meant by retained interest, and you just have.

18 MR HOLMES: (Overspeaking).

19 THE CHAIRMAN: What I haven't understood is what -- this seems to be shadow  
20 boxing slightly -- I haven't really understood the dispute.

21 MR HOLMES: I can cut through it easily and quickly. I think we have clarified that the  
22 retained interest is relevant as a portion of the service fee. We did it when we first  
23 received the RFI in the correspondence I showed to you. We've done it again in the  
24 skeleton argument. We don't think that this is a matter that is open for discussion or  
25 doubt.

26 THE CHAIRMAN: What about that 52.2.1 and 52.2.2, which was explained by

1 Mr Pascoe as their sort of breakdown --

2 MR HOLMES: The alternative -- yes.

3 THE CHAIRMAN: Well, it's a breakdown of question 2.

4 MR HOLMES: So --

5 THE CHAIRMAN: And they're asking --

6 MR HOLMES: Sorry. Apologies.

7 THE CHAIRMAN: No, go on. Rather specifically now, I just want to know what you

8 say -- why they don't need this or they've already got it.

9 MR HOLMES: The retained interest claimed by Whaleco relates to interest which it

10 would allegedly have earned on lost sales caused by Shein's alleged infringements

11 and that the claim for retained interest does not add to the quantum. So the claim for

12 retained interest does not add to the quantum of the claim for the service fee. There's

13 obviously a definitional or semantic point about whether distributions for sums paid as

14 part of the service fee are the whole of the service fee. We haven't meant them to be

15 understood as such. So 69A.2 is that portion of the service fee that is paid by

16 payments from the other entity. 69A.1 is that portion of the service fee which is

17 satisfied by retaining interest.

18 THE CHAIRMAN: Right.

19 MR HOLMES: But if the question is, "Does the claim for retained interest add to the

20 quantum of the claim for the service fee?", the answer is, "No, it does not".

21 THE CHAIRMAN: I'm sure that will be helpful for them to know. Then question 4.

22 MR HOLMES: I think question 4 --

23 THE CHAIRMAN: It's a concern about an inconsistency.

24 MR HOLMES: So question 4, I thought he accepted, did he not, that that went

25 together with 2, insofar as the answer is that --

26 THE CHAIRMAN: Sorry, I ... (Pause)

1 Go on.

2 MR HOLMES: I had understood -- but I stand to be corrected if I'm wrong -- that he  
3 agreed and accepted that insofar as the retained interest element was not additive to  
4 the claim for the service fee, understood to consist of both the distributions, the  
5 payments from the other entity and the retained interest, then question 4 was not  
6 a relevant enquiry, but I'm sure -- I should perhaps let him confirm whether I've  
7 correctly understood.

8 THE CHAIRMAN: Yes.

9 Again, just so I go through them all, there's -- sorry, we jump: request 3.

10 MR HOLMES: So, well, this does look to us to be an attempt to lever a disclosure  
11 request after the end of the DRD process into a request for information. We've already  
12 provided the seller terms. The seller terms show that Temu and its affiliates are  
13 entitled to keep interest earned on balances. I can show you that, if that's helpful. Let  
14 me see. That's at tab 18, page --

15 THE CHAIRMAN: Just to try and cut through it, my understanding was this could be  
16 cut through if you gave the disclosure. Is that resisted or not?

17 MR HOLMES: Well, we've already disclosed the first category. We say that the  
18 second category is really not relevant to understand the mechanism of loss. So it's  
19 asking for further intragroup contractual arrangements governing the transfer of the  
20 platform service fee. The platform service fee, that's to say the amount paid by  
21 merchants to Temu, to other Temu group entities. We don't see how that's remotely  
22 relevant to the mechanism of loss. But as to 3(a), we have already provided the seller  
23 terms for the Temu platform which contained the contractual provision relating to  
24 interest.

25 As regards the timing of when the payment must be made, in other words, what are  
26 the terms of dealing, when does the payment have to be made by, after how many

1 days? That's surely a question of quantum, sir. It's not a question relevant to  
2 understanding the mechanism. We've made a clear statement of the mechanism of  
3 loss and of the way in which the service fee is satisfied, how it's paid. That's sufficient  
4 at this stage of the process, we would say.

5 THE CHAIRMAN: I'm sorry, I'm still not sure I know your answer to question 4.

6 (Pause)

7 MR HOLMES: So ... (Pause)

8 THE CHAIRMAN: Basically, they want to know or confirm that retained interest  
9 income before being so used is owned legally or beneficiary by X, and if Whaleco's  
10 case is it's not so owned, explain the basis on which the retained interest income is  
11 used to discharge the liability of X. I just want to know -- I'm not sure I'm clear on your  
12 answer to that, of why that can't be said or given.

13 MR HOLMES: Sir, it is a further level of granular detail that we say just isn't necessary  
14 to understand the case. The standard for a request for information is obviously  
15 whether a party can understand the case that is being put against them. In my  
16 submission, the case is clear; it's quite a simple one in relation to the mechanism of  
17 loss. It's the service fee, and the service fee is affected by the level of the service  
18 costs which is affected by GMV. We don't see that this additional detail is helpful or  
19 necessary at this stage of the process.

20 Then I think question 5 has gone now, and so --

21 THE CHAIRMAN: That's not pressed, yes. That's not pressed.

22 MR HOLMES: Yes, and so I think, sir, that is everything.

23 Oh, only just to mention the Shao 6 statement. Sir, this was on the IP side of the case,  
24 so I'm afraid I'm a little bit in the dark about it. But I understand, on instructions, that  
25 the proposed exercise in Shao 6 wasn't undertaken because it was mentioned as  
26 a result of the negligent misstatement case claim which was disallowed, and that

1 apparently has been confirmed by the IP solicitors that are retained on the case by my  
2 client.

3 THE CHAIRMAN: Okay.

4 MR HOLMES: Subject to your questions, that those are my submissions.

5 THE CHAIRMAN: Well, I think that's very helpful. Mr Pascoe, are you going to be  
6 long or do we need a break now? Or are you going to be short, in which case I can  
7 have a break afterwards?

8 MR PASCOE: Sir, I'll be short and give you the break.

9 THE CHAIRMAN: Okay, I agree for the short hand writer, actually. But, yes, that  
10 would be kind of you. Keep it crisp.

11 Reply submissions by MR PASCOE

12 MR PASCOE: Yes, of course.

13 That's been a somewhat helpful and illuminating discussion of what is a single line at  
14 paragraph 69A of the new pleading. There are really two critical points that I say we  
15 can take from that discussion. The first is what comes from paragraph 78 of the  
16 skeleton, that what is meant by the term retained interest is interest that is used to pay  
17 down the distribution or the service fees. It's not correct to say that that was clear from  
18 the face of the pleading at the time that we asked our RFI, and it's a point that should  
19 now be formalised in an RFI response. It shouldn't be for the parties to fish around in  
20 transcripts and correspondence and procedural skeletons to formalise that.

21 But the second point, perhaps more fundamental, is Mr Holmes' confirmation, only  
22 given for the first time today, that this claim is not additive to the claim for distributions  
23 under subparagraph 2, at least in quantum terms. In our submission, the appropriate  
24 course is for Mr Holmes' clients to confirm both of those points in a formal response.

25 That would address, in my submission, both request 1 and request 2.

26 Because what we're not trying to achieve through request 1 is a roving update of the

1 quantum of the claim. What we wanted to know is whether this amendment to the  
2 claim changed the order of magnitude of the quantum claims. Mr Holmes appears to  
3 be confirming that it doesn't, and there's no reason why that shouldn't be confirmed.  
4 That leaves questions 3 and 4, sir. I don't accept, given Mr Holmes' confirmation that  
5 the claim is not additive in terms of the figures, in terms of the quantum claims, that  
6 either or both of those questions fall away. It's no secret that the reason we've been  
7 probing the mechanism of the claim for distributions is to assess whether it's  
8 sustainable in law, and in particular, whether it overcomes the test for remoteness that  
9 Whaleco will need to satisfy.

10 Now, what we don't want to be met with is an argument at some point -- because there  
11 must be some reason that these two heads of claim have been separated -- that  
12 somehow the interest which is used to pay part of these service fees sits in a different  
13 position to the cash that comes from the other group company for remoteness  
14 purposes. Now, we'd say that's a bad argument, but the two heads of loss have been  
15 split out for some reason, and it's possible that we'll face an argument that one could  
16 survive a remoteness challenge even if the other didn't.

17 So on that basis, we say we're entitled to probe whether the interest claim on its own  
18 terms is sustainable, and that's what questions 3 and 4 go to.

19 THE CHAIRMAN: Questions 3 and 4 -- forgive me -- if they confirm what has been  
20 said today by Mr Holmes, and I accept it's been said today, surely that in fact makes  
21 it rather improbable, that you need at the moment questions 3 and 4, or there's some  
22 separate remoteness issue on interest, because it would seem to fall away with what  
23 he said and what they may have to confirm on questions 1 and 2. Surely that follows?

24 MR PASCOE: Well, sir, I'm not sure it does follow. I don't know why the claims have  
25 been split apart. In my submission, we're entitled to probe the separate claim for  
26 interest on its own terms, and these are both relevant questions.

1 THE CHAIRMAN: I see that on the basis of the way it's written in 69A.1 and 69A.2.  
2 I take your point. If you then have a confirmation in terms of an RFI as to how one  
3 reads 69A.1 and .2, and they're not separate claims in the way they look and I take  
4 that on the face. But if you're – if it's explained in an RFI that is not what is meant,  
5 why do you then need 3 and 4?

6 MR PASCOE: Well, because what we have been probing towards is this remoteness  
7 challenge on the basis that the funds go out of the Whaleco entity and come back in  
8 through what is, according to Mr Shao, a discretionary judgment. What we don't want  
9 to face is an argument that that remoteness challenge somehow doesn't apply to funds  
10 which have always sat in Whaleco's bank account and haven't gone round that  
11 merry-go-round. So, in our submission, we're entitled to probe the claim for interest  
12 on its own terms at this stage for that reason, even though it doesn't add anything in  
13 terms of the figures to the overall quantum of the claim.

14 THE CHAIRMAN: I'm sorry, I'm making a short point longer, so apologies to the  
15 shorthand writer.

16 Just so I understand, my difficulty is, is that if it's right that you don't look at (A) and (B)  
17 as separate claims, you say you can still probe (A) for remoteness. But I'm struggling  
18 at the moment to see how you could probe (A) for remoteness to a point where there  
19 is no liability and no loss, which is the only reason, as you started, that this is relevant  
20 at this stage.

21 Because as I understand it, you accept the quantum issues are for later. You  
22 explained that it was for probing, effectively, whether there is no loss -- if I put it that  
23 way -- or almost no loss. From what we've heard today from Mr Holmes, and what  
24 may have to be confirmed, probing the interest element alone for remoteness is not  
25 going to matter for whether there's no loss.

26 MR PASCOE: No, no, sir, I'm not explaining myself. You're exactly right, sir, that we

1 are probing the claim for distributions for a remoteness issue.

2 THE CHAIRMAN: Oh, okay. Yes.

3 MR PASCOE: Because the claim for distributions involves a discretionary payment  
4 made by another group company into Whaleco. That's what Mr Shao's witness  
5 statement says. That's why I say we don't want to just ignore the claim for interest,  
6 even though it's not additive in quantum terms, because what we don't want is  
7 a situation where we challenge the distributions claim on a remoteness basis, but are  
8 left with the interest element of our claims essentially unexplored.

9 THE CHAIRMAN: Right. Your request for -- I misunderstood, seemed to me to be  
10 only probing retained interest.

11 MR PASCOE: Yes, that's right. And it's a separate basis for probing the claimed  
12 interest. It's not looking at a remoteness issue there; we're simply asking, "Is this your  
13 interest?"

14 THE CHAIRMAN: Right.

15 MR PASCOE: And with respect, we don't see any reason why they couldn't answer  
16 that question.

17 THE CHAIRMAN: Right. Okay.

18 MR HOLMES: Sir, I hesitate to interrupt. If it assists to help to cut through this, we  
19 are very happy to give the confirmations in relation to the two critical points identified  
20 by Mr Pascoe, confirming not separate claims and interest not added to the service  
21 fee in the form of a response.

22 THE CHAIRMAN: Thank you. I think we'll pause now, but I think Mr Pascoe's point  
23 is that doesn't, in their view, remove the need for 3 and 4, but I'll think about that over  
24 the break.

25 Okay, if we break for ten minutes. 3.40 pm, if we come back.

26 MR PASCOE: Excellent.

1 MR HOLMES: Thank you, sir.

2 (3.30 pm)

3 (A short break)

4 (3.41 pm)

5 MR HOLMES: For my part, yes.

6 MR PASCOE: Yes, thank you.

7 (3.41 pm)

8

9 **Ruling on quantum RFI application by Shein**

10

11 THE CHAIRMAN: Finally on the applications today, there is Shein's application to

12 have an RFI answered in relation to a number of questions that arise from an

13 amendment to paragraph 69A of the pleading that has been made by Temu.

14 The trial has been split between liability and quantum. Therefore, it is not the

15 appropriate time to include issues about quantum; the parties must focus on liability.

16 Mr Pascoe for Shein submits that the Requests are not concerned with quantification

17 of loss, but relate to whether there was loss at all and whether the claim for loss is

18 strikeable. Both parties accept that at this liability trial, there must be proven some

19 loss. Therefore, it is said by Mr Pascoe that his clients can probe the claim to see if it

20 is sustainable or whether it is strikeable for showing, on its face, no loss. He also says

21 that that issue can be relevant to whether an injunction should be granted as

22 a discretionary remedy; it may factor into the discretion if it can be shown that there is

23 no loss because the claim for loss is strikeable.

24 It seems to me that the issue really came down to how paragraph 69A was pleaded

25 and the amendment made to it. On its face, I agree with Shein that it appears to plead

26 two distinct heads of loss: one being "retained interest" generated from sale proceeds

1 received from customers on Temu's UK sub-page and the other being the service fee  
2 or distribution claim. The first of those was changed by amendment; it was originally  
3 "reduced takings in the UK" rather than "retained interest".

4 That amendment led to the first two requests: first, as to whether the change from  
5 "reduced takings" to "retained interest" might affect the value of the claim and second  
6 being what is meant by "retained interest".

7 In the course of today, things moved on and Mr Holmes KC gave an explanation of  
8 the claim which, as Shein accepted, obviates the need for either Requests 1 or 2.  
9 I agree with Shein that these explanations must be given in an RFI response and that  
10 is what I direct will be done.

11 With that direction, Requests 1 and 2 fall away. That leaves Requests 3 and 4, which  
12 also are directed to the retained interest claim (a matter that is clear from the skeleton  
13 argument of Shein at paragraphs 52.3 and 52.4). As for Request 3, there remained a  
14 suggestion that Shein still needed this information to understand the basis under which  
15 interest is held or, alternatively, disclosure could be given. Request 4 was also  
16 pressed as needing information about ownership of the earned interest.

17 It seems to me that, in light of the information that I have directed will be given by  
18 Temu, these questions no longer satisfy the basis under which they were sought:  
19 being requests to assist in whether or not to strikeout the claim for loss. Based on  
20 what has now been explained by Temu, Shein cannot show that simply probing the  
21 "retained interest" element alone is likely or probable to show no loss. Accordingly, it  
22 does not seem to me that there is necessity at this stage for those questions to be  
23 answered. I am also concerned, having ordered a split trial, that the purpose of that  
24 Order should not be undermined. Already, these issues have generated  
25 a considerable amount of questions and correspondence, some of which I have been  
26 shown. The parties ought to be focusing on the liability aspect, and it has not been

1 shown that requests 3 and 4 are necessary. I decline to order them.

2  
3 (3.48 pm)  
4

5 Housekeeping

6 MR PASCOE: Thank you. That leaves the issue of costs, which was going to be  
7 addressed by Ms Demetriou, so we may need to do some shuffling. Just before we  
8 do --

9 MR HOLMES: Can I -- I'm so sorry, forgive me. I was only going to make a suggestion  
10 in relation to costs, but if there's still some business in relation to the last application,  
11 that's fine.

12 MR PASCOE: Sorry, I'll let Mr Holmes make his suggestion.

13 MR HOLMES: I'm only going to say, sir, we've been considering on our side, and we  
14 think that in the round there have been wins and losses on each side and in the  
15 circumstances, it may not be worth having some lengthy inquisition into costs which  
16 would simply prolong the hearing. So, if we can find common ground on this, we might  
17 simply say that it's costs in the case without needing to trouble you about costs.

18 MR PASCOE: Sir, I was about to make exactly the same submission.

19 THE CHAIRMAN: Well, obviously, I welcome that and so, of course, costs in the case.  
20 One point I will raise now -- I've been thinking about since this morning, and with -- it's  
21 actually, Mr Pascoe, your client's request for permission to appeal the confidentiality  
22 direction.

23 I am concerned about impact on the proceedings going forward, and as I mentioned  
24 to Ms Demetriou, and she confirmed that you would be requesting from the  
25 Court of Appeal expeditiously.

26 It does also seem to me that rather than having the normal three weeks in which to

1 make an application for permission to appeal, particularly on such a short point, it  
2 makes more sense for me to curtail that period, as I am permitted to do, and to say  
3 that any application should be made within seven days -- so before everyone goes off  
4 for Christmas -- by, I think, that's 19 December. That, I think -- I can't see you would  
5 say no to that on the basis that you agree to the expedition, but I think you can  
6 understand my reasoning for why, if that is going to be appealed, we need to get on  
7 with it. Is that opposed? I need to ...

8 MR PASCOE: Sir, you said 19 December, which is in two days? Did you mean the  
9 24th?

10 THE CHAIRMAN: Oh, I may have got my dates wrong on my calendar. Let me have  
11 a look. What is in seven days' time from today?

12 MR HOLMES: It's the 24th.

13 THE CHAIRMAN: 24th. What I'll do is -- the only question I have is whether you can  
14 make an appeal on the 24th. I'm not sure when the Civil Appeals Office closes. Why  
15 don't we say the 23rd? Unless you -- and please say if you think if you want to try and  
16 oppose that, but ...

17 MR PASCOE: Sir, we don't oppose that.

18 THE CHAIRMAN: In that case, I will direct that, and so that any appeal can be heard  
19 as swiftly as we can in the new year and not hold up matters on that basis.

20 I think other than that, I think that's everything for today, isn't it?

21 MR HOLMES: Subject, sir, to -- have you seen the small consequential changes to  
22 the timetable that the parties have proposed in the light of the change to the deadline  
23 for disclosure?

24 THE CHAIRMAN: I did. I must admit, I'm not sure I really focus on it because  
25 I thought it's still a moving feast. Can you just show me where that is, and so  
26 I (overspeaking).

1 MR HOLMES: Yes, I'm not sure of the letter itself. I can just talk you through it by  
2 reference to the original order, if that's convenient. That's tab 9 --

3 THE CHAIRMAN: Okay, because it was at the end of your skeleton, wasn't it? But ...

4 MR HOLMES: Oh, probably. I mean, the long and the short of it is that the dates are  
5 agreed.

6 THE CHAIRMAN: Let me just see. Okay, yes. Could you show me those?

7 MR HOLMES: Yes, so if we could just go to tab 9 of the main bundle, page 152.

8 THE CHAIRMAN: Yes.

9 MR HOLMES: You recall the dates for an appendix to the order, annex 1, so this was  
10 your order from the October CMC. So the proposal is: step I should shift to  
11 9 January 2026; step K to 22 January, just under a week later, that's the draft list of  
12 issues for expert evidence, first draft from the defendant; step L, back until 28 January;  
13 and then step M, the agreed list, would move to 2 February, so three days later. You'll  
14 see that the CMC is then 9 February. So it's a little bit tight, but it should give enough  
15 time for everyone to digest --

16 THE CHAIRMAN: My suggestion is that we liaise with your clerks and my clerk, and  
17 we push back a bit the 9 February CMC. In my experience, having CMCs so close to  
18 matters is actually not helpful, and the idea of a CMC then gets rather negated by last  
19 minute to-ing and fro-ing.

20 So I can't give a date at the moment. Obviously I would like the CMC, I think, to be in  
21 February, but it seems to me a sensible thing to do -- I'll have to check with  
22 everybody's clerks, or someone will -- to have it later in February. I won't say a date  
23 now. If you could liaise -- and we'll list that. 2 February to 9 February I feel is too tight.

24 MR HOLMES: Understood. We'll do so, sir.

25 THE CHAIRMAN: I think it needs to be in February, because otherwise we move into  
26 the March dates. I also think we may have other things to talk about at the end of

1 February, so if you could do that, that would be great. Thank you very much.

2 MR HOLMES: Thank you very much.

3 THE CHAIRMAN: Thank you very much for all your assistance.

4 MR PASCOE: Thank you.

5 THE CHAIRMAN: Thank you. Bye.

6 MR HOLMES: Bye.

7 (3.54 pm)

8 (The hearing concluded)

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### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?