UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Richmond Division

STEVES AND SONS, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3:16-cv-545-REP
JELD-WEN, INC.,	)	
Defendant.	)	

PLAINTIFF STEVES AND SONS, INC.'S REPLY MEMORANDUM
IN SUPPORT OF STEVES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Rather than address Steves' arguments head on, JELD-WEN leads its opposition with an erroneous discussion of the scope of Rule 56 based largely on authority interpreting an obsolete version of that rule. JELD-WEN's focus on a flawed procedural argument speaks volumes about its desire to avoid the real issues here: the burden-shifting framework applicable in all Section 7 cases and the undisputed facts that show that Steves has established its prima facie case.

First, under well-established case law, Steves can prove its prima facie case using just a few facts: a definition of the market, the market shares of the merging parties, and the results of the relevant HHI calculations. Once the prima facie case is established, Steves is entitled to a rebuttable presumption that the merger is likely to have anticompetitive effects. Although additional facts ultimately may prove relevant to JELD-WEN's liability, those facts are for JELD-WEN's rebuttal and later consideration, and are not relevant to the prima facie case.

JELD-WEN responds by refuting a claim Steves has never made: that market shares alone are "sufficient for the jury to find that the merger violated Section 7." (JELD-WEN's Opposition to Steves' Motion for Partial Summary Judgment ("Opp.") at 13.) In fact, Steves does not believe or ask the Court to rule that liability can be based on market concentration alone. But if the Court agrees that Steves has established its prima facie case, Steves is entitled to a rebuttable *presumption* that anticompetitive effects are likely to result from JELD-WEN's acquisition of its rival, while retaining the ultimate burden of persuasion. JELD-WEN ignores the limited relief that Steves requests, and instead knocks down a straw man of its own creation. None of this casts doubt on Steves' clear right to the narrow ruling that it seeks.

Second, Steves has presented the facts it needs to prove its prima facie case, and none is genuinely in dispute. [redacted] JELD-

WEN relies on lawyer argument to attack Professor Shapiro's careful analytical work. But JELD-WEN's arguments only call on Professor Shapiro to conduct analyses he has either already done or that cannot possibly affect the ultimate conclusion here. For example, [redacted] JELD-WEN cannot reasonably expect to contest this issue at trial with manufactured, hypothetical disputes.

Third, JELD-WEN's procedural argument overstates the law. JELD-WEN argues that summary judgment motions addressing part of a claim or defense are not merely improper, but so patently frivolous as to be subject to Rule 11 sanctions. (Opp. at 9.) JELD-WEN primarily relies, however, on case law interpreting the version of Rule 56 in effect before the 2010 amendments. Those amendments added language specifically permitting motions that address "part of [a] claim or defense." Not surprisingly, numerous courts since the amendments have adjudicated motions for partial summary judgment which, like Steves' present motion, seek pre-trial adjudication of a discrete aspect of a claim that does not itself result in judgment as to that claim. The Court should grant Steves' motion.

RESPONSE TO JELD-WEN'S STATEMENT OF FACTS

Steves responds to JELD-WEN's purported disputes of material fact as follows:

4. The evidence JELD-WEN cites does not undermine Steves' original statement. [redacted]. JELD-WEN's cited evidence does not support its assertion [redacted]

[redacted]

Regardless, Steves originally stated [redacted] (Steves' Motion for Partial Summary Judgment ("Mot.") at 3.) [redacted] Thus, even assuming JELD-WEN's evidence established that [redacted]—which it does not—Steves' original statement stands as undisputed fact.

JELD-WEN's statement that doorskin designs vary by manufacturer is irrelevant. Steves' original statement was not intended to, and does not, imply that JELD-WEN, Masonite, and CMI each supplied every variation of doorskin design available in the marketplace in 2012.

5, 6 & 7. It is unclear what part of Steves' original statements JELD-WEN believes to be in dispute. [redacted] Moreover, Steves' original statements were not intended

to, and do not, imply that JELD-WEN, Masonite, and CMI individually supplied every variation of doorskin design existing in the marketplace in 2012.

10. JELD-WEN's citations do not relate to the market as defined. JELD-WEN's "dispute" as to the relevant market appears to be based on a misunderstanding of how the relevant market is defined by Steves' economist. Professor Shapiro defines the market as [redacted] (Mot. at 4 (emphasis added).) [redacted] JELD-WEN also misunderstands the product market, [redacted]

11-20. JELD-WEN claims these facts are disputed because [redacted] (Opp. at 6-7.) To the contrary, Professor Shapiro [redacted]

[redacted]

[redacted] JELD-WEN's arguments about the product market do not create issues of fact for similar reasons addressed elsewhere. (*See supra* at 4 & *infra* at 13-15.) JELD-WEN's arguments about [redacted] but instead are elements of JELD-WEN's rebuttal case not relevant to this motion.

ARGUMENT

I. SUFFICIENTLY HIGH MARKET SHARES COMPEL A PRESUMPTION OF ANTICOMPETITIVE EFFECTS

In an effort to evade the well-established burden shifting framework used in Section 7 cases, JELD-WEN resorts to mischaracterizations of Steves' arguments and of the law.

First, JELD-WEN argues that Steves is prematurely arguing about what the jury instructions in this case should say. (Opp. at 12.) This is not so. Steves' motion does not ask the Court to pre-judge what the jury instructions should be, but merely points out that the jury is unlikely to need significant instruction on issues that are not in dispute, such as market definition, market shares, and the HHIs. Market definition is a highly complex issue, and Steves' motion provides an opportunity to reduce the complexity of the jury instructions and thus the burden on the Court and the jury. The language of those instructions is not raised by Steves' motion.

Second, JELD-WEN argues that market shares and concentrations are insufficient, on their own, to conclusively establish that a merger is anticompetitive and illegal. (Opp. at 14 &

18-19.) But Steves does not argue or ask the Court to rule otherwise. As the Plaintiff, Steves bears the ultimate burden of persuasion under Section 7 of the Clayton Act. *See F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). Instead, Steves asks the Court to rule that Steves has established its prima facie case with undisputed evidence, and is entitled to a presumption in its favor on the question of anticompetitive effects.

Largely ignoring the relief Steves seeks, JELD-WEN repeatedly conflates a presumption of anticompetitive effects (which Steves seeks) and a binding conclusion of such effects (which Steves does not seek). As a result, JELD-WEN's discussion of the applicable case law is largely inaccurate. For example, JELD-WEN cites *Heinz* for the proposition that "market concentration on its own is not enough to establish the [plaintiff's] prima facie case" (Opp. at 19), when *Heinz* says just the opposite. *See Heinz*, 246 F.3d at 716 ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive" and give rise to a presumption). JELD-WEN cites the portion of *Heinz* saying that the resulting presumption alone is not enough to justify injunctive relief, which is entirely consistent with Steves' motion.

Heinz and many other cases show that while Steves cannot conclusively ***prove*** anticompetitive effects based only on market shares, it is entitled to a ***presumption*** in its favor on that issue if it can show that the merger led to a sufficiently large increase in concentration in the relevant market. Steves needs nothing more to qualify for that presumption. *See, e.g., FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016) ("[Plaintiff] can establish a prima facie case simply by showing a high market concentration based on HHI numbers."); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 785 (9th Cir. 2015) ("A prima facie case can be established simply by showing high market share.")

JELD-WEN cites no case that says otherwise. Instead, JELD-WEN points out that some courts had more evidence of anticompetitive effects at the time they applied the presumption. (Opp. at 14.) That may be so, but it does not establish that anything more was *needed*, and the cases themselves explicitly say that it was not. For example, in *Tasty Baking Co. v. Ralston Purina, Inc.*, the Court discussed the HHI figures and then stated, "***Nothing else need be shown*** to demonstrate that defendants' acquisition impermissibly creates a probable anticompetitive effect." 653 F. Supp. 1250, 1265 (E.D. Pa. 1987) (emphasis added). The court then shifted the burden to the Defendant to show some reason why "the market-share statistics give an inaccurate account of the acquisition's probable effects on competition." *Id.* at 1264 (alterations and internal quotation marks omitted). Similarly, JELD-WEN insists that the plaintiffs in *St. Alphonsus* had more than HHI figures to support their prima facie case, but the court was clear that the plaintiffs did not *need* anything more, writing: "The extremely high HHI ***on its own*** establishes the prima facie case." 778 F.3d at 788 (emphasis added); *see also AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 574 (7th Cir. 1999) (large HHI increases were sufficient "to warrant a preliminary injunction").[2]

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[2] *Remington Products, Inc. v. N. American Phillips Corp.*, 717 F. Supp. 36, 44 (D. Conn. 1989), cited by JELD-WEN, is not to the contrary. The issue the court struggled with in *Remington Products* was not whether high market shares give rise to a presumption of anticompetitive effects, but whether high market shares alone can establish antitrust injury. *See Remington Prods. Inc. v. N. Am. Phillips Corp.*, 755 F. Supp. 52, 58 (D. Conn. 1991).

JELD-WEN's additional cases—*Hart Intercivic, Inc. v. Diebold, Inc.*, No. 09-678, 2009 WL 3245466 (D. Del. Sept. 30, 2009), and *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 492-93 (5th Cir. 1984)—address different elements of a plaintiff's case under Section 7 and do not hold that a plaintiff is required to produce evidence beyond a showing of a large increase in market concentration in order to make out a prima facie case.

At trial, JELD-WEN is free to offer whatever admissible evidence it thinks will rebut the presumption of anticompetitive effects. But the fact that the presumption is rebuttable and does not relieve Steves of its ultimate burden of persuasion does not mean that the presumption does not exist, let alone that the court will commit "reversible error" by properly applying it.

Third, JELD-WEN incorrectly relies on the *Brunswick* case to threaten that this Court will be reversed if it gives "the instruction Steves seeks." (Opp. at 16.) *Brunswick* involved a vertical merger, not a horizontal merger as is involved here. Moreover, the merging companies did not compete, so the merger did not increase market concentrations at all. *See NBO Indus. Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262, 275 (3d Cir. 1975) ("Brunswick's entry into the picture did not increase concentration, but only acted as a substitution of competitors."), *rev'd on other grounds*, 429 U.S. 477 (1977). Nonetheless, the district court instructed the jury that "high market shares and significant increases in concentration may be sufficient in itself to establish a violation of Section 7." *Id.* at 274.

Brunswick is not relevant here. Steves has not sought any jury instruction and, if it does, it will not match the one used in *Brunswick*. Market concentration alone cannot establish liability under Section 7, even in a horizontal merger, and Steves will not ask that the jury be instructed otherwise. And *Brunswick* does not cast doubt on the importance of market concentrations in cases involving a horizontal merger like the one here. The case explicitly distinguished horizontal merger cases from its holding. *See id.* at 275 (noting that "the quantitative substantiality of the market shares is important in a case involving a merger of horizontal competitors"). In sum, even if *Brunswick* had some binding power on this court (and it does not), nothing in that decision impugns Steves' ability to obtain the limited summary judgment ruling it seeks here.

Fourth, JELD-WEN argues that the Horizontal Merger Guidelines require more than high HHI figures "before the factfinder can deem a merger anticompetitive." (Opp. at 17.) But again, Steves does not ask the Court to determine whether the merger is conclusively anticompetitive; it asks only for the legal presumption in its favor. The Merger Guidelines expressly support that presumption, in harmony with the law discussed above.[3] JELD-WEN then claims that Professor Shapiro "agrees" with JELD-WEN's views on market shares because he purportedly wrote in 2010 that, "[a]s economic learning and practice evolved, emphasis on market shares became less helpful." (Opp. at 2.) It is hard to see how this is relevant to the legal questions presented in Steves' motion. In any case, JELD-WEN has misquoted Professor Shapiro, who actually wrote, "As economic learning and practice evolved, the emphasis on market shares ***found in Section 2.21 of the 1992 Guidelines*** became less helpful to achieve transparent and accurate merger enforcement ***using a unilateral-effects theory***." (Emphasis added).[4] Steves is not asking the Court to apply the 1992 guidelines, which had a substantially lower HHI threshold for the

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[3] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 2.1.3 (Aug. 19, 2010) ("*Merger Guidelines*") ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.").

JELD-WEN also cites a 2006 Commentary on the Merger Guidelines for the idea that market concentration does not matter in unilateral effects cases. (Opp. at 18.) Of course, that commentary has no force of law, but it would not matter if it did. The document pre-dates the current Merger Guidelines (updated in 2010), and the current guidelines do not make this distinction when applying the presumption. *See Merger Guidelines* § 5.3. In any case, the comment is irrelevant here because this case involves both unilateral and coordinated effects.

[4] JELD-WEN purports to quote Professor Shapiro twice. (Opp. at 2 & 18.) In both instances, JELD-WEN omits the obvious and significant reference to the outdated 1992 guidelines. In one place, JELD-WEN inserts ellipses to indicate that it edited the quote. (Opp. at 18.) In another, it simply edits the quote without indicating that it did so. (Opp. at 2.)

presumption of anticompetitive effects,[5] and [redacted] While JELD-WEN is free to ask Professor Shapiro about this passage at trial, it is simply not relevant to Steves' motion.

Finally, JELD-WEN claims that it would again be "reversible error" to apply the presumption here because the DOJ previously reviewed the merger. (Opp. at 19.) This argument is a *non sequitur*. For one thing, evidence concerning the prior DOJ investigations is not admissible; the government's decision not to act is irrelevant to whether the merger has likely anticompetitive effects. (*See* Mot. at 10 n.6.) But admissibility aside, prior government review of a merger does not alter the fundamental legal framework applicable to Section 7 claims. Certainly, JELD-WEN nowhere contends, nor could it, that the government's discretionary decision not to challenge the merger is somehow *evidence* that the merger did not result in HHI calculations sufficient to establish a prima facie case of anticompetitive effects.

II. JELD-WEN'S EFFORTS TO MANUFACTURE A FACTUAL DISPUTE FAIL

[redacted] So JELD-WEN resorts to lawyer argument, with a sprinkling of largely irrelevant factual citations, hoping to manufacture a factual dispute where none exists. None of JELD-WEN's arguments casts doubt on Steves' motion.

Non-expert evidence can be relevant to market definition, but courts are skeptical of efforts to address market definition without expert analysis. *See, e.g., Cogan v. Harford Mem'l Hosp.*, 843 F. Supp. 1013, 1020 (D. Md. 1994) ("Cogan must provide the Court with expert

[5] The 1992 Horizontal Merger Guidelines applied a presumption of anticompetitive effects where post-merger HHIs exceeded 1800 and the merger produced an HHI increase of 100 points. U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 1.51(c) (Apr. 2, 1992).

testimony on this highly technical economic question."); *Berlyn v. Gazette Newspapers, Inc.*, 223 F. Supp. 2d 718, 727 & n.3 (D. Md. 2002) ("As a practical matter . . . it would seem impossible to prove such a complex economic question without the assistance of a qualified expert, *viz.*, an economist."). JELD-WEN's arguments here show why such skepticism is appropriate.

First, JELD-WEN claims that Steves defines the geographic market "as the United States," and thus improperly excludes foreign suppliers. (Opp. at 22.) But Steves' market is defined as [redacted] as JELD-WEN appears to think. (Shapiro Rep. at 12 (emphasis added).) Professor Shapiro explains in his report that [redacted] JELD-WEN has no evidence to dispute that conclusion; it merely argues that [redacted] (Opp. at 22.) [redacted] is not relevant to the present motion because disproving the possibility of future entry is not part of Steves' prima facie case. *See FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991) (explaining that "ease of entry into the market" is not within plaintiff's prima facie case, but is an aspect of defense rebuttal); *see United States v. Anthem, Inc.*, 855 F.3d 345, 368 (D.C. Cir. 2017) (discussing entry as "rebuttal evidence," and noting that entry is not meaningful unless it "would offset the merger's anticompetitive potential"). JELD-WEN can present its entry-related

argument at trial, where Steves will show that potential foreign suppliers cannot ameliorate the anticompetitive effects of the merger.

In any event, [redacted] JELD-WEN has no evidence to dispute this analysis.

Second, JELD-WEN argues that Steves' "product market definition appears to be limited to the exact bundle of doorskin designs that it purchases from JELD-WEN." (Opp. at 23-24.) [redacted]

Professor Shapiro discusses [redacted] because those facts are relevant to other issues.

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[6] In a footnote, JELD-WEN argues that Professor Shapiro's market definition is wrong "to the extent that it is comprised of JELD-WEN's current range of doorskins as a whole." (Opp. at 24 n.6.) [redacted]

For example, [redacted] But again, this issue of potential entry is part of JELD-WEN's rebuttal case and does not impact Steves' motion.

Third, JELD-WEN claims that Professor Shapiro should have analyzed whether "certain doorskin designs are reasonably interchangeable with other doorskin designs" or belong in their own submarket. (Opp. at 26.) This misunderstands how market definition works. "The Supreme Court . . . has held that groups of non-interchangeable products and services may be aggregated to form a single relevant market." *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1204 (9th Cir. 1997) (citation omitted); *see also In re Pool Prods. Antitrust Litig.*, 940 F. Supp. 2d 367, 378-79 (E.D. La. 2013) (listing examples). The fact that there might also be alternative ways to define the market for individual products does not mean that the market as proposed is defective, let alone that the likelihood of anticompetitive effects in that proposed

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[7] [redacted]

market should be ignored. *See United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360 (1970) ("[S]ubmarkets are not a basis for the disregard of a broader line of commerce that has economic significance."); *accord Anthem*, 855 F.3d at 350-51, 367 (affirming that anticompetitive effects in smaller geographic market within a larger relevant geographic market are "independent and alternative" reason to bar merger). The standard analytical approach used to test a candidate market—the hypothetical monopolist test—"does not lead to a single relevant market." *Merger Guidelines* § 4.1.1. Instead, the test takes one candidate market and determines whether it can be reliably used to evaluate the potential for anticompetitive effects. *Id.*

To challenge Professor Shapiro's candidate market, JELD-WEN needs to do more than hypothesize that other relevant markets exist; it needs to show that Professor Shapiro's market is faulty. JELD-WEN has not done that, and cannot create a dispute of material fact simply by suggesting that Professor Shapiro could have done his analysis in a slightly different way.[8] Were it otherwise, antitrust defendants could prevail merely by suggesting, with no economic support or evaluation, a hypothetical market that was not specifically analyzed by the plaintiff's expert.

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[8] [redacted] This is a quintessential example of JELD-WEN substituting attorney argument for economic analysis. The bounds of the market are defined by price elasticities, not merely differences in price, *see Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."), and JELD-WEN has no evidence or analysis to address that relevant issue. In any event, [redacted] JELD-WEN cites no other evidence to suggest that submarkets exist here.

But even if the Court accepted JELD-WEN's argument, it would not change the outcome. [redacted] In other words, had JELD-WEN asked its expert to conduct and disclose the analysis JELD-WEN proposes, rather than simply hypothesizing about the outcome, it would have reached the same conclusion Professor Shapiro reached.

Finally, JELD-WEN asks the Court to apply *United States v. General Dynamics*, 415 U.S. 486 (1974), to Steves' prima facie case, and require Steves to refute JELD-WEN's argument that "evidence of market concentration based on past production does not give an accurate picture of a supplier's future ability to compete where sales are made under long-term requirements contracts." (Opp. at 27.) JELD-WEN's argument is wrong, but the issue is not relevant to this motion because these issues are part of JELD-WEN's rebuttal case, not Steves' prima facie case. *See United States v. Marine Bancorp.*, 418 U.S. 602, 631 (1974) (citing *General Dynamics* to illustrate issues which may rebut the prima facie case).[9] Supreme Court opinions discussing *General Dynamics* make clear that the prima face case requires nothing more than high market

[9] Although unnecessary for the purposes of this motion, *General Dynamics* is not applicable here. In *General Dynamics*, the acquired company had not only committed its existing coal reserves to contracted customers, but also had "neither the possibility of acquiring more (reserves) nor the ability to develop deep coal reserves." 415 U.S. at 503. The combination of these factors made the company an unlikely future competitor. [redacted]

shares resulting from the merger. *See id.* ("[B]y introducing evidence of concentration ratios of the magnitude of those present here the Government established a prima facie case.").[10]

III. STEVES' MOTION IS PROCEDURALLY PROPER

JELD-WEN's leading objection to Steves' motion is not substantive, but procedural. Relying primarily on cases decided before the 2010 amendments to Rule 56, JELD-WEN argues that the motion is improper because Steves does not seek summary judgment on its entire antitrust claim. (Opp. at 8.)

JELD-WEN is wrong. The plain text of current Federal Rule of Civil Procedure 56(a) authorizes a party to seek summary judgment on "part of [a] claim or defense." This "permits a court to dispose of less than an entire claim or defense, including a particular issue within a claim or defense, or a particular element of a claim or defense." *Delanda v. Cty. of Fresno Dept. of Probation*, No. 10-cv-1857, 2012 WL 253190, at *2 (E.D. Cal. Jan. 25, 2012); *see also BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) (in contrast to Rule 12(b)(6), which "doesn't permit piecemeal dismissals of *parts* of claims," "[t]he Federal Rules of Civil Procedure explicitly allow for '[p]artial [s]ummary [j]udgment'" (emphasis and alterations in original)); *Servicios Especiales Al Comercio Exterior v. Johnson Controls, Inc.*, 791 F. Supp. 2d 626, 632 (E.D. Wis. 2011) (Rule 56(a) allows a party to move for "an issue-narrowing adjudication").

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[10] Under the Merger Guidelines, "rapid entrants" can be considered part of the relevant market at the time of a merger "if they can easily and rapidly begin selling." *Merger Guidelines* § 5.1. Potential foreign doorskin suppliers clearly should not be considered "rapid entrants" in this case.

[redacted]

The 2010 amendments to Rule 56 were intended to reinforce this very point. The current rule reads: "A party may move for summary judgment, identifying each claim or defense—*or the part of each claim or defense*—on which summary judgment is sought." (Emphasis added). As the Advisory Committee Notes accompanying the 2010 amendments explain, the italicized language was "added to make clear at the beginning that summary judgment may be requested *not only as to an entire case but also as to a claim, defense, or part of a claim or defense*." Fed. R. Civ. P. 56(a) advisory committee's note to 2010 amendment (emphasis added).

In accord with this clear language, courts routinely entertain and grant partial summary judgment motions as to discrete parts of claims that do not themselves establish the *entirety* of any of the plaintiff's causes of action. For example, in *United Food & Commercial Workers Local 1776 v. Teikoku Pharma USA, Inc.*, No. 14-md-02521, at *1, 37 (N.D. Cal. Nov. 3, 2017), the court granted a Sherman Act plaintiff's motion for partial summary judgment that was limited to establishing the relevant market definition and the existence of a "contract, combination, or conspiracy." Similarly, in *Delanda*, 2012 WL 253190 at *6, the court granted the plaintiff's motion for partial summary judgment that the plaintiff's removal from an auxiliary instructional position constituted an adverse employment action for purposes of his retaliation claims. In *Lester v. SMC Transport, LLC*, No. 7:15CV00665, 2016 WL 4595696, at *7-9 (W.D. Va. Sept. 2, 2016), the court granted in part a motion for partial summary judgment to establish a defendant's vicarious liability for the acts of its employees. And in *In re SemCrude, L.P.*, No. 08-11525, 2012 WL 694505, at *1, 3 (Bankr. D. Del. Mar. 1, 2012), the court granted a

creditor's motion for partial summary judgment establishing that it had a perfected security interest in and lien on the proceeds of certain oil sold to the debtor.[11]

Such cases are not rare, particularly within the Fourth Circuit. *See, e.g.*, *Harmon v. United States*, No. PX 15-2611, 2017 WL 4098742, at *4, 16 (D. Md. Sept. 15, 2017) (granting in part plaintiff's motion for partial summary judgment to establish violation of standard of care element of medical malpractice claims); *Franklin v. K-Mart Corp.*, 997 F. Supp. 2d 453, 454, 462 (W.D. Va. 2014) (same); *see also Moore v. State Farm Mut. Auto. Ins.*, No. 15-CV-01058, 2017 WL 2569733, at *1 (C.D. Ill. June 13, 2017) (granting defendant partial summary judgment as to portion of plaintiff's retaliation claim related to particular assault and battery incident); *Servicios Especiales*, 791 F. Supp. 2d at 627-28, 632 (considering motion for partial summary judgment to establish agency relationship between defendant and another entity; denying motion due to presence of issues of disputed material fact). This was true even before Rule 56(a) was favorably amended. *See, e.g.*, *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 520 (4th Cir. 2003) (affirming grant of partial summary judgment precluding copyright plaintiff from recovering certain categories of the defendant infringer's profits as damages); *Rotorex Co., Inc. v. Kingsbury Corp.*, 42 F. Supp. 2d 563, 570-71, 574 (D. Md. 1999) (granting in part plaintiff's motion to establish the governing terms of the parties' contract); *Blizzard v. Nat'l R.R. Passenger Corp.*, 831 F. Supp. 544, 545 (E.D. Va. 1993) (Payne, J.) (granting third-party plaintiffs' motion

[11] Even JELD-WEN concedes that motions for partial summary judgment are permissible to the extent they are "determinative of liability or damages for any period." (Opp. at 8-9.) But this concession demonstrates the fallacy of JELD-WEN's cramped interpretation of the Rule. Motions seeking to limit liability or damages to particular periods of time do not resolve the entirety of any particular claim. Neither the text of Rule 56(a), nor the Committee Notes accompanying the Rule, suggests why such motions should be permissible, but motions directed to other discrete issues, such as those decided in the cases cited above, should not be.

for partial summary judgment to establish third-party defendant's status as a successor to a defunct corporation). According to JELD-WEN, all of these cases were wrongly decided.

Unsurprisingly, this is not so. The cases on which JELD-WEN relies, none of which is binding on this court, are either outdated, unpersuasive, or both. Remarkably, JELD-WEN relies heavily on three cases—*SFM Corp. v. Sundstrand Corp.*, 102 F.R.D. 555 (N.D. Ill. 1984), *Collins v. Cottrell Contracting Corp.*, 733 F. Supp. 2d 690 (E.D.N.C. 2010), and *Doty v. Sun Life Assurance Co. of Canada*, No. H-07-3782, 2009 WL 3046955 (S.D. Tex. June 30, 2009)—which pre-date the 2010 amendments to Rule 56.[12] Multiple courts have recognized that older cases holding that motions for partial summary judgment are improper under Rule 56(a), to the extent they ever reflected prevailing practice, are no longer good law. *See, e.g.*, *Tampa Bay Water v. HDR Eng'g, Inc.*, No. 08-CV-2446, 2011 WL 3101803, at *4 n.6 (M.D. Fla. July 25, 2011) ("[T]he Court questions the continued viability of pre–2010 case law discussing the propriety of partial summary judgment."); *Isovolta Inc. v. ProTrans Int'l, Inc.*, 780 F. Supp. 2d 776, 779 (S.D. Ind. 2011) (rejecting argument that motion for partial summary judgment to establish duty of care was procedurally improper; pre-2010 cases on which defendant relied "no longer represent good law"); *see also SemCrude*, 2012 WL 694505 at *3 ("Since the [2010] amendments . . . the argument that summary judgment is not proper for a portion of a single claim has lost its pluck.").

While some post-2010 cases support JELD-WEN's view, they do not represent the modern majority view and in any case have no binding effect. For example, *William Powers v. Emcon Associates, Inc.*, No. 14-cv-03006, 2017 WL 4102752, at *1-2 (D. Colo. Sept. 14, 2017), relied largely on pre-2010 case law and did not consider the effects of the 2010 amendments to

[12] The amendments took effect on December 1, 2010. *Collins* was decided on August 5, 2010.

Rule 56(a). Meanwhile, the court in *Moses H. Cone Memorial Hospital Operating Corp. v. Conifer Physician Services, Inc.*, No. 13CV651, 2017 WL 1378144, at *5 (E.D.N.C. Apr. 11, 2017), acknowledged that "[p]artial summary judgment is permitted," even though it concluded that the defendant's particular summary judgment motion—which sought to eliminate several factual bases for a breach of contract claim—would "not serve the best interest of justice."

Moreover, Steves is not seeking merely a "'pruning' [of] factual allegations" related to its antitrust claim. (Opp. at 10.) Rather, Steves seeks a conclusive adjudication that it has met its burden of establishing the first step in a well-defined burden-shifting scheme. Whether Steves has established its prima facie case is discrete and legally consequential; a ruling in Steves' favor will both shift the burden to JELD-WEN to rebut Steves' prima facie case and will remove a set of issues—namely, market definition, market share, and market concentration—from the jury's assignment. Steves is not asking the Court "to piecemeal and separately decide" individual facts. *Moses H. Cone*, 2017 WL 1378144 at *5. Instead, Steves is asking the Court to adjudge that it has met its burden to establish a prima facie case under Section 7 as a matter of law. *Accord Servicios Especiales*, 791 F. Supp. 2d at 632 (observing that even if Rule 56(a) did not permit partial motions for summary judgment for "an order declaring a lack of dispute as to a pure question of fact," motion to establish legal issue of agency status was proper).

Finally, JELD-WEN's argument that Steves may not seek relief under Rule 56(g) because such relief is available only in connection with a proper Rule 56(a) motion (Opp. at 11-12) collapses together with its Rule 56(a) argument. For the reasons stated above, Steves *has* brought a proper motion under Rule 56(a).

CONCLUSION

For the foregoing reasons, Steves respectfully requests that the Court grant Steves' Motion for Partial Summary Judgment.

Dated: November 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2017, I caused a copy of the foregoing to be electronically filed using the CM/ECF system, which will send notification to counsel of record of such filing by operation of the Court's electronic system. Parties may access this filing via the Court's electronic system. Additionally, the sealed documents have been provided to counsel of record via email.

By /s/Lewis F. Powell III
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