

EXHIBIT 9

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

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

**STEVES AND SONS, INC.’S FACTUAL CONTENTIONS AND
TRIABLE ISSUES OF FACT**

Steves and Sons, Inc. contends that:

1. The effect of Defendant JELD-WEN, Inc.’s October 2012 acquisition of CraftMaster Manufacturing, Inc. (“CMI”) (the “2012 Merger”) may be substantially to lessen competition or tend to create a monopoly.
2. There is a relevant market for interior molded doorskins used in the United States.
3. The 2012 Merger has already substantially lessened competition or tended to create a monopoly in the market for interior molded doorskins used in the United States.
4. The 2012 Merger is likely in the future to substantially lessen competition or tend to create a monopoly in the market for interior molded doorskins used in the United States.
5. Steves was injured as a result of the 2012 Merger, the 2012 Merger was a material cause of that injury, and Steves’ injury is of the type the antitrust laws were intended to prevent.
6. The 2012 Merger threatens to cause injury to Steves of the type that the antitrust laws were intended to prevent.

7. In 2012, three companies—JELD-WEN, CMI, and Masonite Corporation—supplied all or nearly all of the interior molded doorskins used in the United States. JELD-WEN had a market share of approximately 38%, while Masonite had a market share of approximately 46%, and CMI had a market share of approximately 16%.¹

8. As a result of the 2012 Merger, the Herfindahl-Hirschman Index (“HHI”) measure of market concentration increased by approximately 1213, going from 3820 to 5033.² Given the magnitude of the increase and the resulting HHI, the 2012 Merger is *presumed* to have anticompetitive effects.

9. There have been numerous anticompetitive effects, both unilateral and coordinated, since the 2012 Merger. These include, but are not limited to:

a. *Increased prices.* JELD-WEN has forced its customers that do not have the protection of long-term agreements to accept substantial price increases. JELD-WEN has used its market power to renegotiate its long-term contracts with other doorskin customers to charge those customers significantly higher prices. JELD-WEN sought to impose such a price increase on Steves. When Steves refused to accept a price increase that was inconsistent with the parties’ long-term supply agreement (the “Supply Agreement”), JELD-WEN increased its prices to Steves by other means, such as by violating the Supply Agreement’s price formula and charging Steves extra-contractual prices for certain doorskin designs.

¹ These market shares are measured in terms of units sold. Market shares as measured by revenue are not materially different, resulting in approximate market shares of 40%, 43%, and 17% for JELD-WEN, Masonite, and CMI respectively.

² When calculated using revenue-based measures of market share, the HHI increased by approximately 1361, from 3737 to 5098.

b. *Decreased quality.* After the 2012 Merger, JELD-WEN reduced the quality of its doorskins. JELD-WEN also began to impose onerous credit request procedures, made threats to charge for inspections of defective products, and discouraged and rejected warranty claims.

c. *Termination of Long-Term Supply Agreement.* JELD-WEN has served a notice of termination of the Supply Agreement. Although the Supply Agreement provides that it can be terminated only with seven years notice, JELD-WEN has taken the position that it can terminate the agreement with only five years notice. JELD-WEN's bargaining position and its ability to terminate the Supply Agreement was strengthened by the 2012 Merger because, as a result of the 2012 Merger, JELD-WEN is Steves' only source for the full range of doorskins Steves needs to compete.

d. *Coordinated effects:* In 2014, Masonite publicly announced that it would cease selling interior molded doorskins to external customers. Masonite now sells interior molded doorskins only in small quantities to a small set of customers active in markets segments in which Masonite does not compete, and not pursuant to long-term supply agreements. Masonite's announcement functioned as a signal to JELD-WEN that it too could cease to sell doorskins to external customers, raise prices to external customers, or otherwise make it difficult or impossible for those external customers to compete effectively against JELD-WEN and Masonite in the downstream market for doors. JELD-WEN monitored Masonite's statements and received Masonite's signals. JELD-WEN and Masonite have an incentive to coordinate on sales of doorskins to independent door manufacturers because, by hurting or destroying these manufacturers, Masonite and JELD-WEN are positioned to take over these manufacturers' market share.

The 2012 Merger made it easier for Masonite and JELD-WEN to coordinate because it eliminated CMI from the market.

10. These anticompetitive effects have damaged competition overall, as well as Steves in particular. Among other things, Steves has been damaged by higher prices and decreased quality, as have JELD-WEN's other customers for interior molded doorskins. Steves has also been harmed by loss of choice in the market, which makes it dependent on few remaining producers of interior molded doorskins.

11. The 2012 Merger is also likely to result in further anticompetitive effects in the future. For instance, JELD-WEN has expressed its intention to cut off doorskin supplies to all external customers, there will be continued opportunities for coordinated interaction between Masonite and JELD-WEN, and the lack of alternative doorskin supply options will allow JELD-WEN to continue to charge supra-competitive prices while lowering doorskin quality.

12. Steves is facing the imminent threat of future loss or damage. The current doorskin supply agreement between JELD-WEN and Steves will terminate in September 2021. At that time, Steves will no longer have a secure, reliable source of interior molded doorskins capable of fulfilling Steves' commercial needs. Without such supply, Steves will be forced out of business and will suffer future lost profits as a result. Even before Steves loses its doorskin supply entirely, it will likely lose profits as a result of door customers abandoning Steves based on the insecurity of Steves' doorskin supply.

13. JELD-WEN cannot demonstrate that the anticompetitive effects of the 2012 Merger have been deterred by the prospect of current or future entry into the market for interior molded doorskins used in the United States. In the five years since the 2012 Merger, no new competitor has entered the market in a manner sufficient in character, magnitude, and scope to deter or

counteract the 2012 Merger's anticompetitive effects. Nor can JELD-WEN demonstrate that future entry into the market for interior molded doorskins used in the United States will be timely, likely, and sufficient in its magnitude, character, and scope to deter the future anticompetitive effects of the 2012 Merger.

14. JELD-WEN cannot demonstrate that CMI's doorskin-producing assets would have exited the market had they not been acquired by JELD-WEN such that the anticompetitive effects of the 2012 Merger would have occurred even absent the 2012 Merger.³ There is no basis to conclude that in 2012 CMI would have been unable to continue to meet its financial obligations, that it would not have been able to reorganize in bankruptcy should it have become unable to meet its financial obligations, and that it could not have been sold to an alternative buyer. Nor is there any basis to conclude that CMI would have been a less effective competitor after 2012 than it had been in the past.

15. Steves is entitled to recover damages for the injury it has suffered and the injury that is the likely consequence of JELD-WEN's unlawful acquisition of CMI. These damages include damages suffered as a result of increased prices and decreased quality, and damages Steves will likely suffer in the future in the form of future lost profits.

16. The parties stipulate that the Supply Agreement is a valid and enforceable contract under which JELD-WEN agrees to sell interior molded doorskins to Steves, and Steves agrees to purchase interior molded doorskins from JELD-WEN, in accordance with the Supply Agreement's terms and conditions.

³ For the reasons stated in Steves' Motion in Limine to Exclude Evidence or Argument that CMI Would Have Exited the Doorskin Market Had it Not Been Acquired by JELD-WEN (ECF No. 502), the Court should not permit JELD-WEN to advance a "failing firm" defense.

17. Since the 2012 Merger, JELD-WEN has breached and continues to breach multiple provisions of the Supply Agreement in a variety of ways. JELD-WEN's contractual breaches have caused Steves substantial damages.

18. JELD-WEN has breached the Supply Agreement by overcharging Steves for its doorskin purchases in violation of the Supply Agreement's price term. JELD-WEN has pursued several methods for overcharging Steves, including a) manipulating the Supply Agreement's price adjustment mechanism, and b) refusing to sell certain doorskin designs to Steves at contract prices.

- a. The Supply Agreement contains a formula used to recalculate doorskin prices annually based on changes in JELD-WEN's costs for certain specified key inputs. JELD-WEN has manipulated its key input cost data to impose higher doorskin prices on Steves than would have otherwise resulted if JELD-WEN had honestly calculated the annual price changes using its actual key input costs.
- b. JELD-WEN has refused to sell certain doorskin designs to Steves, namely the Madison and the Monroe, at contract prices. Instead, it has charged Steves substantially more than the contract price for those products, contending that they are not covered by the Supply Agreement's price term.

19. As a result of JELD-WEN's overcharges in violation of the Supply Agreement, Steves has been forced to pay more for doorskins than is required under the contract.

20. JELD-WEN has breached the Supply Agreement and its associated warranties by its sale and delivery to Steves of doorskins that are defective and do not meet the requirements of the Supply Agreement's quality term.

21. JELD-WEN has breached the Supply Agreement and its associated warranties by refusing to inspect and properly credit Steves for its damages caused by the defective JELD-WEN doorskins.

22. In the Supply Agreement, JELD-WEN expressly warrants that it will sell and deliver to Steves doorskins “of a quality satisfactory to Steves, meeting JELD-WEN’s specifications, fit for the intended purpose, and subject to JELD-WEN’s standard written warranty applicable to the Product.” JELD-WEN has breached this express warranty through its sale and delivery to Steves of defective doorskins, and its refusal to inspect and properly credit Steves for its damages caused by the defective JELD-WEN doorskins.

23. As a contract for the sale of goods, the Supply Agreement contains an implied warranty of merchantability, under which JELD-WEN warrants that the doorskins that it will sell and deliver to Steves pursuant to the Supply Agreement are: passable without objection in the trade under the contract description; fit for their ordinary purpose; within the variations of kind, quality, and quantity permitted by the contract; adequately contained, packaged, and labeled; and in conformity with any factual promises or affirmations made on the container or label. JELD-WEN has breached the implied warranty of merchantability through its sale and delivery to Steves of defective doorskins, and its refusal to inspect and properly credit Steves for its damages caused by the defective JELD-WEN doorskins.

24. Steves has suffered damages as a result of the defective doorskins sold and delivered to it by JELD-WEN, and JELD-WEN’s refusal to inspect and properly credit Steves for its losses caused by those defective JELD-WEN doorskins. In some instances, Steves discovered obviously defective, and therefore unusable, doorskins before they were incorporated into doors. In other instances, Steves unknowingly manufactured and sold doors made with defective

doorskins to its own customers. In those situations, Steves learned of the defects only when its customers submitted warranty claims for the defective doors and Steves was forced to credit them for the purchase price of the doors.

25. Depending on the scenario, Steves has sought credit from JELD-WEN for the amount it paid for the defective doorskins or the amount Steves was forced to refund or credit its own customers for doors Steves sold to them that were rendered defective by defective JELD-WEN doorskins.

26. Beginning in 2012 and continuing through the present, Steves has provided commercially reasonable notice to JELD-WEN of its concerns regarding the degradation in quality of JELD-WEN's interior molded doorskins, the reduction in protective packaging, and the many thousands of defective doorskins that JELD-WEN has sold and shipped to Steves over the life of the contract. JELD-WEN was and remains aware of the quality issues with its doorskins, both from the complaints and warranty claims of JELD-WEN's own door manufacturing plants as well as those made by Steves and other independent door manufacturers that purchase doorskins from JELD-WEN.

27. In response to Steves' persistent quality complaints and requests for credit for defective product, JELD-WEN implemented a slower and more onerous claims inspection process.

28. Although JELD-WEN has reimbursed Steves for many of the defective doorskins for which Steves sought credit, it has refused to issue Steves any credit for many others. Even when JELD-WEN has issued refunds, it has often refused to reimburse Steves for the full amount of Steves' damages.

29. JELD-WEN has breached the Supply Agreement by wrongfully attempting to accelerate its termination date by twenty-one months earlier than permitted by the Supply Agreement's termination provision.

30. JELD-WEN has breached the Supply Agreement by attempting to force Steves to accept extra-contractual price increases and other changes to the contract's terms and conditions.

31. Steves has fully complied with its obligations under the Supply Agreement and is prepared to continue to perform its contractual obligations.

Triable issues of fact:

1. Is there a relevant market consisting of interior molded doorskins used in the United States?⁴

2. What were the market shares of JELD-WEN, Masonite, and CMI immediately prior to the 2012 Merger?

3. Immediately prior to the 2012 Merger, what was the Herfindahl-Hirschman Index ("HHI") measure of market concentration?

4. By how much did the HHI increase as a result of the 2012 Merger?

5. Is the 2012 Merger presumed to substantially lessen competition?

6. Did the 2012 Merger result in anticompetitive effects, including, but not limited to, higher prices, reduced quality, early termination, and/or coordinated interaction between JELD-WEN and Masonite?

⁴ For the reasons stated in Steves' Motion for Partial Summary Judgment (ECF No. 382), Steves contends that there are no disputed facts or triable issues regarding market definition, market shares, market concentration, and the presumption that JELD-WEN's acquisition of CMI will substantially lessen competition.

7. Is the 2012 Merger likely to result in future anticompetitive effects, including, but not limited to, higher prices, reduced quality, decreased output, and/or coordinated interaction between JELD-WEN and Masonite?
8. Did the 2012 Merger cause injury to Steves of the type that the antitrust laws were intended to prevent?
9. Does the 2012 Merger pose the threat of likely future injury to Steves of the type that the antitrust laws were intended to prevent?
10. Have the anticompetitive effects of the 2012 Merger been deterred or counteracted by entry or the likelihood of future entry?
11. Does proof that CMI's doorskin producing assets would have exited the market absent the 2012 Merger or that CMI would not have continued as an effective competitor absent the 2012 Merger show that the anticompetitive effects of the 2012 Merger would have occurred even absent the 2012 Merger?
12. By what amount has Steves been damaged as a result of the 2012 Merger?
13. By what amount is Steves likely to be damaged in the form of future lost profits as a result of the 2012 Merger?
14. If the jury finds that the 2012 Merger violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and that Steves has been and is likely to be injured as a result, what equitable remedy will restore the competition that was lost as a result of the 2012 Merger and prevent further harm to Steves?
15. Did JELD-WEN breach the Supply Agreement by charging a price for doorskins that was higher than the price established by the Supply Agreement's price term?

16. Did JELD-WEN breach the Supply Agreement by taking the position that the Madison and Monroe doorskin designs were not covered by the Supply Agreement's price term, and charging substantially more than the contract price for those products?

17. Did JELD-WEN breach the Supply Agreement by selling and delivering defective doorskins to Steves, and/or by refusing to inspect and properly credit Steves for its damages caused by the defective JELD-WEN doorskins?

18. Did JELD-WEN breach any express warranty associated with the Supply Agreement by selling and delivering defective doorskins to Steves, and/or by refusing to inspect and properly credit Steves for its damages caused by the defective JELD-WEN doorskins?

19. Did JELD-WEN breach the implied warranty of merchantability associated with the Supply Agreement by selling and delivering defective doorskins to Steves, and/or by refusing to inspect and properly credit Steves for its damages caused by the defective JELD-WEN doorskins?

20. Did JELD-WEN's breaches of the Supply Agreement give rise to a claim for damages, and if so, in what amount?

21. Did JELD-WEN's breaches of any express warranty and/or the implied warranty of merchantability associated with the Supply Agreement give rise to a claim for damages, and if so, in what amount?

22. Is Steves entitled to attorneys' fees, and if so, in what amount?

23. Is Steves entitled to pre- or post-judgment interest, and if so, in what amount?

24. Is Steves entitled to a declaration regarding certain disputed provisions of the Supply Agreement, including but not limited to the effective termination date of the Supply Agreement, JELD-WEN's obligation to sell to Steves its full array of interior molded doorskins existing at

any time during the life of the Supply Agreement at contract prices and according to the Supply Agreement's terms and conditions, JELD-WEN's obligation to ship doorskins FOB Steves to any Steves plant that may exist during the life of the Supply Agreement, JELD-WEN's obligation to provide Steves with all information required to validate the historical pricing under the Supply Agreement and to provide the input cost information necessary to calculate any future price adjustments by November 30th of each year, Steves' entitlement to the benefit of price decreases in accordance with the Supply Agreement's price term, and Steves' entitlement to independently verify, using its own personnel and/or third parties, any information to which it is entitled under the Supply Agreement?⁵

25. Is Steves entitled to specific performance on the Supply Agreement, or any other injunctive and/or non-monetary relief?

⁵ To the extent that the contract provisions implicated are ambiguous, they are for the jury to resolve.