UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

STEVES AND SONS, INC., Plaintiff, v. JELD-WEN, INC., Defendant.	)	Civil Action No. 3:16-CV-00545-REP

REPLY IN SUPPORT OF JELD-WEN'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Steves and Sons, Inc.'s ("Steves") Opposition (or "Opp."), Doc. 452, to JELD-WEN, Inc.'s ("JELD-WEN") Motion for Partial Summary Judgment, Doc. 375, confirms that there is no genuine *antitrust* case here, and that the parties, this Court, and the jury should proceed to adjudicate the straightforward *contract* dispute that this has always been.

At the outset, it is important to clarify three important and distinct concepts—antitrust injury, impact, and the measure of damages—that are pervasively confused or conflated in Steves' opposition. As part of its liability case, an antitrust plaintiff must show both a violation of the antitrust laws and *impact* from that violation on that plaintiff. Impact is a present and tangible injury to the plaintiff's "business or property" directly caused by the violation, 15 U.S.C. § 15(a), and requires proof that the plaintiff paid more, or received lower quality, than it would have paid in the absence of the alleged antitrust violation. Impact must be proved *with certainty* under every case that has considered the issue. Separately, the plaintiff also must show that the *impact* that it suffered is an "antitrust injury," meaning an injury that coincides with the public harm that the antitrust laws were enacted to prevent, and for which Congress provided the

extraordinary remedies of the Clayton Act. Not every private harm factually traceable to an antitrust violation is an antitrust injury. Finally, an antitrust plaintiff, if and only if it has established impact and antitrust injury, must be able to reasonably approximate its *damages*. Again, however, those damages have to be measured in relation to the price that the plaintiff would have paid in the absence of the antitrust violation.

None of the arguments that Steves has raised creates a legal impediment, or an issue of fact, that can defeat this motion on either antitrust injury or impact (or anything else).

1. JELD-WEN's Memorandum in Support, Doc. 379, ("Mem.") explained that Steves' factual contentions that JELD-WEN's acquisition of Craftmaster, Inc. ("CMI") gave it the "incentive" (whatever that means) to breach the contract with Steves, even if accepted, would not establish "antitrust injury" as a matter of law. Steves' response rests on a (perhaps intentional) confusion between antitrust injury, impact to itself, and the measure of damages. Steves points out that, in appropriate circumstances, antitrust injury, impact, and damages from an antitrust violation and damages from a breach of contract can overlap, and that an antitrust violation is not excused merely because it is also a breach of contract. Of course JELD-WEN agrees with that. But Steves is inviting the Court to make the opposite, and just as plain, error. Proving a breach of contract, even one (allegedly) caused by an antitrust violation, does not automatically establish antitrust injury. To maintain a claim under Section 7 of the Clayton Act, the antitrust plaintiff must prove an injury that coincides with harm *to the public* stemming from some substantial limitation of competition in a reasonably defined relevant market. Steves' claims that JELD-WEN charged more than it should have under the terms of the parties' long-term Supply Agreement ("2012 Agreement"), and that [redacted] as allegedly required by that Agreement, do not coincide with any harm to the public or to

competition generally. If proved at trial, these are at most idiosyncratic private harms to Steves, defined entirely by the four corners of a contract that benefits only Steves.

2. JELD-WEN's motion also demonstrated that Steves has come forward with no evidence of impact, to itself, as antitrust law defines it. Steves consistently measures its claimed impact and damages against what it contends the Supply Agreement promised—not, as antitrust law would require, against a hypothetical but-for world in which the 2012 Merger never happened. The clearest illustration of that problem is that all of Steves' calculations of what JELD-WEN's prices should have been give Steves the benefit of cost reductions in JELD-WEN's operations that are a direct result of the merger. Steves' response tries to salvage its antitrust claims by arguing that its expert, Dr. Shapiro, [redacted]. That argument is simply false; Dr. Shapiro did not so testify. And Steves still points to no triable record evidence that the quality of JELD-WEN's doorskins declined after the merger, or because of the merger. Steves has no right to put the parties, the Court, and the jury through the time and expense of a complex antitrust trial based on nothing but its own argument that is not supported with facts.

3. Steves' arguments about its supposed future "lost profits" similarly ignore the critical distinction between ongoing future *damages* from an injury already suffered, and a legal claim premised on an injury that has not happened yet and may never happen. A plaintiff who can prove that smoking gave him cancer can, for example, recover reasonably certain future medical costs, pain and suffering, and lost wages. But smokers cannot sue for an estimate of future compensatory damages on the theory that they *may* get cancer someday, or even that they are likely to do so. That sort of theory is utterly foreign both to traditional common law principles incorporated into the antitrust laws and to constitutional ripeness principles. And those

limitations do not disappear merely because the plaintiff also alleges present damages from some *different* injury already suffered. If the hypothetical smoker has already overpaid for his cigarettes, or is already disabled from shortness of breath, he can recover damages for those harms—but still may not recover for a contingent future possibility of lung cancer. Here, the claimed "injury" supporting the lost profits claim is [redacted]; that, indisputably, has not happened and may never happen. Steves' claims that it has suffered present injuries from higher prices and reduced quality today do not permit a claim for estimated future damages from a [redacted] years in the future, which depends on all sorts of contingent possibilities that may never happen. That is not merely because those "damages" are "speculative," although of course they are. It is because the impact from which those "damages" would stem may not occur at all.

4. If the Court determines that some portion of Steves' antitrust claims survive summary judgment, the Court should exercise its discretion under Federal Rule of Civil Procedure 56(e) to narrow the antitrust issues genuinely in dispute. Steves cannot be permitted to argue to the jury that its pure breach-of-contract damages should be recoverable under an antitrust theory and trebled. That would be exactly the error the Supreme Court reversed in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), when it held that antitrust damages proofs must measure only the impact of the specific theory of harm that the court deems legally viable.

5. Steves' arguments about divestiture illustrate eloquently why the doctrine of laches plays, and has to play, such a prominent role in this area of the law. Steves forthrightly argues that the parties' ongoing relationship and Supply Agreement permitted Steves to delay in bringing this suit, even though it concedes that it knew the full legal and factual basis for its antitrust suit more than four years before it filed. On that view, any parties with business

dealings with an acquiring or merging company could strategically withhold an antitrust challenge to the transaction *for years*, and then sue to unwind a long-consummated merger when negotiations or business conditions turn against it. That position cannot be reconciled with the extensive case law holding that plaintiffs are barred by laches by waiting even until the closing date of the merger, if they had a basis for challenging it earlier. It would mean that all significant corporate transactions have a sword of Damocles hanging over them for years, even after the Department of Justice ("DOJ") has reviewed and approved the transaction. A legal regime like that would discourage useful business transactions, including those that are procompetitive and very positive for consumers, and would be a radical break from decades of law in this area.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS AND STATEMENT OF ADDITIONAL MATERIAL FACTS

Supplemental Undisputed Fact[1]

46. [redacted] STEVES-000095133-34, attached as Ex. 1; E. Steves Tr. 307:17-21, attached as Ex. 2.

JELD-WEN's Statement of Undisputed Facts

6. Steves cites no support for its contention that JELD-WEN has "refused" to propose terms for a new long-term agreement. The documents and testimony cited in Steves' Statement of Additional Material Facts ("SAMF") ¶ 14 do not support Steve's statement.

[1] JELD-WEN is adding one additional undisputed fact to respond to a legal theory that Steves advanced for the first time in the litigation in its Opposition.

28 & 29. The documents and evidence that Steves cites in SAMF ¶¶ 16-23 do not support Steves' statement that [redacted]

31. The documents cited at SAMF ¶ 22 do not [redacted].

44. The documents cited in SAMF ¶ 37 do not support Steves' claim that JELD-WEN "has not performed the analysis necessary to determine if such a separation is possible." The testimony that Steves cites relates to [redacted]

Response to SAMF[2]

1-4. No objection.

5-6. The documents and testimony cited by Steves do not establish the purported facts.

7-8. The testimony and opinion of an expert is itself insufficient to create a genuine issue of fact. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 242 (1993). JELD-WEN agrees that it raised Steves' pricing for 2015 in accordance with the terms of the 2012 Agreement. The remaining statements are not supported by the cited documents.

9. Irrelevant. Actions taken by JELD-WEN before its acquisition of CMI closed are irrelevant to any analysis of antitrust injury.

10-12. Irrelevant. Steves' characterizes these "facts" regarding quality issues as

[2] The Court should not even consider Steves' proffered Relevant Factual Background statement, because it is not in compliance with Local Rule 56(B), which requires assertions of disputed material facts to be set forth as a "specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated." *See also, e.g.*, *Integrated Direct Mktg., LLC v. May*, 129 F. Supp. 3d 336, 345 (E.D.Va. 2015), *aff'd*, 690 F. App'x 822 (4th Cir. 2017) (refusing to consider plaintiffs' own version of facts presented in narrative argument format). But were the Court to consider the factual assertions in the statement, none of them would meet Steves' burden under Rule 56, because none is either material or relevant to the undisputed material facts that establish JELD-WEN's entitlement to summary judgment. We respond in more detail, in an excess of caution, in Appendix A.

occurring only "after the merger." Steves has presented no analysis or evidence to establish whether quality problems occurred before the Merger, and certainly provides no analysis or evidence that they occurred because of the Merger.

13-15. The documents and testimony cited by Steves do not establish the purported facts.

16-18. Documents and testimony cited by Steves do not establish the purported facts. JELD-WEN also object to these "facts" as irrelevant because Steves' characterizes Masonite's sales practices as occurring only "after the merger." Steves has presented no analysis or evidence to establish whether these practices also occurred before the Merger, and certainly provides no evidence that they occurred because of the Merger.

19. Irrelevant. Steves' characterizes Masonite's sales as occurring only "after the merger." Steves has presented no evidence to establish whether Masonite sold at this level before the Merger, and certainly provides no evidence that they occurred because of the Merger.

20-23. Documents and testimony cited by Steves do not establish the purported facts. Additionally, JELD-WEN objects to SAMF ¶¶ 20-22 because the testimony and opinion of an expert is itself insufficient to create a genuine issue of fact.

24-26. The documents and testimony cited by Steves do not establish the purported facts.

27. [redacted]

28. [redacted]

29. [redacted] JELD-WEN objects to the remaining statements in SAMF ¶ 29 because

the testimony cited by Steves does not establish the purported fact.

30. The documents and testimony cited by Steves do not establish the purported fact.

31. No objection.

32. The documents and testimony cited by Steves do not establish the purported facts. The testimony and opinion of an expert is itself insufficient to create a genuine issue of fact.

33. No objection.

34-36. These "facts" are inadmissible at trial because they reflect confidential settlement communications covered by Federal Rule of Evidence 408.

37. The documents and testimony cited by Steves do not establish the purported facts.

38. JELD-WEN objects to the undefined term "fully integrated," but agrees that it closed doorskin plants located in Iowa and North Carolina.

39-40. The documents and testimony cited by Steves do not establish the purported facts.

ARGUMENT

I. STEVES' OPPOSITION CONFIRMS THAT IT HAS DEFAULTED ON ITS BURDEN TO ESTABLISH THAT IT SUFFERED ANTITRUST INJURY AND IMPACT AS REQUIRED FOR A DISTINCT ANTITRUST CLAIM

For months, the parties and this Court have circled around a critical issue: can Steves succeed on distinct *antitrust* claims when the only injury it asserts is the same as the injury it claims it suffered because of JELD-WEN's alleged breach of contract? In oral argument back in June, this Court opined: "I don't think so." Hr'g Tr. at 19-20, June 6, 2017, Doc. 257, attached as Ex. 3. Steves asked to brief the issue, promising case law and evidence proving that it could proceed with both sets of claims. *Id*. Steves has not made good on that promise.

Steves musters case law standing for the propositions that "the same *conduct* can both breach a contract and be an antitrust violation," and that "an antitrust violation is not excused by also being a breach of contract." Opp. at 14 (emphasis added). Of course JELD-WEN has no

quarrel with those unremarkable principles, but the problem with Steves' antitrust claims is that, whether or not Steves can prove a breach of contract, it cannot proceed with *antitrust* claims unless it can prove both *impact* and *antitrust injury* as antitrust law defines them. Proof of impact requires Steves to show that it paid more, or got less (such as in reduced quality), than it would have if the Merger did not occur (the so-called "but-for world"). Proof of antitrust injury requires Steves to show that its claimed injury is not merely private and idiosyncratic but an expression of a broader harm to competition in the marketplace—*i.e.*, that its injury "coincides with the public detriment tending to result from the alleged violation." *Orion Pictures Distrib. Corp. v. Syufy Enters.*, 829 F.2d 946, 948 (9th Cir. 1987) (quoting II P. AREEDA & H. HOVENKAMP, ANTITRUST LAW, ¶ 335.1 at 229 (1986 Supplement)). Steves' antitrust claims fail both requirements, and evidence that a contract may have been breached cannot fill those gaps.

A. Steves' Alleged Contractual Harms Are Purely Private To Steves And Cannot Establish Antitrust Injury

As JELD-WEN's motion explained, many courts have recognized that a breach of a purely contractual obligation does not necessarily establish antitrust injury, even when the plaintiff can allege that the contract would not have been breached but-for the antitrust violation. When the plaintiff complains only of breach of a contractual duty that was "fixed by [defendant's] contractual commitment" negotiated before any alleged antitrust violation, a breach of those duties does not "reflect the anticompetitive effect" of the merger or "coincide[] with the public detriment tending to result from the alleged violation." *Id.* at 948-49. It is just a breach of private, idiosyncratic duties allegedly owed to the plaintiff alone.

Of course in an appropriate case, a plaintiff could suffer harm genuinely coinciding with the *public* detriment the antitrust laws were intended to address, even if that harm also happened

to constitute a breach of contract.[3] But the fact that a breach of contractual duty *can* coincide with a broader harm to the public for which Congress provided treble damages does not mean that it *necessarily will*. Here, Steves advances no real argument that its contractual complaints coincide with harm suffered by other participants in the marketplace. Steves' complaint is, purely and simply, that it does not believe it received what *it* was promised, under a long-term contract whose terms Steves concedes were favorable and not reflective of broader marketplace conditions. *See* Shapiro Reply at 8.

The case law cited by Steves has nothing to do with a case like this one. In *Blue Shield of Virginia v. McCready*, plaintiff alleged that the defendant insurance company conspired with psychiatrists to exclude psychologists from the market by not reimbursing patients for care by psychologists. 457 U.S. 465, 468-69 (1982). Since McCready's insurance contract actually required this reimbursement, the conduct also breached her contract. *Id.* at 468. But the harm the plaintiff claimed to suffer—inability to get insurance reimbursement for psychological care—was exactly the same injury inflicted on the broader market. Similarly, in *International Wood Processors v. Power Dry, Inc*., plaintiff alleged that nine defendants conspired to eliminate it as a competitor in the market for drying wood by terminating a sub-license to manufacture and sell a patented machine. 792 F.2d 416, 419 (4th Cir. 1986). And the plaintiff in *Barber & Ross Co. v. Lifetime Doors, Inc*. asserted that defendant terminated its supply contract because it would not agree to purchase a tied product, in violation of the Sherman Act's prohibitions on tying. 810 F.2d 1276, 1282 (4th Cir. 1987). In each case, the harm to the plaintiff coincided

[3] If, for example, a defendant had separately promised the plaintiff that it would not engage in some behavior that also violated the antitrust laws, and the result was higher prices to the plaintiff and the public alike because of a common reduction in market-wide competition, contractual and antitrust injuries might coincide. JELD-WEN would still argue that Congress did not intend by the Clayton Act to provide a treble damages remedy to a party fully protected by a private contract.

with, and/or was a critical component of, the broader public harm that made the conduct unlawful under the antitrust laws.

The pricing injury Steves complains about is defined entirely by the unique Steves/JELD-WEN contract and does not coincide with any broader marketplace harm of the sort that Congress intended the Clayton Act, with its extraordinary remedies of treble damages and attorneys' fees, to address. That is particularly true because Steves brings its antitrust case under Section 7 of the Clayton Act, which creates a cause of action only if a merger or acquisition may substantially lessen competition in a properly defined market. And, cases like *Orion* hold squarely that such gaps cannot be bridged merely with an allegation that the defendant would have performed the parties' private contract if it had not violated the antitrust laws.

B. Steves' Last-Minute Attempts To Identify Some Injury Shared With The Public And Not Defined By Contract Are Unsupported By Any Facts

Referencing *Z Channel Ltd. Partnerships v. Home Box Office, Inc*., 931 F.2d 1338 (9th Cir. 1991), Steves' Opposition presents, for the first time in this litigation, an argument that Steves can establish antitrust injury because an alleged reduction of competition reduced its ability to take advantage of various provisions in the contract, [redacted]. Opp. at 16-18. These could be coherent antitrust theories if Steves had developed any evidence of them, but it has not.

Competition Outside The Contract: Steves' claim relies on the entirely unsupported speculation that, but-for the 2012 Merger, one or more other competitors would have been [redacted]

[redacted]. *Id*. at 17-18.[4] Steves ignores the fact that [redacted]. *Id*. Accordingly, Steves' claims that it "ha[d] no alternative source of supply" and that "[t]he merger took away [its] options," Opp. at 17, are flatly contradicted by the only actual evidence available. Moreover, Edward Steves testified at his deposition in May that [redacted]. Ex. 2, E. Steves. Tr. 409:11-18.

Steves cannot rely on Masonite's purported "signaling" and "intentions to cut off sales to independents," Opp. at 21, because Steves has admitted that [redacted]. Mem. Statement of Undisputed Facts ("SUF") ¶¶ 28-31. Masonite's own evidence shows [redacted]. SUF ¶ 27. Steves cannot manufacture a triable antitrust case simply by asserting that it does not believe that [redacted]. Opp. Ex. 10, Lynch Tr. 41:17-42:19. Steves admitted that [redacted]. Opp. at 7.

[4] Steves does not cite even one fact or any empirical analysis to support its own theory. Speculation cannot support a jury verdict or defeat JELD-WEN's motion. *First Data Merch. Servs. Corp. v. SecurityMetrics, Inc.*, 672 F. App'x 229, 238-39 (4th Cir. 2016). Steves' self-serving claims also say nothing about whether the Merger [redacted]. The record is undisputed that other customers of JELD-WEN did so during the relevant period. SUF ¶ 27.

Madison and Monroe: Steves' assertion, again for the first time in this litigation, that JELD-WEN's pricing for Madison and Monroe skins "fall[s] outside of Steves' contract claims," Opp. at 18, is blatantly false. Steves' Complaint expressly alleges that JELD-WEN's failure to sell these designs at the contract price breached the contract. Compl. ¶¶ 168-71, Doc. 5. And, of course, Dr. Tucker calculates [redacted]. Mem. Ex. 35, Tucker Rpt., ¶ 57. These claims are wholly subsumed within Steves' breach of contract claims.

Steves claims that Dr. Shapiro opined that [redacted]" Opp. at 19 (citing Opp. Ex. 47). But Dr. Shapiro did not actually provide any analysis purporting to show that JELD-WEN's prices for these doorskins are the result of the Merger or higher than they would have been but-for the Merger, as Steves claims. *Id*. at 19. Dr. Shapiro merely [redacted]." Opp. Ex. 47, Shapiro Reply at 2. He said nothing about what the pricing for Madison or Monroe doorskins would have been but-for the merger. *Id*. at 2-3. And he admitted that he did no work [redacted]. Shapiro Tr. at 222:10–225:20, attached as Ex. 5. It is axiomatic that an expert opinion must be "supported by sufficient facts to validate it in the eyes of the law." *Brooke Grp.*, 509 U.S. at 242 (affirming reversal of jury verdict for plaintiff and grant of judgment as a matter of law for defendant in antitrust case).

Notice of Termination: Finally, Steves argues that it experienced antitrust injury because [redacted]. Opp. at 19-20. Steves does not explain how this private contractual issue coincides with any injury to the public. Regardless, the [redacted]

[redacted]; therefore, it is impossible for Steves to have been injured by this possible future act. *See* Mem. at 21; *infra* Sec. II. To the extent that Steves means that JELD-WEN's [redacted] Steves is wrong also. Steves does not cite any evidence to support its assertion that JELD-WEN [redacted] because of the 2012 Merger; it asks this Court to send this claim to the jury solely because "common sense suggests" that must have been so. Opp. at 19. "Common sense suggests," Opp. at 19, is just "speculation [and] conjecture" that does not provide the "underlying facts" required to defeat summary judgment in this circuit. *Thompson Everett, Inc. v. Nat'l Cable Advert., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995).

C. Steves Separately Cannot Prove Impact Causally Traceable To The Merger, Because It Has No Evidence Or Theory Of What Pricing Or Competition Would Have Looked Like In The "But-for World"

JELD-WEN's motion explained that summary judgment also must be granted against Steves' antitrust claims because Steves cannot even prove *impact* to itself, as defined by the antitrust laws. Steves has not developed or come forward with evidence of what the but-for world would have looked like if the 2012 Merger had never happened. One small, but dramatic, illustration is that [redacted] Mem. at 18-19. This is not just a question of whether Steves can "compute the precise prices it would have paid but-for the acquisition." Opp. at 21. The law clearly requires Steves to prove "with certainty" that the Merger, in fact, impacted Steves. Mem. at 17-18. Steves cannot do that without evidence and a sound theory of the but-for world.

Steves' belated assertion that Dr. Shapiro presented an opinion about but-for pricing is false because Dr. Shapiro did not render such an opinion. Steves states that "the Agreement stands as a benchmark for the pricing conditions that prevailed before the merger," but tellingly provides no citation or support for this claim. Opp. at 22. Neither Dr. Shapiro nor Mr. Tucker

opined that the individually negotiated contract price between JELD-WEN and its largest customer was an appropriate benchmark for the market price for doorskins before the Merger, or for what the market price would have been now if the Merger did not take place. Both experts were utterly silent as to what the competitive benchmark would be, and Mr. Tucker explicitly concedes that [redacted]. Mem. Ex. 1, Tucker Tr. 111:20-112:9, 112:22-113:4.

Again, Steves retreats to arguing that it finds JELD-WEN's pricing analysis unpersuasive. Opp. at 22. It is Steves' burden to prove impact; not JELD-WEN's burden to disprove it. Summary judgment is necessary here because Steves has fully defaulted on its burden; it cannot proceed to a jury by shifting that burden to JELD-WEN, then disputing JELD-WEN's analysis. *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986) (summary judgment is appropriate when a party fails to make a showing sufficient to establish the existence of an element on which that party will bear the burden of proof at trial). *See also In re Ebay Seller Antitrust Litig.*, 2010 WL 760433 at *10-14 (N.D. Cal. Mar. 4, 2010), *aff'd* 433 Fed. App'x. 504 (9th Cir. 2011) (noting that even if defendant's expert's analysis was flawed, "that fact [did] not help Plaintiffs carry their burden on summary judgment").

While Steves strings together a number of documents detailing quality problems since 2012, it points to no evidence that such problems did not exist before the Merger, that they increased after the Merger, or that they were caused by the Merger. The fact that JELD-WEN began "thinning" its doorskins after it announced the Merger is immaterial. The Merger had not happened, and indeed was under DOJ review at that time. Steves' evidence shows that [redacted]. Opp. at 5 (citing Opp. Ex. 83, 45, 54, 20). Again, Steves cannot manufacture a right

to try a complex antitrust case merely by criticizing JELD-WEN's observations.

II. STEVES' CANNOT SUE NOW FOR FUTURE "LOST PROFITS" ATTRIBUTABLE TO AN INJURY THAT MAY NEVER HAPPEN

JELD-WEN's motion explained that Steves cannot sue now to recover future "lost profits" allegedly associated with the *possibility* [redacted] Mem. at 21-27. Both constitutional ripeness principles and basic common law principles of injury and damages, incorporated into the antitrust laws, prohibit claims for future damages that depend on a future injury that may or may not happen. *Id.* Steves' response does not refute these principles, and confirms that the injury from which "future lost profits" would stem has not yet occurred and may never occur.

Steves' response confuses the important distinction between uncertainty as to the fact of future *injury*, and uncertainty as to the amount of future *damages* flowing from a present injury. Citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), Steves argues that an antitrust plaintiff who has already suffered an injury also can recover "all provable damages that will flow in the future." *Id.* at 338-39. But the cited passages in *Zenith* perfectly illustrate Steves' mistake. The Supreme Court's holding in *Zenith* was that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages *caused by that act*," which include "not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future *from the particular invasion*…" *Id.* (emphasis added). "Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future *from the acts of the conspirators on that date*." *Id.* at 339 (emphasis added).

Zenith also made clear "that even if injury and a cause of action have accrued as of a

certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Id.* But Steves ignores that and asks for something completely different, and much more radical. Steves seeks a right to sue for damages associated with a distinct future injury *that has not happened, and may not ever happen*. Put in terms of *Zenith*, Steves suggests that proven injury from one sale by a price-fixing conspiracy would permit not only suit for the damages (present and future) attributable to that sale—but also suit for future damages that would be caused by imagined *new* sales and *new* injuries, in the future, on the prediction that the conspiracy will continue to operate for years to come. That is incompatible with the Supreme Court's careful explanation that each distinct injury to business or property gives rise to a distinct cause of action. Indeed, if Steves were right, then the statute of limitations would begin running on all *future* injuries at the time a plaintiff suffered its *first* injury, because the Clayton Act limitations period begins to run when the particular claim accrues. *Id.* at 338. The well-settled law is exactly opposite. *See, e.g., Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189-90 (1997) (explaining how antitrust accrual and limitations principles work).

Steves argues that so long as it has any present injury, all claims for future harm are ripe for adjudication. Steves does not cite any cases supporting this argument, and it is inconsistent with fundamental common law and Article III principles explained in JELD-WEN's motion. Steves' claim that JELD-WEN's cases are distinguishable because each "involved a situation where the plaintiff had suffered *no injury* (and was not threatened with imminent future injury) at the time of suit," is flatly wrong. Opp. at 27. *Plant Oil Powered Diesel Fuel Systems, Inc. v. Exxon-Mobil Corp.*, is directly on point. 801 F. Supp. 2d 1163, 1184-85 (D.N.M. 2011). There, plaintiff alleged that defendants violated the antitrust laws by promulgating two quality

standards. *Id*. at 1168. The court held that plaintiff's challenge to one guideline was not ripe for an injunction because the guidelines were still in development, but that the challenge to another was because it was finalized and scheduled for imminent passage. *Id*. at 1179-80. To the same effect is *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988), where the plaintiff Volvo alleged that defendants violated the antitrust laws by proposing rules that would restrict Volvo's ability to compete in the market for men's tennis events. *Id*. at 61-62. The Court held that one rule was ripe for consideration because it was having a current effect, while three did not and thus were not ripe. *Id*. at 64-65. The Court allowed Volvo to go forward with its antitrust claims to the extent that they were based on the ripe rule, and ordered dismissal of the challenge to the others. *Id*. at 65.

Allowing the jury to consider claims that are not ripe and for which this Court does not have jurisdiction will only ensure that any jury verdict is vacated by the Court of Appeals. *See, e.g., New Horizon of New York, LLC v. Jacobs*, 231 F.3d 143, 155 (4th Cir. 2000) (vacating jury verdict for plaintiff because district court lacked subject matter jurisdiction); *Hukill v. Auto Care, Inc*., 192 F.3d 437, 444-45 (4th Cir. 1999) (same). This claim should not proceed to the jury.

III. AT A MINIMUM THIS COURT SHOULD EXERCISE ITS DISCRETION TO NARROW THE ISSUES IN DISPUTE

If this Court concludes that Steves has identified some harm, ripe for present adjudication, that the Court believes could satisfy the requirements of impact and antitrust injury, the Court should at a minimum exercise its discretion under Rule 56(e) to narrow the issues genuinely in dispute to whatever theory of *antitrust* harm the Court deems viable. Steves' strategy in this case, from the beginning, has been to blur the boundaries and contend that all of its damages—under every theory—are recoverable under the antitrust laws. That would be clear and reversible error. Steves now concedes, for example, that [redacted]

[redacted]

In *Comcast*, the Supreme Court recently reversed an antitrust judgment because the damages theory failed to distinguish between harm attributable to theories that were, and were not, substantively viable in the litigation. 569 U.S. at 38. The exact same principle requires that Steves' damages proof and arguments in this case must be limited to whatever theory of antitrust injury and impact the Court concludes is legally viable.

IV. STEVES' REQUEST FOR DIVESTITURE MUST BE DISMISSED NOW

A. Steves Failed To Rebut JELD-WEN's Clear Showing That Laches Bars Steves' Section 16 Claim For Divestiture

1. Steves' *Post Hoc* Arguments Provide No Excuse For Its Unreasonable Delay In Bringing Its Antitrust Claim

Steves essentially admits that it strategically delayed filing an antitrust challenge in order to use the threat of such a challenge as leverage in private contractual negotiations—for years after the 2012 Merger was fully consummated and CMI's former assets were being deeply integrated into JELD-WEN's operations. Courts have dismissed claims like this on laches grounds because the plaintiff delayed until the scheduled time for consummation of the merger, let alone years afterward. Steves points out that laches often involves factual issues not appropriate for summary judgment, but in this case the pertinent facts are clear and undisputed.[5]

First, Steves' claim that laches cannot attach during the four-year statute of limitations that the Clayton Act applies to *damages* cases brought under Section 4 is flatly wrong. Opp. at 33. As Steves implicitly acknowledges, the Clayton Act's four-year statute of limitations only

[5] *See Elliott's Enters. v. Flying J, Inc.*, 1998 WL 163808, *2-3 (4th Cir. Apr. 6, 1998) (upholding grant of summary judgment on basis of laches and equitable estoppel); *Fair Woods Homeowners Ass'n v. Pena*, 1996 WL 1843, *3 (4th Cir. Jan. 3, 1996) (upholding grant of summary judgment on basis of laches).

applies to Section 4 claims for damages; it does not apply to Section 16 claims for injunctive relief. 15 U.S.C.A. §15b (applying statue to limitations to section 15, 15a or 15c, and not 15 U.S.C.A. § 26). As a result, Steves' reference to the Supreme Court's decisions in *Petrella v. Metro-Goldwyn-Mayer, Inc*., 134 S. Ct. 1962 (2014), and *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), is nonsensical. Those cases hold only that when a statute expressly provides a limitations period for the damages claim, defendants cannot end-run a timely damages suit by claiming a plaintiff is guilty of laches. *Petrella*, 134 S. Ct. at 1967; *SCA Hygiene*, 137 S. Ct. at 959. *Petrella* and *SCA Hygiene* explicitly rest on the traditional distinction between legal and equitable claims.

Second, Steves' claim that JELD-WEN somehow "induced" it not to challenge the Merger in a timely fashion is not supported by its own case law, or indeed any case law. Apparently the only case that Steves could find to support this tenuous proposition was a 90-year old out-of-circuit case, which unremarkably held that defendant could not claim laches when plaintiff threatened suit and defendant asked plaintiff to hold off while he tried to sell his bankrupt company to raise funds to pay off the disputed debt. *In re Indiana Concrete Pipe Co.*, 33 F.2d 594, 596 (N.D. Ind. 1929). Obviously, that fact pattern bears no resemblance to the situation here. And, while a court may also excuse plaintiff's delay when defendant defrauds plaintiff into delay, or conceals the cause of action from plaintiff, *see id*., Steves has absolutely no good faith basis even to allege fraud by JELD-WEN. Nor can Steves claim concealment given that it knew of the Merger even before it was publicly announced, and was given an opportunity to object to the DOJ, yet declined to do. SUF ¶¶ 16, 20.

Steves also has no legal basis to claim that it was somehow excused from bringing its Section 7 claim until it learned that "the Agreement would *not* insulate it from the

anticompetitive effects of the merger." Opp. at 34. As Steves explains, "'delay is measured from the time at which the [plaintiff] knew' of a violation 'sufficient to require legal action.'" Opp. at 34-35, quoting *Ray Commc'ns v. Clear Channel Commc'ns*, 673 F.3d 294, 301-02 (4th Cir. 2012); *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) ("An inexcusable or unreasonable delay may occur only after the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action"). Steves' entire Section 7 claim is based on a belief that the Merger was immediately anticompetitive because it was "a three-to-two merger that led to an exceptionally large increase in concentration in a market that was already highly concentrated." *See* Steves' Mem. in Supp. of Mot. for Partial Summ. J. at 1-2, Doc 383. Steves' suggestion that it waited to see whether the Supply Agreement would "insulate it" from competitive effects simply demonstrates how disconnected Steves' claims (and motives) are from the concerns about broader *public* harm that define the concept of antitrust injury. And if Steves proves right about what the Supply Agreement means, then that Agreement *still* "insulates" Steves from any harm it claims to have suffered. Either Steves is wrong about what the contract means (and virtually all of its case collapses), or Steves has no coherent justification for its delay in bringing suit.[6]

Finally, Steves cannot excuse its four year delay by claiming that during that time it engaged in dispute resolution procedures related to its breach of contract claims. Even assuming that a plaintiff may not be charged with delay when engaging in good faith negotiations to settle the claim that it ultimately filed (Opp. at 36), that is not what happened here.[7] As Steves admits,

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[6] Of course, Steves is free to claim that it did not experience any quantifiable *damage* from the 2012 Merger until later. But that has no bearing on this request for *injunctive* relief.

[7] The cases cited by Steves addressing the applicability of laches as applied to petitions for mandamus in state court are hardly compelling. Opp. at 36, citing *In re Border Steel, Inc*., 229

its complaints stemmed [redacted] *Id*. at 35-36. The parties then engaged in [redacted] The Fourth Circuit addressed a situation exactly like this in *Kloth v. Microsoft*, and held that delay was not excused when plaintiff failed to file a claim because it decided to focus first on settling a *separate* claim. 444 F.3d 312, 325-26 (4th Cir. 2006) (upholding dismissal of antitrust claim on basis of laches). *See also Medinol Ltd. v. Cordis Corp*., 15 F. Supp. 3d 389, 405-06 (S.D.N.Y. 2014) (plaintiff could not excuse delay in bringing suit by arguing that the parties were engaged in negotiations on a separate patent litigation and business issue). Moreover, Steves does not even try to explain how beginning the [redacted] could excuse its failure to file an antitrust suit for the preceding 2.5 years, or how, once the attempt to resolve the disputes failed, it is excused from filing a suit immediately thereafter.

2. Steves Makes No Effort To Overcome JELD-WEN's Clear And Undisputed Showing That Steves' Delay Prejudiced JELD-WEN

Steves completely ignores the Fourth Circuit's holding that the Court should infer prejudice from untimely delay and weigh the factors such that "the greater the delay, the less the prejudice required to show laches…" *White*, 909 F.2d at 102. Under this test, Steves' four year delay should provide a clear inference of prejudice to JELD-WEN.

Steves cannot change the subject by arguing that JELD-WEN *could* divest Towanda or *could* find an alternate source of material such as Masonite.[8] The prejudice issue is not whether

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S.W.3d 825 (Tex. App. 2007); *In re Bd. of Educ. of the Scotia-Glenville Cent. Sch. Dist. v. Shapiro*, 445 N.Y.S.2d 270 (N.Y App. Div. 1981).

[8] While JELD-WEN does not disagree that it, like Steves, would have ample opportunity to source from the multiple third parties that are currently selling and planning to sell in the United States, Steves does not explain why it thinks that Masonite is a viable option for JELD-WEN but somehow not for Steves. Opp. at 38.

divestiture would be hard, but whether JELD-WEN spent time and money that it would not have spent had Steves acted in a timely fashion. In consummated merger cases, the "reliance" on and prejudice from plaintiff's delay is the consummation of that merger, and the continued integration of the two companies. *See, e.g.*, *Garabet v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1172-73 (C.D. Cal. 2000); *Taleff v. Southwest Airlines Co.*, 828 F. Supp. 2d 1118, 1122-25 (N.D. Cal. 2011). The DOJ investigated this transaction in 2012, Steves was given the opportunity to object, which it declined to do, and the DOJ closed its investigation without action. SUF ¶¶ 19-21. JELD-WEN relied on Steves' inaction in consummating the Merger, and continued to rely on Steves' inaction in fully integrating CMI's former assets and personnel into the company, while shuttering plants and discharging employees that had become redundant because of the Merger. That is more than sufficient for prejudice.

B. The Balance Of The Equities Clearly Favors JELD-WEN

Steves' arguments about the balance of equities ignore the extensive case law holding that substantial delay, alone, is more than sufficient for laches. Steves' representations about the balance of the equities are also unsupported by evidence and present a distorted picture of the history. In fact, it is undisputed that [redacted] SUF ¶¶ 13-15. If Steves genuinely cared about the supposed public interest in "resto[ring] competition in the molded doorskin market," Opp. at 25, [redacted], or filed suit to block the Merger at any point from 2012 until June 29, 2016. Instead Steves chose to negotiate a sweetheart supply deal with JELD-WEN, let the integration of JELD-WEN and CMI become accomplished fact, and then brought this antitrust suit only once it determined that it could not bully JELD-WEN into supplying it with artificially low-priced doorskins forever and could not convince the DOJ that the Merger

had become anticompetitive. Nor has Steves put forward any evidence of how this divestiture would help other doorskin customers, especially those with their own long-term supply agreements with JELD-WEN, and who rely upon Towanda's capacity for supply, or how JELD-WEN could be a full participant in a three-firm market without Towanda's capacity. *Ginsberg v. InBev NV/AB*, 623 F.3d 1229, 1236 (8th Cir. 2010) (denying divestiture of already-consummated merger because divestiture would harm employees and distributors and may well damage competition and consumers).

Although Steves' economist seeks to downplay the import of the DOJ's decision not to challenge the Merger, *see* Mem. Ex. 25, Shapiro Report at 7, Steves cannot avoid the fact that the DOJ reviewed the Merger with an eye toward its effect on competition and the public interest, and allowed it to go forward uncontested. More importantly, the DOJ re-reviewed the Merger just this past year at the request of Steves and again closed the investigation without finding a Section 7 violation, or recommending divestiture or any other remedy. SUF ¶¶ 19-23. In contrast, Steves seeks divestiture only to remedy a private supplier-customer dispute with JELD-WEN, a dispute that sounds more clearly in breach of contract than in antitrust.

C. Steves Has No Genuine Evidence Of Threatened Antitrust Injury

JELD-WEN of course acknowledges that a plaintiff can recover injunctive relief under Section 16 by showing "threatened antitrust injury." Mem. at 32-33. But Steves does not have standing as a private party unless it can show a real threat of harm to Steves itself. Any claim of threatened antitrust injury is wholly speculative because, as JELD-WEN showed and Steves did not dispute, any potential future injury could be prevented [redacted]. Mem. at 34-35. Steves cannot base its claim for injunctive relief on any "actual competitive harm" either because, as previously shown, Steves has not proffered any evidence that it suffered antitrust injury or was impacted by the Merger. In fact, if this Court

dismisses Steves' Section 4 claims because they do not assert antitrust injury, the Court should dismiss Steves' Section 16 claims as well for lack of standing. If the jury decides in favor of Steves on its Section 4 claim, JELD-WEN will handle future dealings per the jury's guidance on the contract points, and Steves will not suffer any future injury either.

V. STEVES' DECLARATORY JUDGMENT CLAIM DOES NOT PRESENT A CASE OR CONTROVERSY

Steves' Opposition provides no legal basis for this Court to spend the time analyzing and deciding a claim that is not subject to a current dispute between the parties. This Court has jurisdiction under the Declaratory Judgments Act only if there is a genuine case or controversy, and Steves puts forth no facts that suggest that there is such a controversy. There is now work for the Court to do on this aspect of JELD-WEN's motion other than to dismiss this Count of the Complaint.

CONCLUSION

For all the reasons state above, and in JELD-WEN's Memorandum in Support of JELD-WEN's Motion for Partial Summary Judgment, JELD-WEN respectfully requests that this Court grant JELD-WEN's motion for summary judgment on Counts I and IV of Steves' case.

Dated: November 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November 2017, I will electronically file a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the registered participants as identified on the NEF to receive electronic service, including:

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