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.	)	

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

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INTRODUCTION

After months of fact and expert discovery, it is clear that defendant JELD-WEN, Inc. ("JELD-WEN") cannot dispute a key issue in this case: that JELD-WEN's merger with its rival CraftMaster Manufacturing, Inc. ("CraftMaster") in 2012 dramatically increased the concentration of the market for interior molded doorskins used in the United States. So dramatically, in fact, that the law *presumes* that the transaction is likely to substantially lessen competition. With this motion, plaintiff Steves & Sons, Inc., ("Steves") respectfully asks the Court to rule that these facts are sufficient to establish Steves' prima facie case showing that the merger was anticompetitive, and to shift the burden to JELD-WEN to rebut that showing.

Steves' antitrust claim is brought under Section 7 of the Clayton Act. Proof of a Section 7 violation is subject to a three-step burden-shifting scheme. In step one, the plaintiff bears the burden of establishing its prima facie case by defining the relevant market and showing that the merger increased the concentration of that market so much that the merger is likely to substantially lessen competition. In step two, the burden shifts to the defendant to rebut the plaintiff's prima facie case. In step three, if the defendant has met its burden, the burden shifts back to the plaintiff to produce additional evidence of the substantial likelihood of anticompetitive effects. Steves moves for partial summary judgment to establish that it has met its burden as to step one.

Under well-established case law, only two facts are needed to establish Steves' prima facie case: (1) the definition of the relevant market, and (2) the pre- and post-merger market shares. Steves' antitrust economist, Professor Carl Shapiro, addressed both of these facts, and concluded that: [redacted]

[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

Applying the mathematical index on which antitrust enforcement agencies and courts routinely rely, Professor Shapiro then demonstrated that [redacted] led to an exceptionally large increase in concentration in a market that was already highly concentrated.

Significantly, JELD-WEN's antitrust economist, Professor Edward Snyder, did not dispute any of these facts. [redacted]. Put simply, there is no dispute about the only facts that matter to the establishment of Steves' prima facie case.

It is important to address this issue before trial, not only because it is appropriate under Rule 56, but also because it will help the jury to properly focus on the issues it needs to resolve instead of addressing complex economic calculations that JELD-WEN cannot deny. As this Court has previously noted, the antitrust claim asserted in this case is a complicated claim to present to a jury. Resolving this issue before trial will simplify the parties' proof and the Court's instructions to the jury.

[redacted]

STATEMENT OF UNDISPUTED FACTS

1. Doors used in the interiors of new homes throughout the United States are predominantly molded doors. (Dkt. No. 248 ("Ans.") ¶ 38.)

2. An interior molded door is made by sandwiching a wood frame and a hollow or solid core between two doorskins. (Ans. ¶ 38.)

3. A doorskin is the component which makes up the front and back of an interior molded door. (Ans. ¶ 37.)

4. [redacted]

5. JELD-WEN is a manufacturer of interior molded doorskins, and has been manufacturing interior molded doorskins from before 2012 through the present. From 2012 through the present, JELD-WEN has continually manufactured interior molded doorskins for use in the United States. (Ans. ¶¶ 8, 9; [redacted]

6. Masonite is a manufacturer of interior molded doorskins, [redacted] From 2012 through the

[2] Attached hereto as Exhibit A is the Declaration of Professor Carl Shapiro, dated September 21, 2017 ("Shapiro Declaration"), wherein Professor Shapiro attests that the combined contents of his expert reports are accurate to the best of his knowledge and that his testimony at trial will be consistent with the combined contents of his reports. Each of Professor Shapiro's reports is attached to the Shapiro Declaration.

present, Masonite has continually manufactured interior molded doorskins for use in the United States. (Ans. ¶¶ 8, 19; [redacted]

7. In 2012, CraftMaster was a manufacturer of interior molded doorskins. Prior to and during 2012, CraftMaster manufactured interior molded doorskins for use in the United States. (Ans. ¶¶ 8, 10; [redacted]

8. On or about June 18, 2012, JELD-WEN publicly announced its intent to merge with and acquire CraftMaster. (Ans. ¶ 57.)

9. JELD-WEN's acquisition of CraftMaster closed on October 24, 2012. (Ans. ¶ 19.)

10. [redacted]

11. [redacted]

12. [redacted]

13. [redacted]

14. [redacted]

15. [redacted]

16. [redacted]

17. [redacted]

18. [redacted]

19. [redacted]

20. [redacted]

[3] Professor Shapiro made slight adjustments to the revenue-based HHI calculations in his Reply Report (attached as Attachment A.2 to the Shapiro Declaration). These adjustments do not substantively change Professor Shapiro's conclusions regarding the HHIs.

SECTION 7 LEGAL FRAMEWORK

Clayton Act Section 7 prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1996). This is an "expansive definition of antitrust liability." *See California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 788 (9th Cir. 2015); *see also Berlyn, Inc. v. Gazette Newspapers, Inc.* (*Berlyn I*), 157 F. Supp. 2d 609, 622 (D. Md. 2001) ("A plaintiff may establish a violation of this statute if there is a reasonable probability that competition would be adversely affected.").

Assessing whether a merger violates Section 7 involves a three-step burden-shifting analysis that originated with the Supreme Court's decision in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).[4] In step one, the plaintiff must establish a prima facie case "showing that a transaction will lead to undue concentration in the market for a particular

[4] The burden-shifting scheme has been further developed in a series of appellate and district court decisions. *See United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *see also, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337-38 (3d Cir. 2016); *St. Alphonsus*, 778 F.3d at 783; *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 565, 571 (6th Cir. 2014); *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1214 & n.4 (11th Cir. 2012); *Chi. Bridge & Iron Co. v. FTC* , 534 F.3d 410, 423 (5th Cir. 2008); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 192 (D.D.C. 2017); *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133, 2014 WL 203966, at *32-33 (N.D. Cal. Jan. 8, 2014). Although the circuits sometimes differ with regard to their application of certain aspects of the Clayton Act, they uniformly adopt the basic burden-shifting structure described above.

product in a particular geographic area." *Id.* (footnotes omitted). To establish the prima facie case, a plaintiff must "(1) propose the proper relevant market and (2) show that the effect of the merger in that market is likely to be anticompetitive." *Penn State Hershey*, 838 F.3d at 337-38.

Normally, this is accomplished through a definition of the relevant market and calculation of the related Herfindahl-Hirschman Index ("HHI"), "which compares a market's concentration before and after the proposed merger," *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017), and which courts and government agencies rely on as an authoritative guide when analyzing mergers. *See, e.g.*, *Penn State Hershey*, 838 F.3d at 347; *St. Alphonsus*, 778 F.3d at 787; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 n.9 (D.C. Cir. 2001); U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 5.3 (Aug. 19, 2010) ("*Merger Guidelines*").[5] "The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market," which gives proportionately greater weight to firms with larger market shares. *Heinz*, 246 F.3d at 716 n.9. Thus, for example, the HHI in a market with two firms in which one firm has an 80% market share and the other has a 20% market share is 6,800 (80^2 + 20^2), whereas the HHI in a market with two firms controlling 50% of the market each is 5,000 ($50^2 + 50^2$). Put another way, the HHI calculations do two things: first, they measure the overall

[5] Although courts are not bound by the *Merger Guidelines* in analyzing mergers under Section 7, most courts "consider[] them a helpful tool, in view of the many years of thoughtful analysis they represent," *Anthem*, 855 F.3d at 349, and rely on them frequently in Section 7 cases. *See, e.g.*, *Penn State Hershey*, 838 F.3d at 338; *Heinz*, 246 F.3d at 716; *Bazaarvoice*, 2014 WL 203966, at *28, 36-37; *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 52-53 (D.D.C. 2011). [redacted]

concentration in the market. Second, they measure how much that concentration changed (or will change) due to the merger. Both measures are important. An increase in the HHI is less likely to have anticompetitive effects in an unconcentrated market than in a concentrated one. *See Merger Guidelines* § 5.3 (describing different levels of sensitivity depending on whether the relevant market is unconcentrated, moderately concentrated, or highly concentrated).

Sufficiently high HHI figures resulting from a merger establish a Section 7 plaintiff's prima facie case. *See St. Alphonsus*, 778 F.3d at 788 ("The extremely high HHI on its own establishes the prima facie case."); *Heinz*, 246 F.3d at 716 ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive."); *see also Merger Guidelines* § 5.3. The relevant figures are not only how much the HHI increased due to the merger, but also how high the overall HHI, and thus market concentration, is after the merger.

Relying on the HHI calculations and market concentration is warranted because, as the Supreme Court has recognized, "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Phila. Nat'l Bank*, 374 U.S. at 363. Thus, "[t]he market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market." *Berlyn, Inc. v. Gazette Newspapers, Inc.* (*Berlyn II*), 223 F. Supp. 2d 718, 738 (D. Md. 2002) (internal quotation marks omitted).

If the plaintiff establishes its prima facie case, the merger is presumed anticompetitive. The strength of the presumption varies with the strength of the prima facie evidence presented—

i.e., the size of the post-merger HHI and the increase in the HHI caused by the merger. *See Anthem*, 855 F.3d at 350-51 ("The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." (internal quotation marks omitted)); *see also Merger Guidelines* § 5.3 ("The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns . . . .").

In step two of the burden-shifting process, the burden shifts to the defendant to rebut the prima facie case by casting "doubt on the accuracy of the [plaintiff's] evidence as predictive of future anticompetitive effects." *Chi. Bridge & Iron*, 534 F.3d at 423. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition"—such as by showing that barriers to entry in the relevant market are low—or "by discrediting the data underlying the initial presumption in the [plaintiff's] favor." *Baker Hughes*, 908 F.2d at 991; *see also Berlyn I*, 157 F. Supp. 2d at 622 (a merger resulting in high concentrations "'must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.'" (quoting *Phila. Nat'l Bank*, 374 U.S. 321)).

If the defendant successfully rebuts the prima facie case, the analysis moves to step three, where "the burden of producing additional evidence of anticompetitive effect shifts" back to the plaintiff "and merges with the ultimate burden of persuasion." *Anthem*, 855 F.3d at 350 (internal quotation marks omitted).

This burden-shifting framework for assessing a merger's legality under Section 7 applies equally to both consummated and unconsummated mergers. *See, e.g.*, *Penn State Hershey*, 838 F.3d at 334 (unconsummated merger); *St. Alphonsus*, 778 F.3d at 783 (consummated merger); *ProMedica*, 749 F.3d at 565 & 570 (consummated merger). The framework similarly applies

whether a Section 7 challenge is brought by the government or by a private party. *See, e.g.*, *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1264 (E.D. Pa. 1987).[6]

In this case, undisputed record evidence establishes the relevant market, market shares, and changes in the HHI caused by the merger. This undisputed evidence is sufficient to establish Steves' prima facie case and its right to a presumption that the merger is anticompetitive. On this basis, the Court should enter partial summary judgment in favor of Steves.

LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) provides that a party may move for summary judgment on "each claim or defense—or the part of each claim or defense" as to which "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See also* Fed. R. Civ. P. 56(g) (court "may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case"); *Bell Microprods., Inc. v. Global-Insync, Inc.*, 20 F. Supp. 2d 938, 941 (E.D. Va. 1998) ("[S]ummary judgment may be granted as to any part of a claim.").

"The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Nor can the nonmoving party 'create a genuine issue of material fact through mere speculation or the building of one inference upon another.'" *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th

[6] Moreover, because "federal regulators will not necessarily challenge every potentially troublesome merger," the courts give no weight, in a suit by a private plaintiff, to the fact that the government decided not to challenge the merger. *AlliedSignal*, 183 F.3d at 575.

Cir. 1985)). Rather, a genuine issue of material fact exists only where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

ARGUMENT

The Court should rule that Steves has established its prima facie case under Section 7 of the Clayton Act sufficient to trigger a presumption of anticompetitive effects from JELD-WEN's acquisition of its rival, CraftMaster.

I. STEVES' DEFINITION OF THE RELEVANT MARKET IS UNDISPUTED

The definition of the relevant market is not in dispute. [redacted] Applying the Hypothetical Monopolist Test—an established and accepted test used by the U.S. government and courts to identify relevant markets for antitrust purposes, *see, e.g.*, *Penn State Hershey*, 838 F.3d at 338; *H & R Block, Inc.*, 833 F. Supp. 2d at 51-52; *Merger Guidelines*, § 4.1.1—[redacted] Steves has therefore met its initial burden to identify a "proper relevant market" for purposes of its prima facie case.

II. MARKET SHARES ARE UNDISPUTED

The allocation of market share among the participants in the market for interior molded doorskins used in the United States at the time of the merger is similarly undisputed. [redacted]

[redacted]

These market share calculations are not in dispute. [redacted] Steves has therefore met its initial burden to estimate the relevant market shares for purposes of its prima facie case.

III. STEVES HAS MET ITS BURDEN OF ESTABLISHING PRESUMPTIVE ANTICOMPETITIVE EFFECTS

Having calculated JELD-WEN's and CraftMaster's respective market shares in 2012, Professor Shapiro calculated the merger's impact on the relevant HHIs. He concluded that, based on units sold, the merger between JELD-WEN and CraftMaster caused the HHI [redacted] He further concluded that, when based on revenue, the merger between JELD-WEN and CraftMaster caused the HHI [redacted] These figures show that the relevant market was highly concentrated before the merger, and that the merger dramatically increased the degree of concentration on top of that. *See Merger Guidelines*, § 5.3 (defining "Highly Concentrated Markets" as those with HHIs above 2500).

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[7] As noted, while Professor Shapiro made slight adjustments to the revenue-based HHI calculations in his Reply Report, these adjustments do not substantively change Professor Shapiro's conclusions regarding the HHIs. *See supra* note 3. [redacted]

These figures vastly exceed the threshold over which a merger will be considered presumptively anticompetitive. *See, e.g.*, *Penn State Hershey*, 838 F.3d at 347 ("A post-merger market with a HHI above 2,500 is classified as 'highly concentrated,' and a merger that increases the HHI by more than 200 points is 'presumed to be likely to enhance market power.'" (quoting *Merger Guidelines*, § 5.3)); *H & R Block*, 833 F. Supp. 2d at 73 (increases in the HHI of 400 "are high enough to create a presumption of anticompetitive effects"). They are also uncontested.

[redacted] and the record is devoid of other evidence contravening Professor Shapiro's calculations.

It is instructive to compare the HHIs in this case with those found adequate to establish a presumption in other cases. Those cases demonstrate that the HHIs in this case are not only sufficient to establish the presumption, but also that they are sufficient by a tremendous margin. For example:

- In *Heinz*, the court described a merger that increased the HHI by 510 to 4,775 as being presumptively anticompetitive "by a wide margin." *Heinz*, 246 F.3d at 716. Both the total post-merger HHI and the HHI increase are substantially lower than those in this case.
- In *ProMedica*, the court remarked that a merger that would increase HHIs already above 4,000 by over 1,000 points "blew through [the HHI threshold] in spectacular fashion" and justified the presumption of anticompetitive effects. *ProMedica*, 749 F.3d at 568.
- In *Anthem*, the court considered an merger that increased the HHI by 1511 to a post-merger total of 4,350 and concluded that the result is "an *overwhelming* presumption of anticompetitive effect." *See Anthem*, 855 F.3d at 367 (emphasis added). That merger

resulted in a slightly larger HHI increase than the JELD-WEN/CraftMaster merger, but resulted in substantially less market concentration overall.

These comparisons reveal that JELD-WEN's acquisition of CraftMaster was substantially more threatening to competition than the law requires for a prima facie case, and that a presumption of anticompetitive effects is appropriate. This is not a close call.

In light of the evidence, Steves is entitled to summary judgment that its prima facie case is established and that there is a presumption that the 2012 merger between JELD-WEN and CraftMaster is anticompetitive. Summary judgment on this point will "narrow[] [the] scope of issues for trial" and is an appropriate and efficient use of partial summary judgment. *Bell Microprods.*, 20 F. Supp. 2d at 941 & n.7 (internal quotation marks omitted). Indeed, parties in antitrust actions frequently move for, and are granted, partial summary judgment as to market definition and market share. *See, e.g.*, *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1130, 1136 (10th Cir. 2002) (affirming district court's grant of plaintiff's summary judgment as to the scope of the relevant market); *Remington Prods., Inc. v. N. Am. Philips Corp.*, 717 F. Supp. 36, 43-44 (D. Conn. 1989) (granting plaintiff's motion for summary judgment as to definition of relevant market); *accord Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.*, NO. C 04-02266, 2010 WL 11478992, at *7 (N.D. Cal. July 21, 2010) (considering but denying defendant's motion for "summary adjudication" of attempted monopolization claim on the basis of its "insufficient market share").

At least one court has granted a plaintiff partial summary judgment in a case arising under Section 7. In *Hittman Nuclear & Development Corp v. Chem-Nuclear Systems, Inc.*, the plaintiff moved for partial summary judgment to determine the relevant market and to establish "[t]hat the effect of Chem-Nuclear's acquisition of Atcor may be substantially to lessen

competition" in the relevant market—in other words, to establish its prima facie case. No. N-78-2570, 1979 WL 1749, at *1, 5 (D. Md. Nov. 26, 1979). The court granted the plaintiff summary judgment as to the definition of the relevant market and found that the increased market concentration resulting from the challenged merger "clearly create[d] a presumption of illegality" that warranted summary judgment. *Id.* at *5. The court in *Hittman* went on to reject the evidence the defendant offered to rebut the presumption of anticompetitive effects and thus granted the plaintiff summary judgment on the defendant's rebuttal case as well. *See id.* at *7.

Parties also frequently move for, and receive, partial summary judgment on the establishment of a prima facie case in other actions seeking to enforce federal statutes. *See, e.g.*, *Great Am. Ins. Co. v. USF Holland Inc.*, 937 F. Supp. 2d 376, 384-86 (S.D.N.Y. 2013) (plaintiff entitled to summary judgment that it established prima facie case under 49 U.S.C. § 14706); *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980, 994 (E.D. Mo. 2006) (partial summary judgment granted, ruling that plaintiff had established prima facie case under Age Discrimination in Employment Act ("ADEA")); *Dittmann v. Ireco, Inc.*, 883 F. Supp. 807, 811-14 (N.D.N.Y. 1995) (plaintiff established prima facie case of ADEA violation); *accord Thomas v. Union Pac. R.R. Co.*, 203 F. Supp. 3d 1111, 1119 (D. Or. 2016) (granting summary judgment to plaintiff as to some, but not all, elements of prima facie case under Federal Rail Safety Act).

Market definitions, market shares, and HHIs raise some of the most complex economic and legal issues that judges and juries are asked to consider in antitrust cases. *See, e.g.*, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1993) ("There is no subject in antitrust law more confusing than market definition."); *Berlyn II*, 223 F. Supp. 2d at 727 ("Defining markets for antitrust analysis is an extremely complex task."); *see also* Dkt. No. 239 at 29-30 (Order granting motion for severance acknowledging that the antitrust claims in this

case are "complex"). Where, as here, there is no dispute as to any of these issues, partial summary judgment should be granted to remove these complex questions from the set of issues the jury must decide. Partial summary judgment will also help structure how the Court and the parties frame the antitrust case for the jury by providing clarity that, based on the undisputed facts, Steves has established the elements of its prima facie case and is entitled to the presumption of anticompetitive effects. Advance framing will be particularly helpful in this case, where there are no pattern jury instructions and thus all the Court's instructions must be drafted from scratch based on existing law. Deciding this issue now will facilitate the jury's understanding of the parties' respective burdens and that the starting point for this case is a merger that the law deems presumptively anticompetitive.[8]

CONCLUSION

For the foregoing reasons, Steves respectfully requests that the Court grant partial summary judgment finding that Steves has satisfied the elements of a plaintiff's prima facie case under Section 7 of the Clayton Act and is entitled to the presumption that the 2012 merger between JELD-WEN and CraftMaster was anticompetitive.

[8] In the alternative, Steves requests that the Court enter partial summary adjudication as to the undisputed facts listed in its statement of undisputed facts. *See* Fed. R. Civ. P. 56(g) (court "may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case"). These undisputed facts establish: (1) that the relevant market consists of [redacted] (2) JELD-WEN's and CraftMaster's market shares prior to the 2012 merger; (3) JELD-WEN's market share following the 2012 merger; and (4) the HHI and the change in HHI resulting from the 2012 merger.

Dated: September 22, 2017

Respectfully submitted,

STEVES AND SONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 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 version of this memorandum and exhibits thereto are being provided to counsel of record via email.

By /s/Lewis F. Powell III
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