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

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

PLAINTIFF STEVES AND SONS, INC.'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW

The Court should enter judgment as a matter of law on two distinct issues in the trial between Steves & Sons, Inc. ("Steves") and JELD-WEN, Inc. ("JELD-WEN"):

(1) JELD-WEN's so-called "efficiencies defense;" and

(2) Steves' claim for declaratory judgment regarding the termination date of the Supply Agreement between Steves and JELD-WEN.

First, the Court should find that JELD-WEN has failed to establish the efficiencies defense as a matter of law. The Supreme Court has never recognized an efficiencies defense in a challenge to a merger under Section 7 of the Clayton Act, and several Circuit courts are "skeptical that such an efficiencies defense even exists." *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016). But even if an efficiencies defense is available in theory, JELD-WEN has fallen far short of the showing required to obtain an instruction on that defense or argue that defense to the jury.

Second, the Court should find as a matter of law that the Supply Agreement will terminate on September 10, 2021. JELD-WEN has conceded this point in Court, but has not

amended the pleadings in which it took a contrary position. Consistent with this Court's recent order on JELD-WEN's motion for partial summary judgment, the Court should enter declaratory judgment for Steves on this claim.

ARGUMENT

Judgment as a matter of law may be granted "if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." F.R.C.P. 50(a)(1). "Judgment as a matter of law is proper 'when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.'" *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996).

I. STEVES IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON JELD-WEN'S EFFICIENCIES DEFENSE

A. Neither the Supreme Court Nor the Fourth Circuit Recognize An Efficiencies Defense

Even if it had sufficient proof that efficiencies resulted from the merger, JELD-WEN could not present an efficiencies defense to the jury because no such defense exists as a matter of law. As the Supreme Court has explained, "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition." *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580 (1967). *Cf.* Richard A. Posner, *Antitrust Law* 133 (2d ed. 2001) ("there should be no general defense of efficiency" because "[i]t is rarely feasible to determine by methods of litigation the effect of a merger on the costs of the firm created by the merger"). While some courts outside this Circuit have recognized an efficiencies defense, the Fourth Circuit has yet to do so. And the Supreme Court's "decisions remain binding precedent until [it]

see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–53 (1998). There is therefore no efficiencies defense to be put to the jury at all.

B. <u>If an Efficiencies Defense Exists, JELD-WEN Had the Burden to Introduce Evidence That Would Support a Finding in its Favor on That Defense</u>

If an efficiencies defense was available to JELD-WEN, JELD-WEN had the burden to introduce evidence that would support a jury finding of efficiencies recognized by the law.

As JELD-WEN admits, an efficiencies defense (if it exists) is "part of the defendant's rebuttal to the plaintiff's prima facie case." ECF No. 865 at 2; *see also Anthem*, 855 F.3d at 355; *Penn State Hershey*, 838 F.3d at 347; *Saint Alphonsus*, 778 F.3d at 790-91 & n. 15; *FTC v. Univ. Health, Inc.*, 983 F.2d 1206, 1222 (11th Cir. 1991). The plaintiff's prima facie case establishes a "presumption of anticompetitive effect" from a merger. *Anthem*, 855 F.3d at 349; *see also Saint Alphonsus*, 778 F.3d at 788; *Univ. Health*, 938 F.3d at 1218. Under Federal Rule of Evidence 301, JELD-WEN as "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." Fed. R. Evid. 301.

In order to satisfy this "burden of production," JELD-WEN had the "obligation to come forward with evidence to support its claim" of efficiencies. *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272, 276 (1994); *see also Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d at 425 (burden of production is the "obligation to come forward with evidence of a litigant's necessary propositions of fact.") (quotation marks omitted). More specifically, in order to "to overcome a presumption that a proposed acquisition would substantially lessen competition," JELD-WEN "*must demonstrate* that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers." *Univ. Health*, 938 F.2d at 1223

(emphasis added); Areeda & Hovenkamp, *Antitrust Law*, ¶ 970f ("The burden of asserting and showing such a defense is ordinarily on the defendants.").

Absent such evidence, JELD-WEN cannot argue an efficiencies defense to the jury under "the fundamental rule, known to every lawyer, that argument is limited to the facts in evidence." *United States v. Lighty*, 616 F.3d 321, 361 (4th Cir. 2010) (quotation marks omitted).

C. JELD-WEN Failed to Introduce Evidence Supporting a Cognizable Efficiencies Defense.

Even where recognized, this narrow efficiencies defense is highly disfavored. *See Saint Alphonsus*, 778 F.3d at 790 ("[N]one of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense."); *see also Penn State Hershey*, 838 F.3d at 350 ("high standard" for concentrated markets has never been met in any case "considered by a court of appeals"). Accordingly, as this Court has already recognized, courts that recognize this defense require the defendant to clear a very high bar [*See* Pretrial conference transcript 595:18 – 596:2 ("[y]ou have to really put on some strong proof on [efficiencies]")].

First, the claimed efficiencies must be extraordinary. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 & 720-21 (D.C. Cir. 2001) (efficiencies defense requires "proof of extraordinary efficiencies.").

Second, the efficiencies must be merger-specific, "meaning that [they] cannot be achieved by either company alone because, if [they] can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Anthem*, 855 F.3d at 356 (quotation marks omitted); *see also Saint Alphonsus*, 778 F.3d at 790-91; *Heinz*, 246 F.3d at 722.

Third, the efficiencies must be verifiable, not merely speculative. *See also Saint Alphonsus*, 778 F.3d at 791 ("Claimed efficiencies must be verifiable, not merely speculative");

United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 89 (D.D.C. 2011) ("the estimate of the predicted saving must be reasonably verifiable by an independent party").

Finally, the benefits of any claimed efficiencies must benefit consumers. "[T]he Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations." *Saint Alphonsus*, 778 F.3d at 792. Rather, "a defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers." *Univ. Health*, 938 F.2d at 1223. Thus, courts "require [defendants] provide clear evidence showing that the merger will result in efficiencies that will offset the anticompetitive effects and ultimately benefit consumers." *Penn State Hershey*, 838 F.3d at 350.

None of the efficiencies claimed by JELD-WEN witnesses satisfy *any* of these requirements, let alone each one.

1. None of the identified efficiencies are extraordinary

It is undisputed that JELD-WEN's prices for interior molded doorskins have increased since the 2012 merger between JELD-WEN and Craftmaster. [2118:18 - 24]. JELD-WEN therefore cannot claim that any efficiencies caused its prices to go down. Instead, JELD-WEN witnesses have suggested that the efficiencies resulting from the merger resulted in lower costs for JELD-WEN, [1399:1-3], resulting in a variety of supposed benefits to JELD-WEN's customers. These include improved service, R&D, and new designs, [1591:21-1592:9] and JELD-WEN's ability to provide its customers with "reductions in price, increases." [1401:7-23] In other words, JELD-WEN raised its prices after the merger, but might have raised them *even more* without the supposed efficiencies.

Insofar as they actually exist, these efficiencies are not extraordinary. Instead, they are the benefits that managers hope for in *every* merger, without regard for their scope or actual impact. The only effort to quantify benefits of these efforts came from Mr. Orsino, who estimated benefits of $10-11 million dollars or, alternatively, $10-15 million dollars [1527:18-1528:6]. Efficiencies representing such a tiny percentage of JELD-WEN's annual revenue are not extraordinary, particularly when JELD-WEN witnesses have stressed that JELD-WEN's entire molded doorskin enterprise is just 1% of JELD-WEN's revenues. [*See* 1878:15-17.] *See FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 85–86 (D.D.C. 2015) (savings of "less than one percent of the merged entity's annual revenue" were "unlikely to outweigh the competitive harm to customers" even if all were passed on to consumers); Areeda & Hovenkamp, *Antitrust Law*, ¶ 976d ("efficiencies must be at least 8 percent across the entire output in the market where competition is believed to be threatened"). Even "[a] large percentage reduction in only a small portion of the company's overall variable manufacturing cost does not necessarily translate into a significant cost advantage to the merger." *Heinz*, 246 F.3d at 721.

JELD-WEN also argues that the merger allowed it to reduce JELD-WEN and CMI's "separate product lines . . . down to a common product line," [1591:21-9] and offer a more limited offering as "one shop" [1403:4-8]. This is not an efficiency at all, let alone an extraordinary one. Before the merger, JELD-WEN and Craftmaster had some variation between the products they offered. [1402:6-11] Combining these two distinct offerings into one smaller offering surely made things better from JELD-WEN's perspective, but from the consumers' perspective it is merely the elimination of choice. Far from being an extraordinary efficiency, the loss of choice is an antitrust *injury*. *Laumann v. National Hockey League*, 105 F. Supp. 3d 384, 397 (S.D.N.Y. 2015) ("anticompetitive conduct is injurious if it limits consumer options.");

cf. FTC/DOJ Merger Guidelines, § 10 at 31 ("purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value"). As the court explained in *Penn State Hershey*, efficiencies "must not arise from any anticompetitive reduction in output or service," as is the case with this asserted efficiency. 838 F.3d at 349. *See also University Health*, 938 F.2d at 1223 (rejecting claim of efficiencies from elimination of "unnecessary duplication.").

2. None of the supposed efficiencies are merger specific.

To maintain its defense, JELD-WEN bears the burden of demonstrating that its supposed efficiencies could only be accomplished via its merger with Craftmaster. *See Saint Alphonsus*, 778 F.3d at 791 n.15 (defendant has burden of demonstrating that alternative methods of obtaining efficiencies are not realistic). But all of the supposed benefits of the JELD-WEN CMI merger could have been accomplished without it. For example, JELD-WEN witnesses have stressed that the acquisition of CMI allowed JELD-WEN to replace "two of its older, high-cost plants and replace that capacity with lower cost production out of Towanda." [1592:25-1593:5] If this is an efficiency at all, it is not merger specific. The Towanda plant was already efficient while CMI was operating it, so attributing its efficiency to the merger makes no sense. In any case, JELD-WEN has just built a new plant at Dodson, Louisiana that is also a highly efficient plant and a separate part of JELD-WEN's cost reduction program. [1575:17-1576:16] Although significant evidence shows that it is very difficult to build a new doorskin plant, the same evidence shows that JELD-WEN is one of the few companies in the world capable of doing it. The fact that JELD-WEN was constructing the efficient plant at Dodson at the same time that it

was acquiring Craftmaster shows without question that JELD-WEN did not need to buy CMI to add a more efficient plant.[1] *See Anthem*, 855 F.3d at 357 (rejecting efficiency defense where fact witness testimony was "woefully insufficient to show that [defendant] cannot develop better customer-facing programs" claimed to be an efficiency). Similarly, there is no reason that JELD-WEN could not have raised funds for expenses like research and development without the merger. [*See 1938:2-7* (JELD-WEN made $200 million in profit in 2017)]

3. The supposed efficiencies are not verifiable

The efficiencies JELD-WEN identified are also not verifiable. Instead, they represent, at best, JELD-WEN executives' speculative estimates that are insufficient under the law. *See University Health*, 938 F.2d at 1123 ("Economies employed in defense of a merger must be shown in what economists label 'real' terms. To hold otherwise would permit a defendant to overcome a presumption of illegality based solely on speculative, self-serving assertions." (internal citations and quotation marks omitted)).

For example, Mr. Merrill's testimony that the merger resulted in "reductions in cost, increases" for consumers is a wholly unsupported intuition of what JELD-WEN's pricing would have been without the supposed merger efficiencies. [1401:4-1402:23] Mr. Merrill provided no explanation of how one could calculate the benefits to consumers, and it is very difficult to see how that could be done without extensive expert testimony that JELD-WEN does not have. Notably, Courts have found similar claims insufficiently verifiable even when the passed on cost

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[1] Similarly, there is no reason to believe that JELD-WEN could not have developed and made eight-foot doorskins from a plant other than the one it bought from Craftmaster. [1522:5-13] *See Saint Alphonsus*, 778 F.3d at 791 (affirming rejection of efficiency defense where court had "no empirical evidence" that defendant needed merger to transition to new product).

savings *were* estimated by a competent expert. *See Anthem,* 855 F.3d at 362. JELD-WEN's evidence falls well short of this.

Similarly, Mr. Morrison testified that JELD-WEN saved "between 10 and $11 million" from shutting outdated plants after the CMI acquisition, but provided no basis for those round figures. [1595:4-6] *See H & R Block*, 833 F. Supp. 2d at 91 (rejecting cost estimates "largely premised on its managers['] experiential judgment about likely costs, rather than a detailed analysis of historical accounting data"); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175 (N.D. Cal. 2004) (same because top executives' "personal estimations regarding the potential cost-savings . . . are much too speculative to be afforded credibility"); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1090 (D.D.C. 1997) (rejecting efficiency defense where defendant's executive "was unable to explain the methods used to calculate many of the cost savings" predicted in documents); *see also* Areeda & Hovenkamp, *Antitrust Law*, ¶970a ("both prior to and when defending a merger firms tend to exaggerate the magnitude of efficiencies that can be realized from a merger").

"While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court. If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise." *H & R Block*, 833 F. Supp. 2d at 91.

4. The claimed efficiencies do not benefit consumers

"[C]ost savings only improve consumer welfare to the extent that they are actually passed through to consumers, rather than simply bolstering [the defendant's] profit margin," so "only

efficiencies that create an equivalent downward pricing pressure can be viewed as sufficient to reverse the merger's potential to harm consumers." *Anthem*, 855 F.3d at 362 (quotation marks omitted). Here, however, it is undisputed that doorskin prices ***rose*** following the merger, [Snyder 2118:18 - 24], and the testimony of JELD-WEN witnesses confirms that any efficiencies from the merger will ***not*** benefit JELD-WEN's customers. [1422:19-22 ("[MR. MACH:] You are not saying, are you, sir, that reductions in cost would actually result in reductions in the prices you charged your customers; right? [MR. MERRILL:] I am not saying that, correct.") That suffices to conclusively reject the efficiencies defense[2]. *See Saint Alphonsus*, 778 F.3d at 791 (affirming rejection of efficiencies defense where evidence showed that prices would increase).

Ultimately, JELD-WEN has not identified or produced evidence of efficiencies that comes near the high standard imposed by the law. Instead, JELD-WEN has identified pecuniary benefits it hopes will ***inure to JELD-WEN*** because of its acquisition. As this Court has recognized, such benefits are not recognized efficiencies for the simple reason that they do not bring benefits to society that could counteract the injury to competition brought about by the merger. [Pretrial conference 595:17-596:11.]

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[2] JELD-WEN's expert economist, Professor Snyder, further undercut Mr. Merrill's testimony by opining that "the acquisition plays no role, either in a statistical sense or an economic sense, in explaining market outcome since the acquisition." [2120:5-8]

II. **THE COURT SHOULD GRANT STEVES' CLAIM FOR DECLARATORY JUDGMENT REGARDING THE TERMINATION DATE OF THE SUPPLY AGREEMENT BETWEEN STEVES AND JELD-WEN**

Steves also seeks judgment on one claim for relief in Count Four of its Complaint. In that Count, Steves sought, among other things, a declaration that "because JELD-WEN provided written notice of termination on September 10, 2014, the effective termination date is September 10, 2021." ECF No. 5 at 43 ¶192(c). Steves sought this declaration because JELD-WEN had "put Steves on notice of its intention to terminate the Supply Agreement on December 31, 2019, which is 21 months earlier than the Supply Agreement permits." ECF No. 5 at 7-8 ¶24. In its answer, JELD-WEN denied that Steves was entitled to such a declaration. ECF No. 252 at 27.

JELD-WEN has since attempted to withdraw from the position that the Supply Agreement would terminate on December 31, 2019, but has not amended its pleadings. Mr. Buterman stated in open court and on the record that JELD-WEN had abandoned any claim or defense that the Supply Agreement would terminate on December 31, 2019:

> THE COURT: You're not any longer considering saying that the termination is 2019, right?
>
> MR. BUTERMAN: No, Your Honor.

[1210:10-12] Mr. Pfeiffer made a similar representation. [1031:23-1032:1] ("THE COURT: . . . That addresses the alternate date which I thought you all withdrew. MR. PFEIFFER: Sorry. We did withdraw that, Your Honor"). The representations of Messrs. Buterman and Pfeiffer are binding on JELD-WEN. *Pvd Plast Mould Indus. v. Polymer Group, Inc.*, 2001 U.S. Dist. LEXIS 23804, *21 (D.S.C. Feb. 1, 2001) ("counsel's representation[s] in court are binding on PVD"). Accordingly Steves is entitled to judgment on its claim seeking a declaration that "because

JELD-WEN provided written notice of termination on September 10, 2014, the effective termination date is September 10, 2021."

Dated: February 13, 2018

Respectfully submitted,

STEVES AND SONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2018, 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.

By /s/Lewis F. Powell III
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