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 OPPOSITION TO JELD-WEN'S MOTION FOR JUDGMENT AS A MATTER OF LAW

In its motion for judgment as a matter of law ("Mot."), JELD-WEN presents a series of arguments this Court already has rejected, both at the summary judgment stage and in its ruling on motions in limine. JELD-WEN also presents a one-sided view of the evidence, ignoring extensive testimony that amply supports jury rulings in Steves' favor on liability and damages for both Steves' Clayton Act and contract claims. JELD-WEN's motion should be denied.

I. STEVES HAS SHOWN THAT JELD-WEN'S ACQUISITION OF CRAFTMASTER CAUSED STEVES INJURY AND DAMAGES RELATIVE TO THE "BUT FOR" WORLD WHICH ASSUMES THE ACQUISITION DID NOT OCCUR

Throughout this case, Steves has presented a consistent theory of how it has suffered injury and damages as a result of JELD-WEN's acquisition of CraftMaster: JELD-WEN charged Steves higher prices for doorskins than permitted under the Supply Agreement, provided doorskins of lower quality than permitted under the Supply Agreement, and terminated the Supply Agreement, because the acquisition gave it the economic incentive and opportunity to do so. Thus, as a direct result of the acquisition, Steves *did* in fact pay higher prices and receive lower-quality doorskins than it would have in the "but for" world in which the acquisition did not deprive it of a potential alternative doorskin supplier—CMI. That establishes both antitrust injury and damages causally linked to the acquisition.

If JELD-WEN's argument to the contrary sounds familiar to the Court, that is because the Court already has considered and rejected it. JELD-WEN filed a motion in limine to exclude opinions from Steves' expert, Professor Carl Shapiro, as to the "prices that would have prevailed in the market for doorskins[] in the absence of" the acquisition. (ECF No. 539, at 1.) The Court denied this motion, reasoning that "the premise upon which the motion is predicated is erroneous." (ECF No. 778, at 1.) The Court explained:

> Contrary to the premise of the defendant's motion, Professor Shapiro, and other experts for the plaintiff, have analyzed the relationship between the merger and post-merger prices and have formed opinions on the post-merger prices, and in the process, they have testified about, and explained, that prices in the pre-merger market, including the prices reflected in the agreement between the plaintiff and the defendant executed shortly before the merger was announced, *would be the prices in the market but for the acquisition of CraftMaster Manufacturing, Inc. by the defendant.* It is obvious that the defendant will offer expert testimony to the contrary and the jury will be required to assess which version of the circumstances it chooses to accept.

(*Id.* at 1-2, emphasis added.) The Court also denied JELD-WEN's related motion in limine to exclude Professor Shapiro's "opinion that the acquisition caused anticompetitive effects" (ECF No. 543), reasoning that "the record establishes that … Professor Shapiro has conducted a reliable economic analysis that permits him to express opinions respecting whether the acquisition of CraftMaster Manufacturing, Inc. by the defendant caused anticompetitive effects." And as the Court further emphasized in denying JELD-WEN's motion for summary judgment, Steves has presented evidence sufficient to support a jury finding that the CMI acquisition "allowed JELD-WEN to raise prices under the Supply Agreement or provide lower quality doorskins because the merger undercut Steves' ability to seek favorable prices or higher-quality doorskins from other suppliers." (ECF No. 976, at 20.)

The trial has proceeded precisely as the Court envisioned in denying these motions. JELD-WEN's Rule 50 motion ignores extensive testimony from Professor Shapiro regarding the exact evidence JELD-WEN faults Steves for ostensibly not presenting. Professor Shapiro testified that he analyzed "the way competition was working before the merger" in the market for interior molded doorskins, to define a baseline against which to measure the observed effects in the market following the CMI acquisition. (Tr. 912:17-913:4.) He explained that he analyzed evidence such as "prices" and "market shares" prior to the acquisition, and found "two significant episodes of competition" in the relevant market prior to the merger: competition to secure a long-term doorskin supply agreement with Steves in 2012, and competition to supply CARB-compliant doorskins. (Tr. 913:13-914:9.)

Professor Shapiro then testified that he found evidence of a reduction in competition following the CMI acquisition. He explained that the "fundamental change that was caused by the merger" in the doorskins market "was a move from three suppliers, JELD-WEN, CraftMaster, and Masonite, just to two, since CraftMaster has been acquired by JELD-WEN," which economists refer to as a "three to two merger." (Tr. 902:15-22.) For Professor Shapiro, this change was "very important for understanding the economic incentives of the companies involved." (Tr. 910:14-15.) He elaborated that, as a result of these "economic incentives," JELD-WEN would have "recognized right before the merger that if they don't sell the doorskins, Steves is going to get the door skin from Masonite or CraftMaster." (Tr. 911:19-22.) Thus, "[s]o long as JELD-WEN is making a profit margin on that sale, it's better to do it even though Steves is competing with them. And that was the situation prior to the merger." (Tr. 911:24-

912:2.) Professor Shapiro explained that, as a result of price competition among JELD-WEN, CraftMaster, and Masonite, Steves was able to secure a Supply Agreement with a competitive price on doorskins—approximately 5.1 percent, or "a million dollars a year," lower than JELD-WEN initially offered. (Tr. 917:9-14.)

By contrast, after the merger, JELD-WEN implemented "significant price increases" for doorskins. (Tr. 945:18.) Where JELD-WEN's prices were not constrained by supply agreements, it instituted a price increase of approximately "20 percent" in just one year (2015), with additional price increase in other years. (Tr. 945:18-21.) And even where JELD-WEN's prices *were* constrained (at least to some degree) by supply agreements, as with Steves, JELD-WEN sought to "renegotiat[e]" the agreement to obtain a higher price (Tr. 951:9-22), then unilaterally imposed price increases in violation of the agreement (Tr. 954:18-957:7), and ultimately terminated the agreement (Tr. 953:23-954:3). Professor Shapiro also explained the "general economic point" that (as common sense also suggests) "when the seller doesn't have as much competition to face," as was true of JELD-WEN after the merger, it is more likely to "take a tougher stance when there are ambiguities in the contract or other day-to-day business issues." (Tr. 955:22-956:2.)

Professor Shapiro also specifically testified that the "JELD-WEN price increases" were "caused by the merger." (Tr. 960:7-11.) He explained that the large increase in HHI concentration strongly suggested that price increases likely would result from the merger. (Tr. 960:14-15.) But he did not stop there: he also "check[ed]" to see whether there were "other things" besides the merger that might have caused JELD-WEN's doorskin prices to go up. (Tr. 960:15-21.)

Professor Shapiro examined two possibilities in particular: whether the increase in doorskin prices might have resulted from either an increase in JELD-WEN's costs or an increase in demand for doorskins. He testified that, in his view, these alternative explanations did not explain the observed price increases, bolstering the likelihood that the merger was the cause. He explained that JELD-WEN's costs to manufacture doorskins, when properly measured, had gone *down*, not up—so those costs could not explain the price increases. (Tr. 961:23-965:9; *see also* ECF No. 976, at 23 (Court observing in denying JELD-WEN's summary judgment motion that "evidence indicates that JELD-WEN increased doorskin prices from pre-merger levels even as key input costs … declined").) Professor Shapiro also explained that the evidence did not support the conclusion that increased demand for doorskins caused the increase in price—because, among other things, there was ample doorskin manufacturing capacity throughout the relevant period. (Tr. 973:11-977:15.) Thus, he concluded:

> So at this point, we've seen that prices did go up. We've ruled out the other explanations that seem possible, and so we are back to the merger as the cause as we were so suspecting from earlier in the analysis based on market concentration. (Tr. 977:20-23.)

This expert testimony amply supports a jury finding that the acquisition caused the price increases that occurred after the acquisition—in other words, that the price increases would not have come about in the "but for" world in which the acquisition had not occurred. "The very essence of … the jury's [] function is to select from among conflicting inferences and conclusions that which it considers most reasonable, … whether it relates to negligence, causation, or any other factual matter." *Doggett v. Atl. Holding Corp.*, 239 F.2d 156, 159 (4th Cir. 1956). Of course it is not possible for Professor Shapiro or anyone else to testify with certainty what conditions would have prevailed in the absence of the acquisition. And JELD-

WEN will introduce its own expert testimony. But the inference that the competitive conditions that prevailed in 2012, when Steves was able to secure certain terms in its supply agreement with JELD-WEN as a result of competition among three potential suppliers, would have continued to exist in roughly the same form but for the merger is certainly a *reasonable* one.[1]

JELD-WEN's attempt to impugn the sufficiency of the evidence on this point by reference to testimony from Steves' damages expert, Ave Tucker, falls flat. JELD-WEN cites Mr. Tucker's testimony that he did not perform any calculations to determine what Steves' submitted or disallowed defect claims would have been absent the merger, or seek to compare Steves' pre- and post-merger defect claims. But Mr. Tucker was not offering an opinion as to whether "the merger actually caused Steves' claimed injuries." (Mot. 5.) Instead, as the Court recognized in denying JELD-WEN's summary judgment motion, testimony from fact witnesses provided the "genuine evidence that the decrease in JELD-WEN's doorskin quality was exacerbated by the CMI Acquisition." (ECF 976 at 23.)

Steves introduced this same evidence at trial, allowing the jury to conclude that the quality problems that arose following the merger were caused by the merger—in other words, that those quality problems would not have arisen in the "but for" world in which CMI remained as an alternative supplier of doorskins. Sam Steves testified that "[a]fter the merger, the quality degraded significantly." (Tr. 364:4-5.) Doug Gartner explained that before the merger, "[q]uality was really pretty good" and "very consistent," and that Steves experienced "fewer

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[1] To the extent JELD-WEN implicitly faults Professor Shapiro for not examining whether CMI would have remained in the market as a supplier of doorskins absent the merger, this Court has already correctly rejected that theory too, in holding that JELD-WEN has not offered sufficient evidence to present a "weakened competitor" defense to the jury. (See ECF No. 955, at 17.)

quality issues" with CraftMaster doorskins in particular, a sharp contrast with the situation after the merger. (Tr. 520:17-24.) JELD-WEN also changed its process for addressing doorskin defects. Whereas before the merger it acted "[v]ery promptly" to give Steves a credit for defective doorskins (Tr. 529:11-14), following the merger, JELD-WEN has become "much more stringent" in refusing to grant Steves credits (Tr. 532:12-17). "Temporal proximity" between an event and subsequent harm "can give rise to an inference of causation," *Spencer v. Va. State Univ.*, 224 F. Supp. 3d 449, 459 (E.D. Va. 2016), and that is true here. That is especially so because, as Professor Shapiro testified, economic theory indicates that an anticompetitive merger often will "reduce quality or lead to service that's not as good." (Tr. 937:1-2.)

Mr. Tucker's testimony was typical of that of a damages expert. He opined as to the *amount* Steves suffered in damages, assuming that the jury found JELD-WEN liable under either Steves' antitrust or contract claims. (Tr. 1152:8-1153:8.) JELD-WEN faults Mr. Tucker for measuring damages "relative to what the parties' *contract* required." (Mot. 5.) But he did so because the supply agreement, which pre-dated the merger and would have existed even had the merger not occurred, specified the prices Steves *should* have paid for doorskins as well as JELD-WEN's obligations regarding defect claims. It certainly is permissible for the jury to presume that Steves would not have incurred these damages absent the merger, which allowed JELD-WEN to exercise its enhanced market power by disregarding the restrictions in a contract that Steves could not terminate without tolling the deathknell of its business.

Fourth Circuit precedent is clear that damages resulting from breaches of a contract may also constitute antitrust damages, where the trier of fact finds that the breach is a result of an antitrust violation. *See Int'l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 419 (4th Cir. 1986) ("The parties agree that the $200,000 award for breach of contract is included in the

$900,000 antitrust award."). This is just such a case, and the jury is accordingly entitled to find that JELD-WEN's behavior under the contract was an anticompetitive effect of the merger.[2]

II. STEVES HAS PRESENTED EVIDENCE PROPERLY MEASURING ITS FUTURE LOST PROFITS DAMAGES

JELD-WEN next argues that it is entitled to judgment as a matter of law on Steves' claim for future lost profits because, in JELD-WEN's view, Mr. Tucker failed to properly measure what Steves' profits would have been but for the merger. This argument directly contravenes the rule set forth in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

The essence of JELD-WEN's argument is that Mr. Tucker's calculation may have overestimated Steves' future lost profits because, in the more competitive *door* market that would have existed had CMI remained in the market, Steves' profits in recent years might have been lower than they have in fact been, and thus Mr. Tucker's use of those actual profits in calculating future lost profits is unreliable.

As the Court is well aware, the merger eliminated not only one of three United States doorskin manufacturers, but also the third largest United States door manufacturer. Since Steves competes only in the door market, the only conceivable way in which the CMI acquisition might

[2] JELD-WEN's suggestion that it was improper for Mr. Tucker to include Towanda, the doorskin plant JELD-WEN acquired from CMI, in calculating his doorskin price calculations is also misplaced. First, there is no question that, for purposes of Steves' contract claims Towanda, which was one of the plants selling skins to Steves, must be included in the cost calculations. (PTX-842 (JELD-WEN interrogatory response regarding input costs); Tr. 1163:19-1164:25.) Second, to the extent JELD-WEN contends that Mr. Tucker should have backed out JELD-WEN's Towanda-related costs in order to determine how much of these contract overcharge damages also constituted antitrust damages, it had every opportunity to do so through the testimony of its own expert, Mr. Kaplan. In fact, Mr. Kaplan performed such an analysis in his April 14, 2017 report (at ¶ 45), but chose not to update that opinion when Mr. Tucker provided his final damages calculations. (Kaplan Dep. 19:20-20:13.)

have increased Steves' profits is if the effects of the merger in that downstream market may have enabled all door manufacturers, including Steves, to raise their prices above what they would otherwise have been. But the *Hanover Shoe* rule against offsetting of antitrust damages bars any evidence or argument that Steves' recovery in this case should be reduced by the amount that its profits on doors have increased as a result of the merger. *See* 392 U.S. at 489 ("[T]he buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower."). Indeed, JELD-WEN surely knows that the *Hanover Shoe* rule bars this argument, which is why its brief describes its argument in such vague terms.

With *Hanover Shoe* and this Court's ruling foreclosing any argument that Steves' damages in the doorskin market should be offset by its supposed *benefits* in the door market, counsel for JELD-WEN took a different tack in cross examining Mr. Tucker, now arguing that "Steves' profits may have been *negatively* impacted by defective doorskins and overcharges that they suffered after the merger." (Tr. 1296:2-6, emphasis added.)

Mr. Tucker's lost profits calculation takes this into account. He assumed that, absent the merger, the competitive prices and terms that Steves had negotiated for in the Supply Agreement – and not the higher prices and unreimbursed defect costs that Steves contends JELD-WEN implemented due to its enhanced market power – would have been honored. That assumption as to the merger's effect on Steve's doorskin costs, however, which is supported by ample evidence in the record and Mr. Shapiro's opinion, does not allow JELD-WEN to seek to introduce evidence that the merger also had a positive effect on *prices* in the *doors* market. That is precisely the type of evidence that is foreclosed by *Hanover Shoe* and the Court's prior ruling.

III. STEVES' CLAIM FOR FUTURE LOST PROFITS IS NOT INCOMPATIBLE WITH ITS CLAIM FOR DIVESTITURE

JELD-WEN's request that the Court require Steves to choose now between (a) asking the jury for damages for lost profits after the contract terminates in 2021 and (b) seeking divestiture at the equitable remedies phase is both premature and improper. The law does not require an election of remedies prior to final judgment. That makes eminent sense here. JELD-WEN seeks to convert the sequencing of the determination of legal versus equitable relief mandated by the Constitution into a "gotcha" that disables Steves' from even seeking its main requested remedy. But as the Supreme Court has emphasized, federal courts must "use [their] discretion" to ensure that the merger of law and equity does not deprive litigants of their rights to obtain either form of relief. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959).

The jury, of course, has not decided whether to award Steves damages for profits lost after the JELD-WEN contract terminates in 2021. If the jury awards such relief, the Court may then determine whether that remedy is sufficient to make Steves whole in the course of assessing Steves' claim for a divestiture remedy. And in making that determination, the Court may bear in mind that Steves has been in business for 150 years but is claiming only 8 years of lost profits damages—underscoring that a remedy such as divestiture that actually restores competition to the interior molded doorskin market and allows Steves to continue making doors might be a more appropriate remedy than an award of lost profits damages.

On the other hand, if the jury denies an award of lost profits damages, ***but*** also finds the existence of an antitrust violation, that will establish that Steves does not have an adequate remedy at law for the continuing anticompetitive effects of the merger, which will be highly relevant to the Court's consideration of equitable relief at the remedy stage.

The "irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin" and "the requisite analysis for the second factor of the four-factor test [for injunctive relief] inevitably overlaps with that of the first." *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 569 n. 11, 582 (E.D. Va. 2007).

Indeed, "irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994); *see also Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 197 (4th Cir. 1977) ("irreparability of harm includes the impossibility of ascertaining with any accuracy the extent of the loss") (quotation marks omitted).[3] Thus, if the jury finds that the merger harmed competition but agrees with JELD-WEN that Steves' estimates of its lost profits are not reasonably certain, that verdict would underscore rather than undermine Steves' entitlement to equitable relief.[4]

For these reasons, it would be highly improper to remove Steves' primary request for relief from the case before the jury has reached a verdict. This is particularly so given the Supreme Court's admonition that divestiture is "the most important of antitrust remedies" because it is uniquely capable of rectifying the harm *to competition* resulting from an unlawful merger. *California v. Am. Stores Co.*, 495 U.S. 271, 281 (1990).

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[3] *Multi-Channel* and *Blackwelder* both have been abrogated on other grounds by the Supreme Court's opinion in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), but their holding that the difficulty of quantifying the extent of monetary damages may constitute irreparable injury remains good law in the Fourth Circuit. *See Audiology Distrib., LLC v. Hawkins*, 578 F. App'x 260, 261-62 (4th Cir. 2014).

[4] In addition, Steves has requests for equitable relief for the time period between now and termination of the Supply Agreement in 2021. Those obviously would be unaffected by a jury verdict on future lost profits after 2021.

JELD-WEN's assertion that Steves cannot recover "two possible remedies" redressing "the same legal injury" is beside the point. *Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr.*, 594 F.3d 285, 292 (4th Cir. 2010). Steves has no intention of getting a "windfall" by obtaining a divestiture order *in addition to* lost profits damages. *Id.* Were Steves to be awarded both of its requested forms of relief, it would need to make an election. However, the time for doing so is prior to judgment, not before the case is submitted to the jury.

Thus, the Fourth Circuit in *Homeland Training* recognized that "a conclusive election" of remedies "typically is made *only where a suit has advanced to judgment*." *Id.* at 293 (emphasis added). Indeed, courts are in accord that, "[g]enerally, a party must make an election of remedies after the case is submitted to the jury and the verdict is entered, but prior to the entry of judgment." *Rahemtulla v. Hassam*, No. CIV.A.3:05-0198, 2008 WL 2247195, at *2 (M.D. Pa. May 30, 2008); *see also Enhance-It, L.L.C. v. Am. Access Techs., Inc.*, 413 F. Supp. 2d 626, 632 (D.S.C. 2006) (same); *Dopp v. HTP Corp.*, 947 F.2d 506, 515 (1st Cir. 1991) (same); *Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d 483, 488 (11th Cir. 1990) (same); 25 Am. Jur. 2d Election of Remedies § 13 (same).

TVT Records v. Island Def Jam Music Grp., 250 F. Supp. 2d 341, 347 (S.D.N.Y. 2003), is closely on point. Like JELD-WEN, the defendant in that case sought "an order compelling [the plaintiff] to choose between equitable and monetary relief"—there, between damages and specific performance. The defendant made essentially the same argument as JELD-WEN: "[s]ince a claim for specific performance requires a showing that monetary damages would be unascertainable and inadequate, and a claim for a legal remedy would require a showing that the amount of monetary damages is reasonably ascertainable, the proof needed for each claim would be contradictory and mutually exclusive." *Id.* at 348 (brackets in original). The court, however, held that this "argument implausibly presumes [the plaintiff's] success as to, and election of, both equitable and monetary damages simultaneously." *Id.* The court therefore denied the defendant's motion *in limine*, reasoning that, "[t]o the extent necessary, an election between equitable and monetary relief can occur after a verdict is rendered." *Id.*

Just so here. "Once the jury has made a determination of the facts common to the legal and equitable claims and the plaintiffs have made an election of remedies, the court will be in a better position to address the remainder of the relevant equitable claims." *Rahemtulla*, 2008 WL 2247195, at *2. Accordingly, Steves is not required to elect its remedies today.

Taleff v. Southwest Airlines, Co., 828 F. Supp. 2d 1118 (N.D. Cal. 2011), upon which JELD-WEN relies, is wholly inapposite. First, the plaintiff did not even seek damages, but only injunctive relief. Thus, the case did not implicate election of remedies. Although, in rejecting the injunction claim, the court observed that the plaintiff *would have had* an adequate remedy at law, had it sought such relief, the case involved merely harm from "higher prices," not lost profits attributable to the elimination of a 150-year-old family business. *Id.* at 1123 n.7. The two situations are, of course, hardly comparable when considering whether a damages award would provide an "adequate remedy."

Alleging alternative legal and equitable remedies, and following the sequencing of fact-finding required by *Beacon Theaters*, is a commonplace practice. JELD-WEN's argument to the contrary is specious.

IV. STEVES HAS ESTABLISHED ANTITRUST INJURY CAUSED BY THE ACQUISITION

JELD-WEN's argument that Steves has not introduced evidence sufficient to support a jury finding of "antitrust injury" caused by the acquisition is little more than a restatement of its meritless arguments about injury and causation addressed in Section I, *supra*. But to the extent JELD-WEN advances any distinct arguments here, they are equally wrong.

JELD-WEN argues that Steves cannot establish "antitrust injury" because it supposedly has shown only "idiosyncratic" harm to Steves resulting from a breach of a "private contract." (Mot. 10.) But JELD-WEN made this exact argument in its Memorandum in Support of its Motion for Partial Summary Judgment (ECF No. 376 at 13-14), citing the same case law JELD-WEN relies upon now. This Court properly rejected that argument, and nothing has changed. As the Court noted, JELD-WEN's argument "mischaracterizes Steves' Section 4 claim and ignores key differences between this case and those cited by JELD-WEN." (ECF No. 976, at 19.) In fact, "contractual harm can still constitute antitrust injury even if the parties' actions are bound by a contract," especially where "the anticompetitive activity" injures competition that still exists notwithstanding the contractual agreement. (*Id.*, citing *Z Channel Ltd. P'ship v. Home Box Office, Inc.*, 931 F.2d 1338, 1342 (9th Cir. 1991).)

As the Court rightly determined, that is the case here. Steves has introduced evidence "that the Supply Agreement contained provisions intended to preserve competition," such as its "requirement that Steves purchase only 80% of its doorskins from JELD-WEN," and its "allowance of purchases from other suppliers if JELD-WEN could not match their low prices." (ECF No. 976, at 20; *see also* Tr. 696:7-22 (discussing these contractual provisions).) If not for the elimination of CMI as an alternative supplier of doorskins, Steves could have used these contractual provisions to obtain the benefits of competition in the doorskin market, notwithstanding its contract with JELD-WEN. Thus, as the Court concluded, "breaches of the Supply Agreement can also be considered antitrust injuries to the extent that they resulted from the reduced competition under that contract that was facilitated by the CMI Acquisition." (ECF

No. 976, at 19.) And there is ample evidence in the record allowing the jury to draw that causal link between the breaches and the reduction in competition. *See supra* at 4-6.

In addition, JELD-WEN's premise that the anticompetitive effects of the merger do not affect "other market participants" or the "public" at large (Mot. 10) is wrong. In fact, the evidence shows that JELD-WEN increased doorskin prices to other doorskin customers, such as Excel, ABS, and Unidoor, to an even greater degree than it raised prices to Steves, because those customers did not have pre-merger supply contracts. (Tr. 945:14-946:14.) And while it is true that members of the public do not directly buy doorskins, there is no basis whatsoever in the law (and JELD-WEN does not cite any) for the proposition that a relevant antitrust product market may only exist in goods purchased directly by members of the public, rather than by manufacturers for use as an input in such products.

The other arguments JELD-WEN raises in this section fare no better. JELD-WEN very briefly contends that Steves could "turn to other doorskin manufacturers" for supply—specifically Teverpan and Masonite. (Mot. 11.) But as this Court noted, "the post-merger availability of alternate supply—from either Teverpan or Masonite, both of which JELD-WEN focuses on—is a subject of intense dispute." (ECF No. 976, at 20-21.) Steves introduced extensive evidence at trial that neither Masonite nor Teverpan (nor any other foreign supplier) is a viable alternative supplier of doorskins. (*See, e.g.*, Tr. 1000:9-1002:25 (testimony from Professor Shapiro regarding inadequacy of Teverpan and other foreign suppliers); Tr. 393:18-398:18 (similar testimony from Sam Steves); Tr. 400:6-401:14 (testimony from Sam Steves that Masonite is unwilling to sell Steves doorskins at competitive prices); Tr. 984:5-23 (testimony from Professor Shapiro noting that former JELD-WEN CEO Kirk Hachigian forwarded to Sam and Edward Steves Masonite's 2014 public statement that it would not sell doorskins to competing door manufacturers).[5]

JELD-WEN next argues that its breaching activity was not tied to the CMI acquisition, because it could have breached the contract even if the merger had never occurred. (Mot. 12-13.)[6] Steves concedes that JELD-WEN could have breached the contract had it not acquired CMI. The question for the jury, however, is whether JELD-WEN in fact breached the contract because of the enhanced market share it had acquired through the merger, which emboldened it to take ever more unreasonable positions under the contract – as frankly conceded by its Chief Financial Officer, Brooks Mallard (Tr. 1682:2-1683:23) – because it knew Steves had no recourse. It is certainly reasonable for the jury to infer that JELD-WEN would not have engaged in such conduct if Steves still had in 2014 the choices it had before the merger.

Finally, JELD-WEN argues that because some quality issues with its doorskins began to arise just prior to the acquisition's closing, the quality problems "cannot be considered anticompetitive effects of the acquisition." (Mot. 12.) This is nothing more than a reprise of JELD-WEN's argument regarding the calculation of quality-related damages, discussed above. *Supra* at 6-7. Even if certain quality issues arose slightly before the acquisition closed (albeit at

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[5] JELD-WEN argues that, notwithstanding this public statement, Masonite still sells several hundred thousand doorskins to external suppliers as of 2016. (Mot. 11.) But that number is just a tiny fraction of the more than *10 million* doorskins per year Steves purchases, let alone the far greater number of doorksins purchased or used by other manufacturers. (Tr. 627:8-10.) And Masonite's refusal to offer to supply Steves doorskins at a competitive price (Tr. 400:6-401:14) certainly supports a jury finding that Masonite is not a viable supplier for Steves, even if Masonite sells a much smaller quantity of doorskins to other customers.

[6] Curiously, JW cites its breach of an earlier 2003 supply agreement to suggest that it is a serial contract breacher, separate and apart from its behavior in acquiring and eliminating competitors. (Mot. 12-13.)

a time when the acquisition had been publicly announced), Steves presented evidence that the quality problems became *significantly* worse after the acquisition. (Tr. 364:4-5; 521:17-20; Tr. 532:12-17.) Moreover, the acquisition of CMI eliminated from the market a competitor that, prior to the merger, consistently produced better quality doorskins than JELD-WEN did. (Tr. 520:17-24.) The jury easily could credit this testimony and determine that the anticompetitive effects of the acquisition caused these quality problems.

V. STEVES HAS ESTABLISHED THE ELEMENTS OF ITS SECTION 7 CLAIM

A. Steves Has Established a Relevant Market

JELD-WEN argues that Steves has failed to properly define a relevant geographic market because Professor Shapiro supposedly "fail[ed] to include foreign doorskin suppliers in his analysis of the relevant market participants." (Mot. 13.) That is simply wrong. In fact, Professor Shapiro *agrees* that the market shares of foreign suppliers who sell doorskins in the United States should be included. But Professor Shapiro testified that their market shares are nonexistent or negligible, because he did "not find any evidence of meaningful imports at this time," despite looking "quite hard" for such evidence. (Tr. 925:15-926:2.) Tellingly, JELD-WEN does not identify a single actual foreign supplier whose current United States market share Professor Shapiro supposedly overlooked.

To the extent JELD-WEN contends that Professor Shapiro's market calculations do not tell the whole story because of the possibility that foreign doorskin suppliers might enter the U.S. market in the future, the evidence that no significant entry by foreign suppliers has yet occurred despite significant price increases (Tr. 1000:9-1002:25), shows that dispute has nothing to do with whether Professor Shapiro's market *definition* is correct, and JELD-WEN offers no reason to believe it is not.

JELD-WEN next argues that Steves' product market definition is "flawed" because, in JELD-WEN's view, Steves improperly seeks to define the product market "simply as all of the doorskin designs and sizes that JELD-WEN sells to Steves." (Mot. 14.) That, too, is incorrect. In fact, Professor Shapiro defined the product market as "interior molded doorskins." (Tr. 1006:11.) To determine whether this is an appropriate product market, Professor Shapiro used the "hypothetical monopolist test," in order to determine whether buyers of those products would shift their purchases to other products in response to a nontransitory price increase of at least 5 percent in interior molded doorskins. (Tr. 1006:4-1007:6.) Professor Shapiro applied this test in three different ways: through "direct evidence" of actual price competition resulting in price decreases of at least 5 percent; through "recapture analysis," asking whether, when one manufacturer of interior molded doorskins raises its prices, purchasers shift to a different manufacturer of that same product (as opposed to a different product); and through "critical elasticity analysis," asking whether, "if the price of all the interior molded doorskins went up, how much would the customers reduce their purchases" of that product. (Tr. 1007:1-20.) Each of these three applications of the test confirmed that, in Professor Shapiro's expert opinion, it "is not a close call" that interior molded doorskins are "a properly defined relevant antitrust market." (Tr. 1007:21-23.) Significantly, JELD-WEN's expert, Professor Snyder, does not dispute that conclusion. (Tr. 1007:24-1008:1.)

JELD-WEN never seriously tries to define the relevant product market. But to the extent JELD-WEN contends that each size and style of doorskin is a separate relevant market, that is both wrong and irrelevant. It is wrong because, as a matter of law, "a single market" may encompass "a number of different products or services where that combination reflects commercial realities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966); *see also, e.g.*, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015) (defining relevant product market not as "any particular food item" but as "the full panoply of products and services offered … that customers recognize as 'broadline distribution'"); *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962) (affirming lower court's product market definition of "men's, women's, and children's shoes," even though each of the three markets encompasses many different types of shoes). At the very least, the jury reasonably could conclude that interior molded doorskins are a relevant product market. Moreover, JELD-WEN's argument ultimately is irrelevant, because there is no reason to believe that defining separate markets in each size and style of doorskin would change the outcome. *See Brown Shoe*, 370 U.S. at 327-28 (whether different sizes and styles of shoes are "considered separately or together, the picture of this merger is the same"). The jury certainly could reach that conclusion.

B. JELD-WEN Is Not Entitled to Judgment as a Matter of Law on the Basis of Efficiencies Allegedly Created by the CMI Acquisition

JELD-WEN also argues that it is entitled to judgment as a matter of law because of the "procompetitive benefits flowing from the acquisition." (Mot. 15.) As an initial matter, such an argument is not even cognizable in the context of a Rule 50 motion. As JELD-WEN itself admits, any potential efficiencies defense is "part of the defendant's rebuttal to the plaintiff's prima facie case." ECF No. 865 at 2; *see also United States v. Anthem, Inc.*, 855 F.3d 345, 355 (D.C. Cir. 2017); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790-91 7 n.15 (9th Cir. 2015); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991). Thus, JELD-WEN rather than Steves has the "burden of production" on this issue—in other words, the "obligation to come forward with evidence of a litigant's necessary propositions of fact."

Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 425 (5th Cir. 2008). It makes no sense for JELD-WEN to fault Steves ostensibly for failing to rebut evidence that it is JELD-WEN's burden to adduce.[7]

Moreover, the evidence of efficiencies in this case does not come close to rebutting Steves' evidence that the merger has substantially lessened competition and is likely to continue do so in the future. The efficiencies defense that has been recognized by a number of federal courts of appeals is very narrow: it requires the defendant to show that there are "extraordinary efficiencies" that are "verifiable, not merely speculative" and that could not have been "achieved without the concomitant loss of a competitor" resulting from the merger. *St. Alphonsus*, 778 F.3d at 790-91; *accord, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 & 720-21 (D.C. Cir. 2001). JELD-WEN also would have to show that the efficiencies actually "benefit consumers." *Penn State Hershey*, 838 F.3d at 350; *accord, e.g.*, *Univ. Health*, 938 F.2d at 1223.

Here, JELD-WEN's expert witnesses have not opined that the CMI acquisition will create any efficiencies that meet this very high standard—contrasting starkly with cases in which courts have rejected an efficiencies defense *despite* detailed expert testimony supporting the alleged efficiencies. *See, e.g.*, *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 95 (D.D.C. 2017). And the evidence in the record tends to negate, rather than support, the inference that the CMI acquisition has created significant efficiencies benefiting consumers. Even JELD-WEN's expert, Professor Snyder, found that doorskin prices *increased* by 11 percent from 2012 to 2016

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[7] JELD-WEN incorrectly suggests that Steves somehow has attempted to prove its case "purely by presenting market share statistics." (Mot. 15.) That is not remotely true. Although the market share statistics in this case are extremely compelling, Steves has also introduced extensive direct and circumstantial evidence of the anticompetitive effects of the acquisition, including increases in price and reductions in quality. *See supra* at 3-7.

(Tr. 958:21-25 (testimony from Professor Shapiro discussing Professor Snyder)), a figure that strongly suggests any inefficiencies were overwhelmed by the effects of the acquisition that allowed JELD-WEN to raise prices. Bob Merrill of JELD-WEN also testified that any reductions in costs resulting from the acquisition would not necessarily be passed on to consumers in the form of lower prices. (Tr. 1422:6-25.) Indeed, the evidence shows that certain of JELD-WEN's costs to manufacture doorskins *did* go down following the merger—but rather than translating into a price cut for consumers, it translated into an increase in JELD-WEN's margins. (Tr. 969:18-22.)

VI. JELD-WEN IS NOT ENTITLED TO JUDGMENT ON STEVES' DEFECT CLAIMS

A. JELD-WEN Misinterprets the 2012 LTA

JELD-WEN first argues for judgment on the ground that Section 8 of the supply agreement, regarding quality, "defines 'defect' as a product that 'does not meet JELD-WEN's specifications,' and that is 'JELD-WEN's standard written warranty applicable to the Product.'" (ECF 969 at 17 (*sic*).) That is not what Section 8 either states or means.

Section 8 imposes four requirements. It mandates that doorskins "be of a quality satisfactory to Steves, meeting JELD-WEN's specifications, fit for the intended purpose, ***and*** subject to JELD-WEN's standard written warranty applicable to the Product." (PTX 149 at 4, §8.) This promise uses the conjunctive "and"; thus, doorskins must meet ***all four*** requirements. *Williams v. State*, 818 A.2d 906, 912 (Del. 2002) ("In its commonly accepted meaning," the word "and" is "conjunctive … and is not generally used to express an alternative"), *superseded by statute on other grounds as stated in Comer v. State*, 977 A.2d 334, 339 (Del. 2009); *accord, e.g.*, *Lower Paxon Township v. United States Fidelity & Guar. Co.*, 557 A.2d 393, 402 (Pa.

Super. 1989) (use of "and" in "sudden and accidental" "reveal[ed] a clear intent to define the words differently, stating two separate requirements"). Construed so as give effect to all four aspects of JELD-WEN's promise, the failure to meet ***any one*** of the requirements is a breach.

Here, JELD-WEN agreed to guarantee its customer's satisfaction, fitness of its doorskins for Steves' particular purpose, and compliance with its internal specifications. Steves presented evidence showing that JELD-WEN's doorskins were defective and caused doors manufactured with them to be defective. Steves also presented evidence explaining and supporting the good reasons it had to be dissatisfied, (*e.g.*, Tr. 540:3-6), as JELD-WEN concedes. (ECF 969 at 17 ("Steves focused its evidence of breach on repeated claims that JELD-WEN shipped doorskins that were not 'of a quality satisfactory to Steves'").) Thus, Steves presented exactly the evidence Section 8 required to show that JELD-WEN breached the contract. *Luther v. Standard Conveyor Co.*, 89 N.W.2d 179, 185 (Minn. 1958) ("When parties to a sales contract agree that the buyer's satisfaction is to be guaranteed, the standard to be applied is [that of] the buyer himself acting in a reasonable manner. In this instance only [the buyer's] reasonableness, good faith, and honesty in rejecting the machine . . . were matters for consideration").

Moreover, JELD-WEN's complaint that "Steves presented no evidence of JELD-WEN's specifications" is misplaced, given that there is no evidence that JELD-WEN provided Steves with any technical specifications at the time the Supply Agreement was executed**,** and JELD-WEN admittedly never provided Steves with any aesthetic specifications at any time. (Tr. 532:18-20; 1829:5-10.) JELD-WEN cannot escape its obligations under Section 8 by invoking specifications it did not disclose to its customer.

B. Steves Presented Evidence That JELD-WEN Supplied Doorskins Of A Quality Not Satisfactory To Steves Or Fit For Its Intended Purpose

JELD-WEN argues that Steves did not present "reliable" evidence of its defects, pointing to four pieces of evidence suggesting that Steves' processes for inspecting doorskins and submitting claims are imperfect. (ECF 969 at 18.) JELD-WEN is not entitled to judgment on this basis for at least three reasons.

First, the reliability of evidence is a matter for the jury to decide. That JELD-WEN contends the evidence is not "reliable" is of no moment.

Second, Delaware law does not require that estimates of damage achieve the exactitude on which JELD-WEN insists. *Vianix Del. LLC v. Nuance Communs., Inc.*, 2010 Del. Ch. LEXIS 171, *20 (Del. Ch. Aug. 13, 2010) ("While a plaintiff cannot recover damages that are 'merely speculative or conjectural,' the law requires only that there be a sufficient evidentiary basis for making a fair and reasonable estimate of damages, rather than absolute certainty"). The question before the Court is not whether Steves' damage claims are perfect, but whether Steves' evidence offers the jury a sufficient evidentiary basis for making a fair and reasonable estimate of damages. As JELD-WEN does not even argue that Steves' damage estimate are speculative or conjectural, that question must be answered "yes."

Finally, JELD-WEN's complaints are not that Steves did not suffer defects, but that Steves' inspection procedure did not guarantee that Steves never sought reimbursement for a usable doorskin. Nothing in the long term supply agreement requires such perfection. In the absence of such a contractual specification, sections 2-311(1) and (3) of the commercial code mandate that Steves employ a commercially reasonable procedure, not a perfect one. 5A Del. C. 1953, § 2-311.

Given that doorskins typically cost only $4-5 per skin, (Tr. 1637:21-22), a reasonable inspection process reflects both the low cost of the item and its use in an automated assembly process that consumes 10 million skins per year. Steves produced evidence establishing that it employed a process that was reasonable given the cost and volume of the products involved. Doug Gartner, Steves' vice president of plant operations, testified that Steves followed an extensive procedure that included multiple inspections before claims were made to JELD-WEN, thus satisfying the standard of commercial reasonableness. (Tr. 529:21-531:9.)

Further evidence of the reasonableness of this process is that JELD-WEN routinely reimbursed claims made pursuant to Steves' inspection procedure before the merger, sometimes without even inspecting the doorskins or doors. (Tr. 349:2-351:23.) "Some managers would come out, some would request pictures. Others would just allow us to dispose of the product." (Tr. 522:16-18.) *Simkins Indus. v. Std. Group, Inc.*, 2002 Conn. Super. LEXIS 1889, **35-36 (Conn. Super. June 5, 2002) ("Though the contract does not state explicitly what Standard's requirements are, the evidence of what was commercially reasonable in this context is supplied by testimony concerning custom and usage and the course of dealing between the parties").

The record thus contains substantial evidence sufficient to create a question of fact whether Steves used a commercially reasonable process for identifying defects and claiming reimbursement. *Modular Technology Corporation, Metal Board Division v. City of Lubbock*, 529 S.W.2d 273, 276 (Tex. Civ. App. 1975) (commercial reasonableness under §2.311 is a fact question).

C. Steves Presented Evidence That It Provided Notice Of Defects

JELD-WEN next claims that it is entitled to judgment because of "Steves' failure to provide notice to JELD-WEN." (ECF 969 at 18.) JELD-WEN cites nothing in the record to support this claims, and for good reason. The record is brimming with evidence that Steves gave JELD-WEN sufficient notice of the defects in its doorskins.

1. Doorskin Claims

Gartner testified that Steves had a regular practice of creating "a vendor debit memo which is a record of defective product that we would have gathering up the quantity, the description, and so on of that product and then getting that information back to the vendor to request credit for that product." (Tr. 522:6-10.) Steves would then use those memos, along with other communications, to notify JELD-WEN of the defects. (Tr. 528:25-529:10.) Sam Steves also testified about additional ways in which Steves brought quality problems to JELD-WEN's attention. He testified that he brought his quality concerns to the attention of JELD-WEN's senior management on more than five different occasions with "no change." (Tr. 331:22-23; 332:16-20; 334:14-15; 334:25-335:6; 335:7-337:24; 338:9-22; 339:2-343:16; 343:17-344:4; 344:8-346:11; PTX-314; PTX-340.) This testimony shows that Steves had a routine practice of providing notice of defective doorskins, and that in addition to following that practice, Steves kept JELD-WEN's top management fully informed about quality concerns.

2. Door claims

Defects Steves discovered only after shipping the finished door pose a different notice issue. Again, the evidence shows that Steves had an established practice of providing JELD-WEN with adequate notice of such claims. Steves tracked customer credits on the vendor debit memo. (Tr. 347:4-7.)[8] Steves forwarded these memos to JELD-WEN. (Tr. 528:25-529:10.) Regarding the specific claim for customer credits from REEB, Gartner testified that Steves

[8] PTX-226 is an example of a vendor debit memo.

"submit[ted] that reimbursement claim to JELD-WEN." PTX-405 is the extensive and detailed claim that Steves submitted to JELD-WEN for the REEB claim. (Tr. 533:21-534:6.)

Before issuing a credit to its customer, a Steves area sales manager would "call on those customers, [and] do a field inspection report, which is an inspection of the product." (Tr. 535:14-17.) If the doors were returned, Steves would then make the doors available to JELD-WEN for inspection. But often, the customer simply disposed of the door without returning it to Steves. (Tr. 382:14-383:24.) In the early years of the Supply Agreement, JELD-WEN compensated Steves for the credits it provided its customers for doors containing defective doorskins often without requiring inspection. (Tr. 382:14-383:24.) Beginning with the REEB claim, however, JELD-WEN made a "specific change in their policy" under which it refused to "issue credit for a door manufactured with a defective doorskin." Instead, JELD-WEN notified Steves that it would limit any credit to the cost of the skin. (Tr. 359:3-18.)

This change in JELD-WEN policy made it commercially impractical for Steves to submit claims to JELD-WEN for doors rejected by its customers. JELD-WEN would only pay for defects it verified through physical inspection, and even then, only for the skin price. As Gartner testified, "[t]he cost of bringing the door back, with freight costs to try to bring that back, to bring 30 or 40 doors back, outweighs what we might get back. If a door sells for 25 to $125, and we're able to get five or $6 back on a skin, it doesn't pay to pay maybe 500 to $1,000 in freight to bring that product back." (Tr. 538:6-10.)

This is a commercially reasonable process under §2-311 of the commercial code. Accordingly, there is more than enough evidence in the record to create a fact question whether Steves provided the required notice to JELD-WEN of its breaches of Section 8.

D. The Limitation Of Remedy In Section 8 Is Invalid As A Matter Of Law And Steves Presented Evidence That It Inspected Doorskins Before Incorporating Them Into Doors

Lastly, JELD-WEN claims Steves is not entitled to recover damages for customer credits imposed by-Steves' customers for defective doors because of Section 8's provision that "[a]ny additional costs over the price of the Defective Product shall be negotiated by the parties on a case by case basis." (ECF 969 at 19.) This provision, however, is invalid as a matter of law.

Section 2-719 of Delaware's commercial code provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title." 5A Del. C. 1953, § 2-719. As *Crowell Corp. v. Himont U.S.A.*, 1996 Del. Super. LEXIS 400 (Del. Super. May 29, 1996)[9], makes clear, because the defects in the doorskins that Steves incorporated into finished doors were latent, the limited remedy provided by Section 8 fails of its essential purpose and thereby makes direct and consequential damages available under §§2-714 and 2-715 of the commercial code.

In *Crowell*, Crowell manufactured cardboard boxes using Himont's laminate tape. The tape began to delaminate, ruining the boxes. The contract provided, among other things, that "the use of the material shall be deemed to mean that [Himont] has satisfactorily performed." *Id.* at *3. Himont argued that this limitation prevented Crowell from recovering damages even if Himont breached the contract. The Superior Court disagreed, holding that the remedy failed of its essential purpose because the defect was latent, resulting in the tape's use in a finished product in a way that imposed additional damage on Crowell:

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[9] A copy of *Crowell Corp. v. Himont U.S.A.*, 1996 Del. Super. LEXIS 400 (Del. Super. May 29, 1996 is attached as Exhibit A.

> ***[T]he limiting provision, in conjunction with the latent defect, operated to deprive Crowell of the substantial value of its bargain. The latent defect not only destroyed the value and use of Himont's [tape] but the defect also created additional expenses not related to the normal use of the [tape], i.e. consequential damages.*** A defect that was discoverable upon inspection would not have deprived Crowell of the substantial value of its bargain for at that point Crowell had not been forced to expend additional funds. For these reasons, the Court finds that Himont's provision limiting damages to the purchase price to be invalid under § 2-719(2).

Id. at *9; *see also Viking Yacht Co. v. Composite One LLC*, 2010 U.S. App. LEXIS 13483, **31-32 (3d Cir. July 1, 2010) ("When goods have latent defects which are not discoverable upon receipt and reasonable inspection, a limitation of remedy to return of the purchase price fails of its essential purpose").

The same is true here. JELD-WEN supplied doorskins with latent defects that could not be discovered on reasonable inspection. (Tr. 536:17-537:4 ("Some defective doorskins literally can't be identified through the plant where they're going to manifest themselves with the problem once they're in the field").) Steves incorporated those defective doorskins into doors and shipped them to its customers, whereupon the defects became apparent and Steves was required to reimburse its customers for the entire price of the door. As in *Crowell*, the defect in the doorskin ruined not only the doorskin, but also the door to which it was glued, exposing Steves to backcharges from its customers that were 25 times or more greater than the cost of a doorskin. (Tr. 538:6-10.) In just such circumstances, the Superior Court found that Himont's limitation of remedy failed as a matter of law. The same result should apply here.

Because Section 8's limitation causes Steves' remedy to fail of its essential purpose, "remedy may be had as provided in this title." Thus, Steves is entitled to damages under §§2-714 and 2-715 of the commercial code. Section 2-714 authorizes damages for "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable, including consequential damages "in a proper case." 5A Del. C. 1953 §2-714. Section §2-715(2) of the commercial code further provides that "[c]onsequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." 5A Del. C. 1953, § 2-715(2). As a maker of doors itself, JELD-WEN certainly "had reason to know" that latent defects would result in Steves' incurring damages in the form of having to reimburse its customers for the price of the door.

That leaves JELD-WEN's argument that Steves did not offer evidence that it inspected the doorskins before using them. This argument is simply incorrect. Sam Steves testified that employees of Steves take each doorskin off the pallet delivered by JELD-WEN and flip it onto a conveyor—"this is called skinflipping. And it also provides us a pretty quick opportunity to inspect each skin, see if there's an issue. If there's not, move on." (Tr. 283:18-21.) Gartner also testified that skin flippers inspect each product, and that Steves installed in all its plants lamps that "shoot[] light horizontally across the face of the doorskins [so] we were able to pick up and find more of those defects before we made that into a product or doors." (Tr. 527:10-25.) Another inspection occurs when employees called off-bearers "have an opportunity to look at each door and see if there's an issue with it. If it is, they pull it out." (Tr. 287:5-7.) JELD-WEN's claim that "there is no evidence that Steves inspected the doorskins before incorporating them into doors" simply ignores the evidence directed to this very point.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 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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