UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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

MEMORANDUM IN OPPOSITION TO STEVES AND SONS, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

REDACTED VERSION FILED PUBLICLY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Steves and Sons, Inc.'s ("Steves") motion for "partial summary judgment" invites this Court to commit reversible error by granting an unprecedented ruling to Steves, in the form of a summary adjudication that Steves' "prima facie case is established and that there is a presumption that the 2012 merger between JELD-WEN and CraftMaster is anticompetitive." Steves' Mem. at 14, Doc. 383. As an initial matter, Steves' request is moot because, as the separate motion for summary judgment filed by JELD-WEN, Inc. ("JELD-WEN") explains, Steves does not advance any legally viable theory or evidence of antitrust injury. JELD-WEN's Mem. at 11-17; 32-35, Doc. 379. No violation of the antitrust laws, even if presumptive, can ever create a presumption of injury. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). But regardless, Steves' motion is both procedurally and substantively deficient.

Procedurally, it has been settled law for decades that Federal Rule of Civil Procedure 56 does not permit a court to enter a free-standing declaration about disputed factual or evidentiary issues unless there is a motion that seeks at least a partial *judgment* on a claim. For that reason, it is not surprising that Steves does not point to a single case in which a court has granted the relief that it is seeking here.

On the merits, the relief that Steves requests would lead this Court into reversible error. Steves' motion asks the Court to prejudge a conversation that the parties and the Court may (or may not) eventually need to have about jury instructions. Steves apparently believes that the jury should be instructed that it may "presume," from market shares and concentration alone, that the acquisition was likely to have anticompetitive effects. That is not the law. To the contrary, in the most prominent Section 7 case ever tried to a jury the Third Circuit reversed a judgment for the plaintiffs precisely because the jury was told, incorrectly, that "high market shares and

significant increases in concentration may be sufficient in itself to establish a violation of Section 7." *NBO Indus. Treadway Cos. v. Brunswick Corp*., 523 F.2d 262, 275 (3d Cir. 1975), *vacated on other grounds by Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The case law establishes that while properly calculated market shares and increased market concentration may sometimes be *relevant*, the trier of fact cannot rest its decision, or be instructed that it may rest its decision, solely on market share statistics. To the contrary, every Section 7 case requires a holistic evaluation of *all* of the evidence relevant to whether a merger will harm, or has harmed, competition. That is true even in pre-merger challenges brought by the government, where Steves' expert Carl Shapiro has actually been a leading proponent of the view that "[a]s economic learning and practice evolved, emphasis on market shares became less helpful." *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST LAW JOURNAL at 64 (2010). Professor Shapiro has explained in particular that the Herfindahl-Hirschman Index ("HHI") cannot be reliably linked to any danger of collusion or unilateral price effects between differentiated products, which are core issues in this case. *Id.* at 63. It is both telling and ironic that Steves bases its motion on the Horizontal Merger Guidelines (or "Guidelines") promulgated by the Department of Justice ("DOJ"). In essence, Steves asks this Court to determine (prematurely) that the instructions should tell the jury that it can base its verdict solely on one factor, drawn from the Guidelines, and that those very Guidelines do not regard as dispositive—when the DOJ itself has reviewed this acquisition twice under those same Guidelines and declined to challenge it.

In any event, Steves' motion is also premature for the simple reason that market share and concentration statistics cannot be calculated until the relevant product and geographic markets have been determined—and those issues certainly are not, contrary to Steves'

representations, undisputed. Significant discovery has focused on the viability of various foreign suppliers, a topic that goes straight to the heart of the geographic market analysis. The parties disagree vehemently about whether and to what extent such foreign suppliers are participants in the relevant market, and there will be extensive factual testimony at trial on the matter. Similarly, there is a related dispute as to the relevant product market, and whether the market can be defined by reference only to the types of interior molded doorskins that Steves purchases for its use. Accordingly, the relevant markets and market shares just are not appropriate for summary adjudication in this case. The Court should deny Steves' motion in its entirety.

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Disputed in part. JELD-WEN does not dispute that in 2012, JELD-WEN, Masonite Corporation ("Masonite") and Craftmaster ("CMI") supplied molded doorskins used in the United States. However, other manufacturers of interior molded doorskins also supplied doorskins used in the United States in 2012, [redacted] Morrison Tr. 89:16-90:18, attached as Ex. 1; Morrison Dep. Ex. 25 at 41, attached as Ex. 2; MASONITE_001510, attached as Ex. 3. Other doorskin manufacturers in China, Malaysia and Romania may have shipped interior molded doorskins into the United States in 2012. Merrill Tr. 70:6-71:14, attached as Ex. 4. Additionally, in 2011, [redacted] STEVES-000268004, attached as Ex. 5; STEVES-000193386, attached as Ex. 6. Finally, to the extent that Steves' Statement of Undisputed Fact No. 4 ("SSUF") suggests that

JELD-WEN, Masonite and CMI each supplied all of the doorskin designs available in the marketplace in 2012, the undisputed record provides that interior molded doorskin designs vary by manufacturer, and no single interior molded doorskin supplier could supply all of the doorskin designs existing in the marketplace at that time. Steves' Resps. & Objs. to JELD-WEN's RFA No. 10 ("RFA Resp. No. 10"), attached as Ex. 7.

5. Disputed in part. JELD-WEN does not dispute that JELD-WEN is a manufacturer of interior molded doorskins, and has manufactured interior molded doorskins from before 2012 through the present. Between 2012 and the present, JELD-WEN's United States interior molded doorskin plants have manufactured interior molded doorskins for use in the United States, Canada, Central and South America, and Asia. Kaplan Suppl. Rpt. Ex. H, attached as Ex. 8. From 2000 until early 2012, JELD-WEN imported doorskins from Australia for use in JELD-WEN's doors in the United States. Ex. 1, Morrison Tr. 91:4-13. In 2013, JELD-WEN imported doorskins from Latvia for use in JELD-WEN's doors in the United States. *Id.* at 93:15-94:15. Finally, JELD-WEN did not supply all of the doorskin designs existing in the marketplace in 2012. Ex. 7, RFA Resp. No. 10; STEVES-000019621, attached as Ex. 9; STEVES-000018845, attached as Ex. 10.

6. Disputed in part. JELD-WEN does not dispute that Masonite is a manufacturer of interior molded doorskins, and has manufactured interior molded doorskins from before 2012 through the present. Between 2012 and the present, [redacted] Lynch Tr. 172:5-173:1, attached as Ex. 11; MASONITE_000001, attached as Ex. 12. Finally, Masonite did not supply all of the doorskin designs existing in the marketplace in 2012. Ex. 7, RFA Resp. No. 10; STEVES-000016930, attached as Ex. 13.

7. Disputed in part. JELD-WEN does not dispute that in 2012, CMI was a manufacturer of interior molded doorskins, and that prior to and during 2012, CMI manufactured interior molded doorskins. Prior to and during 2012, CMI manufactured interior molded doorskins for use in the United States, Canada, Mexico, and other geographies. E. Steves Dep. Ex. 1 at STEVES-000004534, attached as Ex. 14. Finally, CMI did not supply all of the doorskin designs existing in the marketplace in 2012. Ex. 7, RFA Resp. No. 10.

8. Undisputed.

9. Undisputed.

10. Disputed. Steves' cited evidence does not establish the absence of a genuine dispute regarding the relevant market in this case. Fed. R. Civ. P. 56(c)(1)(B); *see infra* at § II. To the contrary, the record indicates a material dispute of fact as to the relevant geographic market. Manufacturers located within the United States sell doorskins there and elsewhere, using doorskins manufactured in various countries. *See supra* at ¶¶ 5-7. Manufacturers located outside the U.S. also sell, and have stated their intention to sell, interior molded doorskins in the U.S. [redacted]. Heintel Tr. 22:17-23:12, attached as Ex. 15. [redacted] S. Steves II Dep. Ex. 26, attached as Ex. 16; Wysock Tr. 359:20-360:8, attached as Ex. 17; STEVES-000734988, attached as Ex. 18; STEVES-000734994, attached as Ex. 19. [redacted] E. Steves Tr. 305:10-310:9, attached as Ex. 20; E. Steves Dep. Ex. 33, attached as Ex. 21; S. Steves II Tr. 558:21-559:9, 564:8-565:4, 566:14-22, attached as Ex. 22; STEVES-000051809, attached as Ex. 23. [redacted]

[redacted]. Ex. 11, Lynch Tr. 172:5-173:1; Ex. 12, MASONITE_000001. The relevant product market is also the subject of a material factual dispute. Steves has repeatedly alleged that it requires a full "range" of doorskin designs in order to compete in the market for interior doors. *See e.g.*, Compl. ¶¶ 67, 109, Doc. 5; S. Steves II Decl. ¶ 12, Doc. 188-1, attached as Ex. 24; Shapiro Rpt. at 42, attached as Ex. 25. No doorskin manufacturer can supply all of the designs existing in the marketplace at any given time. Ex. 7, RFA Resp. No. 10. [redacted] Shapiro Tr. 229:19-230:3, attached as Ex. 26. The "range" of doorskin designs purchased by each independent door manufacturer is vastly different. Fedio Decl. ¶¶ 4-11, attached as Ex. 27; JW-CIV-00199651, attached as Ex. 28. [redacted]. Ex. 11, Lynch Tr. 181:20-183:8; Hachigian Tr. 382:1-14, attached as Ex. 29; Ex. 4, Merrill Tr. 221:3-20. [redacted] S. Steves Dep. Ex. 50, attached as Ex. 35. Further, Professor Shapiro's analysis fails to address [redacted]. Ex. 26, Shapiro Tr. 229:19-230:3; 226:13-228:1; Compl. ¶¶ 86, 169, 171.

11. Disputed. This fact is disputed because [redacted]. *See supra* at ¶ 4. Further, the contours of the relevant product and geographic market are disputed. *See supra* at ¶ 10. In addition, even assuming Steves' proposed definitions were undisputed, Steves' cited evidence does not establish the absence of a genuine dispute regarding

the relevant market in this case. Fed. R. Civ. P. 56(c)(1)(B); *see infra* at §II. [redacted] (JW-CIV-00179059, attached as Ex. 30 (CraftMaster and Excel), E. Steves Dep. Ex. 6, attached as Ex. 31; STEVES-000071865, attached as Ex. 32 (JELD-WEN and Steves)) or [redacted] (Ex. 5, STEVES-000268004; Ex. 6, STEVES-000193386).

12. to 18. Disputed. Each of these facts is disputed for the same reasons. [redacted] *See supra* at ¶ 4. Further, the contours of the relevant product and geographic market are disputed. *See supra* at ¶ 10. In addition, even assuming Steves' proposed definitions were undisputed, Steves' cited evidence does not establish the absence of a genuine dispute regarding the relevant market in this case. Fed. R. Civ. P. 56(c)(1)(B); *see infra* at § II. [redacted] *See supra* at ¶ 11.

19. to 20. Disputed. These facts are disputed because the contours of the relevant product and geographic market are disputed. *See supra* at ¶ 10. In addition, even assuming Steves' proposed definitions were undisputed, Steves' cited evidence does not establish the absence of a genuine dispute regarding the relevant market in this case. Fed. R. Civ. P. 56(c)(1)(B); *see infra* at § II. Professor Shapiro's HHI calculations are based on market shares which are the subject of a genuine dispute. *See supra* at ¶¶ 11-18. [redacted]

[redacted]. Ex. 5, STEVES-000268004; Ex. 6, STEVES-000193386; Ex. 15, Heintel Tr. 37:3-38:2; 47:15-48:18.

ARGUMENT

I. STEVES IS NOT ENTITLED TO A SUMMARY RULING THAT IT IS ENTITLED TO A JURY INSTRUCTION ABOUT ANY "PRESUMPTION"

A. Steves' Attempt To Obtain A Summary Ruling That It Has Established An Entitlement To A "Presumption" Is Contrary To Law

Steves' motion is improper under Federal Rule of Civil Procedure 56 because Steves does not actually contend that Steves is entitled to a *judgment* of any kind, even a partial one. Steves relies on Rule 56(a), under which Steves may seek summary judgment on any "claim or defense-- or [] part of each claim or defense" if it can show that there is no material dispute as to any fact and that Steves is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Focusing on the first part of the rule and ignoring the latter, Steves seeks a "ruling that Steves has established its prima facie case that the 2012 merger between JELD-WEN . . . and Craftmaster . . . is likely to substantially lessen competition under Section 7 of the Clayton Act . . . and is entitled to a presumption that the merger was anticompetitive." Doc. 381 at 1. That is not a request for partial *judgment*; it is a request for a freestanding declaration that Steves has established certain facts that it believes would advance its case.

It is long-settled law that Rule 56 does not permit a motion of this nature. Steves misunderstands Rule 56(a)'s reference to a "claim or defense-- or [] part of each claim or defense." The Rule contemplates situations in which some claims or subsets of claims are ripe for entry of final judgment even if others are not. Often a court can determine, for example, that a plaintiff's claim for damages suffered prior to a certain date is barred by the statute of limitations, and can enter partial summary judgment for the defense on that ground. *See, e.g.*, *Ely v. Sci. Applications Int'l Corp.*, 716 F. Supp. 2d 403, 409 (D. Md. 2010) (granting partial

summary judgement because some of plaintiff's claims were time barred). Liability and the request for relief are also regarded as separate and distinct parts of one claim, such that a court can enter partial summary judgment on liability but hold a trial on damages. *See Evergreen Sports, LLC v. SC Christmas, Inc.*, 2013 WL 6834643, at *6 (E.D. Va. Dec. 20, 2013) (describing grant of summary judgment in plaintiff's favor on liability for breach of contract and holding a separate trial to determine damages); 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2736 (4th ed. 2017) (noting that the 2010 amendments to Rule 56 authorize partial summary judgment on liability or damages alone).

Courts have long recognized that Rule 56(a)'s reference to "part[s] of each claim" does not permit summary adjudication of discrete *issues* that are not determinative of liability or damages for any period, and therefore do not permit entry of a *judgment* for either side. Indeed, in an oft-cited decision more than thirty years ago, a district court imposed Federal Rule of Civil Procedure 11 sanctions on a party for attempting to use summary judgment procedure to "adjudicate issues of fact which are not dispositive of any claim or part thereof." *SFM Corp. v. Sundstrand Corp.*, 102 F.R.D. 555, 558 (N.D. Ill. 1984). The court stressed that a contrary holding "would draft every district court into performing the task, properly the responsibility of the litigants under this Court's (and every other court's) standard form of pretrial order, of narrowing the issues for trial" and "make *every* case on this Court's calendar fair game for such a 'summary judgment' motion before the case goes to trial"—an "onerous and impermissible . . . use of judicial resources." *Id.* at 558-59.

Numerous courts have reaffirmed those principles, including very recently. For example, in *Powers v. Emcon Associates, Inc.*, 2017 WL 4102752 (D. Colo., Sept. 14, 2017), plaintiffs sought "summary judgment" on the issue of whether a former defendant, FMNow, was the alter

ego of the defendant Emcon. *Id*. at *1. The court denied plaintiffs' motion, finding that it could not apply Rule 56(a) because an action to pierce the corporate veil is merely a procedure to enforce an underlying judgment, and the plaintiffs "did not proffer a claim in their motion upon which judgment could be granted." *Id*. at *2. It explained that motions seeking only to resolve *issues* relevant to plaintiffs' claims, rather than the *claims* themselves, are "entirely inappropriate under any provision of Rule 56." *Id*. *See also, e.g., Moses H. Cone Mem'l Hosp. Operating Corp. v. Conifer Physician Sers., Inc.*, 2017 WL 1378144, at *5 (M.D.N.C. Apr. 11, 2017) (partial summary judgment inappropriate mechanism for "pruning" factual allegations relating to plaintiffs' breach of contract claim); *Collins v. Cottrell Contracting Corp*., 733 F. Supp. 2d 690, 698 (E.D.N.C. 2010) (motion for summary judgment not appropriate where the entirety of plaintiffs' claims would still go to trial and no judgment could be entered as to the portion of the claims on which plaintiff received a favorable ruling); *Doty v. Sun Life Assurance Co. of Canada*, 2009 WL 3046955, at *1 (S.D. Tex. June 30, 2009) (denying motion for summary judgment on one element of misrepresentation claim).

The authority on which Steves relies actually proves JELD-WEN's point. In each case, the moving party sought summary judgment on liability for its claims as a whole, not just concerning proof of a *prima facie* case, and the court entered summary judgment on the entirety of plaintiffs' claims. *Hittman Nuclear & Devel. Corp., v. Chem-Nuclear*, 1979 WL 1749, at **5, 7 (D. Md. Nov. 26, 1979); *accord Great Am. Ins. Co. v. USF Holland Inc*., 937 F. Supp. 2d 376, 387 (S.D.N.Y. 2013) (granting summary judgment on plaintiffs' claims for damaged cargo); *Dittmann v. Ireco, Inc*., 883 F. Supp. 807, 815-16 (N.D.N.Y. 1995) (granting summary judgment on plaintiffs' age discrimination claim); *EEOC v. Allstate Ins. Co*., 458 F. Supp. 2d 980, 994 (E.D. Mo. 2006) (considering defendants' rebuttal evidence before granting partial summary

judgment to plaintiff); *Bell Microproducts, Inc. v. Global-Insync, Inc*., 20 F. Supp. 2d 938, 943 (E.D. Va. 1998) (granting summary judgment as to liability for two of plaintiffs' claims and a portion of damages that was not disputed between the parties).

Of course, courts frequently consider single elements of claims when a *defendant* moves for summary judgment, because failure on a single element often will defeat the plaintiff's claims entirely and justify entry of judgment for the defense. *Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp*., 2010 WL 11478992, at *4 (N.D. Cal. July 21, 2010), cited by Steves, is just such an example. In that case, the defendant moved for summary judgment on whether plaintiff had adequately described a relevant market, an element "essential" to plaintiff's claim. *Id*.

The two cases that Steves cites in which courts granted a *plaintiff's* motion for summary judgment on the definition of the relevant market only did so in the context of considering cross-motions for summary judgment that requested entry of judgment on entire claims. *See Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1132 (10th Cir. 2002) (considering parties' cross-motions on market definition, which if granted for defendant would have eliminated plaintiffs' antitrust claims); *Remington Prods. v. North Am. Philips Corp.*, 717 F. Supp. 36, 40 (D. Conn. 1989) (considering parties' summary judgment motions as to liability and remedies). Nor can Steves save its motion by reference to Rule 56(g). Steves' Mem. at 16 n.8. When a litigant has brought a proper, but unsuccessful, motion for summary judgment under Rule 56(a), Rule 56(g) provides that a 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." Fed. R. Civ. P. 56(g). But that provision only applies in situations where the motion genuinely sought judgment as to a claim or part of a claim under Rule 56(a). Fed. R. Civ. P. 56

advisory committee's note to 2010 amendment; *Sundstrand*, 102 F.R.D. at 558 (emphasizing that "THERE IS NO SUCH THING" as a freestanding motion for the relief permitted by what is now Rule 56(g)); *Greene v. Life Care Ctrs. of Am., Inc.*, 586 F. Supp. 2d 589, 594 (D.S.C. 2008) (*quoting Evergreen Int'l v. Marinex Constr. Co.*, 477 F. Supp. 2d 697, 698-99 (D.S.C. 2007) (denying motion for summary judgment because Rule 56 "does not authorize independent motions to establish certain facts as true.").

Steves' motion is a square violation of the same principles that were so clearly settled *thirty years ago* that the *Sunstrand* court imposed sanctions. Steves openly does not seek adjudication of a claim or even part of a claim, nor "judgment" as to anything at all. Rather it asks the Court to use Rule 56 to "rule" that it has established its *prima facie* case. Steves' Mem. at 16. As in *Powers*, Steves is not seeking a ruling determinative of liability or damages, even as to any portion of a claim, but merely a ruling that it is entitled to an evidentiary presumption as an intermediate step toward proving a portion of its case. Steves' Mem. at 6-9. And that ruling would not even establish any single element of Steves' claim, because any "presumption" is, at most, a rebuttable one. Steves concedes that whether or not the merger was actually anticompetitive will remain for the jury to decide even if the Court grants its motion. *Id.* at 15-16. It has therefore failed to bring a proper motion for summary judgment under Rule 56(a), and it cannot seek an end-run around this result by reference to Rule 56(g). The Court should deny Steves' motion on this basis alone.

B. Steves Will Not Be Entitled To An Instruction That The Jury May Or Should "Presume" Harm To Competition From Market Shares And Increasing Concentration Alone

The merits of Steves' motion demonstrate why motions of this nature are procedurally barred. Steves appears to be inviting the Court to engage prematurely with what the jury instructions in this case should be. But Steves does not actually move *in limine* for a specific

complete instruction, and its motion seems to invite elements of an instruction that would be reversible error. Steves contends that it will be entitled to a jury instruction that the change in market shares and market concentration immediately following the merger in 2012 will be sufficient for the jury to find that the merger violated Section 7. Steves' Mem. at 16. There is no authority for an instruction of that nature. To the contrary, in the most prominent Section 7 case ever tried to a jury the Third Circuit *reversed* the district court, and ordered a new trial, because of instructions that told the jury that concentration statistics alone were a sufficient basis for a verdict. *See Brunswick*, 523 F.2d at 275. And opinions in the Section 7 cases resolved by bench trial (the vast majority) demonstrate that courts have never regarded market share and concentration statistics, standing alone, as sufficient to justify enjoining a merger—even in pre-merger challenges brought by the government. That point is even more important in a case brought by a private customer, five years after the consummation of a merger. Market share statistics are *relevant* in a case like this one, but no trier of fact can treat them as dispositive or as a justification for ignoring the other relevant evidence. The parties and the Court can consider the precise phrasing of the jury instructions at the appropriate time, after the Court has heard the evidence and understands the issues appropriately framed for the jury's consideration.

1. Any "Presumption" Of Harm To Competition Is Inappropriate In This Case

Steves' argument is built around the Supreme Court's decision over fifty years ago, in the context of a government challenge to an unconsummated merger, that

> [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.

U.S. v. Phila. Nat'l Bank, 374 U.S. 321, 362-65 (1963). Steves asks the Court to rule now that the jury in this case will be instructed that it can "presume" harm to competition here based entirely on market share and concentration statistics. Steves assures this Court that a ruling that Steves is entitled to a presumption of anticompetitive effects from the CMI merger will "be particularly helpful . . . where there are no pattern jury instructions and thus all the Court's instructions must be drafted from scratch based on existing law" and that "[d]eciding 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." Steves' Mem. at 16. But the authority on which Steves relies does not support the position, even in the context of unconsummated mergers, that market share and market concentration calculations alone are sufficient for the factfinder to find that a merger is anticompetitive. In *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999), plaintiffs presented evidence that airlines objected to the merger, lending credence to plaintiffs' predictions regarding the likely effects of the merger. *Id*. And in *Tasty Baking Co. v. Ralston Purina, Inc*., 653 F. Supp. 1250 (E.D. Pa. 1987), plaintiffs presented testimony from six witnesses, 105 trial exhibits and portions of ten depositions, and "in thorough briefs, explained how their evidence proved defendants' violations of the antitrust laws." *Id*. at 1256-57. The court in that case evaluated market share data from multiple sources and considered whether there was any evidence of entry by new competitors before finding that the plaintiffs' market shares "provide a meaningful basis on which to evaluate the future significance of the acquisition" at issue. *Id*. at 1264. Similarly, in *Hart Intercivic, Inc. v. Diebold, Inc*., 2009 WL 3245466 (D. Del. Sept. 30, 2009), the court rejected plaintiffs' argument that it was likely to succeed on the merits of its Section 7 claim because it could establish an HHI increase of 2069.51. *Id*. at *7. Instead, the

court noted that "the totality of the circumstances analysis required by Section Seven is fact-intensive" and denied plaintiffs' motion for a temporary protective order enjoining consummation of the merger. *Id*.; *accord Domed Stadium Hotel, Inc. v. Holiday Inns, Inc*., 732 F.2d 480, 493 (5th Cir. 1984) (noting that the Supreme Court's holding in *General Dynamics* "underscores the importance in section seven cases of market conditions.").

The consummated merger cases cited by Steves are no different. In *Remington Products, Inc.*, Remington Products challenged the 1981 merger of North American Philips Co. with Schick. 717 F. Supp. at 44. The court did not limit its analysis to market shares, although the defendants' post-merger share was 55%. *Id*. at 49. Instead, to assess whether the acquisition was reasonably likely to have anticompetitive effects, the court applied a multi-factor approach which considered not only market shares, but also "(1) concentration in the industry; (2) ease of entry into the market; (3) strength of remaining firms; (4) supply and demand in the market; and (5) post acquisition events." *Id*. at 44. The court subsequently denied summary judgment as to defendants' liability under Section 7 in light of the numerous factual disputes between the parties on each of these factors. *Id*.[1] In *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health Systems, Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015), the Ninth Circuit explained that market share and concentration "are not conclusive indicators of anticompetitive effects" and that the district court's finding that the FTC and private plaintiffs had established a prima facie case was supported not just by market share evidence but by "statements and past actions by the merging parties" that made it likely that the defendant would raise reimbursement rates. *Id*. at 788.

[1] This part of the district court's decision was not changed by the court's ruling on reconsideration, which found that the defendants' post-merger market share was sufficient to raise an inference of antitrust injury, *Remington II*, 717 F. Supp. at 48-49, a decision that the district court later abandoned in light of the Supreme Court's ruling in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). *Remington III*, 755 F. Supp. 52 (D. Conn. 1991).

Specifically, the district court found at trial that the parties' pre-acquisition internal correspondence indicated that the merged companies would be able to increase prices. *Id*. at 787. In *ProMedica Health System v. FTC*, 749 F.3d 559 (6th Cir. 2014), the court, reviewing a full factual record of an FTC administrative hearing, found that evidence of a strong positive correlation between ProMedica's prices and its market share supported the FTC's HHI calculations. *Id*. at 570.[2] None of those decisions suggested any belief by the court that it could "presume" liability based solely on market share statistics and decide not to engage holistically with the broader evidence.

Although few Section 7 cases have been tried to juries, in the most prominent of them the Third Circuit held that it was reversible error to give the instruction Steves seeks. In *Brunswick Corp.*, the trial court instructed the jury that "high market shares and significant increases in concentration may be sufficient in itself to establish a violation of Section 7" and that "[a]n acquisition which produces a firm controlling an undue percentage of the relevant market and resulting in a significant increase in concentration is presumptively unlawful, unless the defendants can overcome this presumption by other evidence to establish the vigor of competition or affirmative justifications in support of the acquisition." 523 F. 2d at 273. The Third Circuit reversed and ordered a new trial, holding that those charges were improper (and "virtually a directed verdict") because they only emphasized the market share held by Brunswick and did not appropriately direct the jury toward the broader considerations probative of

[2] Steves cites to only one almost forty-year-old case for the proposition that a private plaintiff can establish on summary judgment entitlement to a "presumption of illegality" based only on an increase in market share. *Hittman Nuclear & Devel. Corp.*, 1979 WL 1749, at *5. Not so. In *Hittman*, the court was not asked to issue a ruling on the *PNB* presumption alone, and instead granted summary judgment to plaintiff that the merger was likely to substantially lessen competition as a matter of law. *Id*. Here, Steves has not requested judgment on any of its claims, and its motion must fail. *See infra* at § I.A.

anticompetitive effects. *Id*. at 275. *Brunswick* involved vertical integration rather than acquisitions of horizontal competitors, but the Third Circuit's concern—that the instructions improperly "emphasized the market share held by Brunswick" "[w]ithout highlighting other factors" pertinent to a holistic consideration of competitive effects—applies equally to the instruction that Steves seeks here. *Id.* at 274.

The jury in this case will be presented with extensive evidence that the market share statistics that Steves points to are both misleading on their own terms (*see, e.g.*, Section II *infra*) and fail to appropriately capture the likely, or actual, competitive consequences of this acquisition. The parties can brief for this Court at the appropriate time exactly how the jury should be instructed to evaluate the market share statistics presented by Steves in light of, for example, the fact that Steves has [redacted] Ex. 22, S. Steves II Tr. 564:8-565:4. This whole issue is premature. The one thing that is clear now is that an instruction telling the jury that it may base a verdict solely on statistics would be reversible error.

2. The Merger Guidelines Do Not Support Steves' Reliance Solely On Pre-Merger Market Shares And HHI Calculations

The great irony of this case is that Steves asks this Court for a determination that the jury will be entitled to presume liability from a mathematical analysis derived entirely from the DOJ's Horizontal Merger Guidelines—when the Guidelines do not actually support that approach, and the actual regulators responsible for protecting the public from anticompetitive acquisitions have applied those Guidelines *twice* and decided not to challenge this merger. The Guidelines, and federal courts applying them, require even the government to present more evidence of anticompetitive effects before the factfinder can deem a merger anticompetitive.

The Guidelines (which are not binding on this Court, Steves' Mem. at 7 n.5) recognize that the purpose of the HHI test and other measures of market concentration

> *[I]s not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones*. . . Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether *other competitive facts* confirm, reinforce, or counteract the potentially harmful effects of increased concentration.

DOJ & FTC, *Horizontal Merger Guidelines* § 5.3 (2010) (emphasis added). In fact, the DOJ and FTC have admitted that "[m]arket concentration may be unimportant under a unilateral effects theory of competitive harm," which forms the basis for Steves' antitrust claims in this case. *See* DOJ & FTC, Commentary on the Horizontal Merger Guidelines at 16 (2006); Compl. ¶¶ 80-92 (alleging unilateral effects of the JELD-WEN/CMI merger).

Steves' liability expert, Professor Carl Shapiro, agrees. In his article *Merger Guidelines: Hedgehog to Fox*,at 64, Professor Shapiro noted that "[a]s economic learning and practice evolved, emphasis on market shares became . . . less helpful." He further explained that HHIs cannot be reliably linked to the danger of collusion or unilateral price effects between differentiated products. *Id*. at 63. Instead of relying merely on market share or market concentration statistics to develop its case, Professor Shapiro cautioned that "[a]ll of the quantitative methods [used to evaluate mergers] must be used in conjunction with the broader set of qualitative evidence that the [DOJ and FTC] assemble during a merger investigation." *Id*. at 77.

Federal courts acknowledge that even the government must present evidence beyond market shares and market concentration in order to prove liability under Section 7. In *U.S. v. Baker Hughes*, the D. C. Circuit recognized that the Supreme Court no longer "accept[s] a firm's market share as virtually conclusive proof of its market power" and that "the [HHI] cannot

guarantee litigation victories." 908 F.2d 981, 990, 992 (1990). Numerous courts have similarly rejected efforts by government enforcers to rely on evidence of market concentration alone to establish the illegality of a merger. *U.S. v. Syufy Enters.*, 903 F.2d 659, 656-66 (9th Cir. 1990) (affirming decision of district court where government placed too much reliance on market share evidence and ignored real-world evidence of entry); *St. Alphonsus Med. Center-Nampa Inc.*, 778 F.3d at 786 (noting that evidence of market share and market concentration are not conclusive indicators of anticompetitive effects and that plaintiffs generally present other evidence to establish anticompetitive effects, citing Professor Shapiro for the proposition that the trend in merger enforcement is to consider factors in addition to market share when evaluating a merger); *FTC v. Heinz*, 246 F.3d 708, 717 n.11 (D.C. Cir. 2001) (noting that evidence of market concentration on its own is not enough to establish the governments' prima facie case); *ProMedica*, 749 F.3d at 570 (HHI calculations must be viewed "in context of [the] record"); *U.S. v. Waste Mgmt., Inc*. 743 F.2d 976, 982 (2d Cir. 1984) (under the Supreme Court's holding in *General Dynamics*, a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect).

Instructing a jury that it can or must "presume" a merger to be anticompetitive based purely on the Guidelines' concentration calculations, when the DOJ has reviewed the merger *twice* without objection, would be significant and reversible error.[3] [redacted]

[3] Steves' assertion that *AlliedSignal v. B.F. Goodrich Co*., stands for the proposition that courts "give no weight, in a suit by a private plaintiff, to the fact that the government decided not to challenge the merger," Steves' Mem. at 10 n.6, mischaracterizes that ruling. 183 F.3d at 575. In *AlliedSignal*, the Seventh Circuit held that "[t]he district court did not abuse its discretion in concluding that the failure of the FTC or the DOD to object to the merger does not bar AlliedSignal's private enforcement action." *Id*. This merely establishes that DOJ non-action is not determinative, but says nothing about the weight that the Court or the jury may give to the fact that the government chose not to challenge a given merger.

[redacted]. Ex. 26, Shapiro Tr. 287:14-288:6. And Dr. Shapiro, a veteran of the DOJ Antitrust Division, cannot testify under oath that DOJ does not employ market concentration analyses in its investigations. Steves further cannot contend that DOJ did not know about the supposed anticompetitive effects of the merger in 2016, because Steves itself brought its allegations to DOJ's attention.[4] E. Steves Dep. Ex. 17, attached as Ex. 34. Steves presents no explanation as to why it deserves an evidentiary presumption when the government agency tasked with enforcing the antitrust laws twice declined to object to the merger. The Court should deny Steves' Motion.

II. STEVES' RELEVANT MARKET DEFINITION AND ITS MARKET CONCENTRATION CALCULATIONS ARE DISPUTED

Summary judgment is only appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (*quoting* Fed. R. Civ. P. 56(c)). When considering a motion for summary judgment, the court must construe all evidence in the light most favorable to the non-moving party, with all inferences drawn in the non-moving party's favor. *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407, 413 (4th Cir. 2015). The plaintiff in an antitrust case bears the burden of proof on the issue of the relevant product and geographic markets. *Satellite Television & Assoc. Res., Inc. v. Cont'l Cablevision of Virginia, Inc.*, 714 F.2d 351, 355 (4th Cir. 1983). Because the defendant does not bear the burden of proof, it does not need to provide expert

---

[4] The alleged anticompetitive effects of the merger that Steves described to the DOJ were, far from undisputed, at best misleading, further cautioning against providing Steves the benefit of any presumption in this case. [redacted] *Id.* at 196:6-196:22; 212:1-213:8; E. Steves Dep. Ex. 25, attached as Ex. 33.

testimony or establish a different relevant market in order to demonstrate genuine disputes of material fact sufficient to defeat a motion for summary judgment. *In re Southeastern Milk Antitrust Litig.*, 730 F. Supp. 2d 804, 824 (E.D. Tenn. 2010), *rev'd on other grounds*, 739 F. Supp. 2d 262 (6th Cir. 2014); *see also It's My Party, Inc.*, 88 F. Supp. 3d 475, 491 (D. Md. 2015) (granting summary judgment for defendant where record evidence contradicted plaintiff's expert's market definition), *aff'd* 811 F.3d 676 (4th Cir. 2016) (holding that the district court "was not required to accept uncritically two market definitions … that coincidentally fit plaintiff's precise circumstances.").

Steves argues that it is entitled to a ruling establishing that the relevant market in this case is interior molded doorskins sold in the United States because Steves' expert said so, and JELD-WEN's antitrust economist did not opine on the definition of the relevant market himself. Steves' Mem. at 2. But JELD-WEN does not need to put forward its own relevant market definition; that is Steves' burden. *Southeastern Milk*, 730 F. Supp. 2d at 824. Steves fails to meet its burden on summary judgment because Professor Shapiro's geographic and product market definitions are squarely at odds with the material facts in this case, such that JELD-WEN is entitled to have a jury resolve them at trial. Because Dr. Shapiro's market share calculations rely on Steves' disputed market definitions, there is by definition a genuine issue of material fact regarding whether those calculations show any relevant concentration as well. As the Fourth Circuit recently made clear, "[no] party can expect to gerrymander its way to an antitrust victory without due regard for market realities." *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 683 (4th Cir. 2016). Steves cannot obtain summary judgment on its proposed relevant market.

A. Steves' Geographic Market Definition Ignores Evidence Of Foreign Suppliers And Customers

Genuine disputes about material facts relating to foreign doorskin suppliers preclude a finding that Steves has properly identified the relevant geographic market in this case. The geographic market defines the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The geographic market should not be "too tightly drawn, unless clear evidence exists that potential competitors outside the region are hindered from entering." *Consul, Ltd. v. Transco Energy Co*., 805 F.2d 490, 495 (4th Cir. 1986). If a customer within a proposed market could avoid a price increase by shifting to a product produced outside of the geographic area, the proposed geographic market is too narrow. *FTC v. Arch Coal, Inc.* 329 F. Supp. 2d 109, 123 (D.D.C. 2004); *It's My Party, Inc.*, 811 F.3d at 682; *FTC v. Penn State Hershey Med. Ctr*., 838 F.3d 327, 338 (3d Cir. 2016).

Relying solely on Professor Shapiro, Steves defines the relevant geographic market as the United States. But Steves' own behavior creates a genuine material dispute regarding that definition, because it demonstrates that the relevant market must be defined to include foreign suppliers. [redacted].[5] Ex. 20, E. Steves Tr. 305:10-310:9; Ex. 21, E. Steves Dep. Ex. 33. The testimony of Sam Bell Steves II establishes that [redacted] Ex. 22, S. Steves II Tr. 558:21-559:9, 566:14-22. [redacted]

[5] JELD-WEN's [redacted] far less than the normal 5% SSNIP threshold used by economists to define a relevant market. Ex. 25, Shapiro Rpt. at 13.

[redacted], the relevant market for doorskins must be broader than just the United States.

B. There Is A Material Dispute About Whether All Doorskin Designs Are Properly Included In The Relevant Product Market

There is likewise a material dispute of fact about the relevant product market. To determine the relevant product market, courts consider whether two products serve the same purpose, are reasonably interchangeable, and whether and to what extent purchasers substitute one product for another. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962); *U.S. v. E.I. DuPont de Nemours & Co*., 351 U.S. 377, 404 (1956). To establish a relevant product market, a plaintiff must present evidence that the products contained in the market are interchangeable for "the consumer's purpose" or "the responsiveness of the sales of one product to price changes of the other." *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 223 F. Supp. 2d 718, 726 (D. Md. 2002) (*quoting E.I. DuPont de Nemours & Co*. 351 U.S. at 400).

Professor Shapiro's product market definition, interior molded doorskins, is ambiguous, ill-defined, and both too narrow and too broad. It is too narrow because Steves' product market definition appears to be limited to the exact bundle of doorskin designs that it purchases from

JELD-WEN, without reference to competing designs that are proprietary to other suppliers, or whether there is some smaller subset of doorskin designs that are reasonably interchangeable between suppliers. At the same time, Dr. Shapiro's definition of the relevant product market is too broad because it assumes that every doorskin design in JELD-WEN's line is interchangeable with every other design, ignoring contemporaneous evidence to the contrary.

1. The Product Market Cannot Be Defined By Reference Only To Steves' Purchases

It is well settled that the relevant product market cannot be limited to only the products of one manufacturer. *Nobel Sci. Indust., Inc. v. Beckman Instruments, Inc.*, 670 F. Supp. 1313, 1323 (D. Md. 1986) (collecting cases). Here, Steves has repeatedly alleged that it requires a certain "range" of doorskin designs in order to compete in the market for interior doors, which it appears to define as the mix of doorskin designs that Steves purchased from JELD-WEN in 2016.[6] Compl. ¶¶ 67, 109; Ex. 24, S. Steves II Decl. ¶ 12. [redacted]

[6] Steves' relevant product market definition is fatally deficient for the independent reason that, to the extent that it is comprised of JELD-WEN's current range of doorskins as a whole, it does not reflect a product that existed "but-for" the merger. The only reason that JELD-WEN is able to provide the specific "range" of doorskin designs that Steves alleges it requires is because of the CMI designs that JELD-WEN acquired as a result of the merger. *See, e.g.*, Ex. 9, STEVES-000019621 [redacted].

[redacted] Steves' Mem. Ex. A. Shapiro Decl. at Attach. A.3, Doc. 383-1 ("Shapiro Decl. A.3").

Whether it is proper to treat the mix of doorskin designs that Steves chooses to purchase from JELD-WEN as defining the entire "interior molded doorskins" market is a subject of material factual dispute. A number of witnesses have explained that [redacted]. Ex. 11, Lynch Tr. 181:20-183:8; Ex. 29, Hachigian Tr. 382:1-14; *see also* Ex. 4, Merrill Tr. 221:3-20 [redacted]). Different doorskin designs are in higher demand in different parts of the country. *See, e.g.*, Ex. 28, JW-CIV-00199651 at 16, 26. In fact, each independent door manufacturer purchases a very different mix of doorskin designs from JELD-WEN. Ex. 27, Fedio Decl. ¶ 4. Whether Steves can substitute all of the doorskin designs that it purchases from JELD-WEN with the exact same mix of designs from a different supplier says nothing about whether the merger had any effect on the ability of other independent door manufacturers to find reasonable alternative sources of supply for the designs that they purchase.

Further, even if the relevant product market could be properly defined by Steves' mix of doorskin designs alone, that mix as it exists today was not available from any supplier before the merger. Steves admits that "interior molded doorskin designs vary by manufacturer, and thus no single interior molded doorskin supplier could supply all of the doorskin designs existing in the marketplace at any given time." Ex. 7, RFA Resp. No. 10. Evidence produced by Steves confirms that the range of offerings supplied by Masonite and Craftmaster before the merger

were not interchangeable with JELD-WEN's offering. Ex. 13, STEVES-000016930 ([redacted]); Ex. 10, STEVES-000018845 ([redacted]).

Finally, [redacted]. Ex. 22, S. Steves II Tr. 564:8-565:4; Ex. 35, S. Steves Dep. Ex. 50. This shows that, at least for some subset of doorskin designs, a consumer is able to purchase those doorskins from other suppliers to avoid a price increase. These facts, at a minimum, create a dispute as to whether Steves' product market is properly defined.

2. A Material Dispute of Fact Exists As To Whether All Doorskin Designs Are Interchangeable

Professor Shapiro's product market definition may also reasonably be disputed as too broad because it includes all doorskin designs without consideration as to whether certain doorskin designs are reasonably interchangeable with other doorskin designs. Whether a product belongs to a distinct market or submarket depends on the "extent to which consumers will change their consumption of one product in response to a price change in another, *i.e.*, the cross-elasticity of demand." *It's My Party, Inc.*, 811 F.3d at 683 (*quoting Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 (1992). [redacted]. Ex. 25, Shapiro Rpt. at 28 Ex. 35, S. Steves Dep. Ex. 50. [redacted]

[redacted]. *Id.* at 22-23. [redacted] *Id.* at 21-23. [redacted] Kaplan Suppl. Rpt. Ex. D, attached as Ex. 36. [redacted]. Ex. 26, Shapiro Tr. 229:19-230:3. [redacted]

C. Material Disputes Of Fact Exist Regarding The Market Shares Underlying Professor Shapiro's HHI Calculations

Professor Shapiro's market share calculations are the subject of material disputes of fact because they do not reflect the actual business that was available to each supplier before the merger, or the imminent presence of [redacted] (and other foreign suppliers) in the marketplace. In *U.S. v. General Dynamics*, 415 U.S. 486 (1974), the Supreme Court explained that statistical evidence of market concentration based on past production does not give an accurate picture of a supplier's future ability to compete where sales are made under long-term requirements contracts, because past sales reflect the obligation to fulfill previously-negotiated contracts and not the exercise of competitive power. *Id*. at 501. Relatedly, the Guidelines instruct that "[f]irms not currently earning revenues in the relevant market, but that have committed to entering the

market in the near future, are also considered market participants" and should be included in market share calculations. *Horizontal Merger Guidelines* § 5.1.

Professor Shapiro's market share calculations are unreliable and disputed because they fail to account for doorskin sales that were no longer properly considered part of the available market due to long term contractual commitments. For example, [redacted] Ex. 30, JW-CIV-00179059. And prior to signing the 2012 Long Term Agreement, Steves purchased doorskins from JELD-WEN pursuant to a long term agreement signed in 2003, under which Steves was required to purchase at least 90% of its requirements from JELD-WEN, unless JELD-WEN did not manufacture a particular type of doorskin. STEVES-000707164, attached as Ex. 37; Ex. 32, STEVES-000071865, Ex. 25, Shapiro Rpt. at 14. Further, after Steves signed the new long term agreement with JELD-WEN on May 1, 2012, [redacted] Ex. 31, E. Steves Dep. Ex. 6.

Despite the existence of long-term contracts before the merger, Professor Shapiro did not [redacted]. MASONITE_000106 at 2, 6 15, attached as Ex. 38 (noting [redacted]

[redacted]

[redacted]).

Further genuine disputes of fact exist as to whether foreign doorskin suppliers should be included in Professor Shapiro's market share analysis. In order to accurately calculate market concentration, [redacted] Ex. 26, Shapiro Tr. 98:15-20. In his supplemental report, Professor Shapiro estimates [redacted] Shapiro Decl. A.3. But Professor Shapiro ignores evidence that [redacted] is about to greatly increase its sales of interior molded doorskins in the United States. First, as described above, Steves has [redacted]. Ex. 22, at S. Steves II Tr. 558:21-559:9, 564:8-565:4. [redacted]. Ex. 15, Heintel Tr. 37:8-38:2; 47:15-48:18. In addition, Mr. Heintel testified that [redacted] *Id.* at 64:9-18; 65:3-8. Professor Shapiro's failure to account for [redacted] imminent U.S. sales creates a material dispute of fact regarding the proper market share calculations in this case.

CONCLUSION

For the above reasons, JELD-WEN respectfully requests that the Court deny Steves' Motion for Partial Summary Judgment.

Dated: October 20, 2017

Respectfully submitted,

JELD-WEN, Inc.

By counsel

/s/Harrison M. Gates
Michael W. Smith (VSB #01125)
Craig T. Merritt (VSB #20281)
R. Braxton Hill, IV (VSB # 41539)
Harrison M. Gates (VSB #80385)
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4100 – Tel.
(804) 697-4112 – Fax
msmith@cblaw.com
cmerritt@cblaw.com
bhill@cblaw.com
hgates@cblaw.com

Margaret M. Zwisler *(pro hac vice)*
J. Scott Ballenger (*pro hac vice*)
Allyson M. Maltas (*pro hac vice*)
Latham & Watkins LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C., 20004
(202) 637-2200 – Tel.
(202) 637-2201 – Fax
margaret.zwisler@lw.com
scott.ballenger@lw.com
allyson.maltas@lw.com

Alfred C. Pfeiffer (*pro hac vice*)
Sarah M. Ray (*pro hac vice*)
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
(415) 391-0600 – Tel.
(415) 395-8095 – Fax
al.pfeiffer@lw.com
sarah.ray@lw.com

Lawrence E. Buterman *(pro hac vice)*
Latham & Watkins LLP
885 Third Avenue

New York, NY 10022
(212) 906-1200 – Tel.
(212) 751-3864 – Fax
lawrence.buterman@lw.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2017, I will electronically file a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the registered participants as identified on the NEF to receive electronic service, including:

Lewis F. Powell III
Maya M. Eckstein
John S. Martin
Douglas M. Garrou
R. Dennis Fairbanks
Alexandra L. Klein
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Broad Street
Richmond, VA 23219
(804) 788-8200 – Tel.
(804) 788-8218 – Fax
lpowell@hunton.com
meckstein@hunton.com
martinj@hunton.com
dgarrou@hunton.com
dfairbanks@hunton.com
aklein@hunton.com

Kyle Mach
Glenn Pomerantz
Gregory Sergi
Munger, Toiles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
(415) 512-4000 – Tel.
(415) 512-4077 – Fax
kyle.mach@mto.com
glenn.pomerantz@mto.com
josh.patashnik@mto.com
gregory.sergi@mto.com

Marvin G. Pipkin
Kortney Kloppe-Orton
Pipkin Law
10001 Reunion Place, Suite 6400

San Antonio, TX 78216
(210) 731-6495 – Tel.
(210) 293-2139 - Fax

Of Counsel

/s/Harrison M. Gates
Michael W. Smith (VSB #01125)
Craig T. Merritt (VSB #20281)
R. Braxton Hill, IV (VSB # 41539)
Harrison M. Gates (VSB #80385)
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4100 – Tel.
(804) 697-4112 – Fax
msmith@cblaw.com
cmerritt@cblaw.com
bhill@cblaw.com
hgates@cblaw.com

Margaret M. Zwisler *(pro hac vice)*
J. Scott Ballenger (*pro hac* vice)
Allyson M. Maltas (*pro hac vice*)
Latham & Watkins LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C., 20004
(202) 637-2200 – Tel.
(202) 637-2201 – Fax
margaret.zwisler@lw.com
scott.ballenger@lw.com
allyson.maltas@lw.com

Alfred C. Pfeiffer (*pro hac vice*)
Sarah M. Ray (*pro hac vice*)
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
(415) 391-0600 – Tel.
(415) 395-8095 – Fax
al.pfeiffer@lw.com
sarah.ray@law.com

Lawrence E. Buterman *(pro hac vice)*
Latham & Watkins LLP
885 Third Avenue

New York, NY 10022
(212) 906-1200 – Tel.
(212) 751-3864 – Fax
lawrence.buterman@lw.com

Attorneys for Defendant