UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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

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

REDACTED VERSION FILED PUBLICLY

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INTRODUCTION

This is, and always has been, a contract case. Steves and Sons, Inc. ("Steves") alleges that JELD-WEN, Inc. ("JELD-WEN") breached the terms of the parties' long term Supply Agreement by misapplying the pricing provisions, delivering defective doorskins, and refusing to pay return claims. Those straightforward claims turn on the proper interpretation of the Supply Agreement, and could have been resolved without elaborate discovery in a trial in June on the Court's original schedule.

This case has become a complex behemoth of discovery and motions, and threatens to produce a needlessly confusing and burdensome trial, because Steves insists on pursuing supposedly distinct antitrust claims alleging that JELD-WEN's long-consummated October 2012 acquisition of and merger with Craftmaster, Inc. ("CMI") violated Section 7 of the Clayton Act. Steves seeks to use those claims to obtain extravagant relief far exceeding the purported impact of the breaches of contract Steves alleges, including as much as $[REDACTED] (before trebling) in speculative future "lost profits" and an unprecedented decree from this Court forcing JELD-WEN to unwind the merger years after it was consummated. While pursuing its antitrust claims, Steves has repeatedly assured the Court that they are truly distinct from the core breach of contract dispute.

Despite a year of discovery, production of millions of pages of documents, 34 depositions, 58 interrogatories, 83 requests for admission and 10 expert reports, Steves has no evidence that it has suffered any *antitrust* harm stemming from the merger. To the contrary, Steves actually complains that JELD-WEN [REDACTED]

[REDACTED].

JELD-WEN is entitled to summary judgment on the antitrust claims, and this case should

proceed to adjudication of the contract claims that have always been the true gravamen of this action.

1. Steves Has No Evidence Of Any Injury "In An Antitrust Sense." Steves claims that JELD-WEN adopted an incorrect interpretation of the price provisions of the Supply Agreement, and [REDACTED]

[REDACTED] Steves also claims that JELD-WEN breached the Agreement by reducing the "quality" of its doorskins and by not reimbursing every return claim Steves submitted. These may or may not be viable breach of contract claims, but they are not *antitrust* claims for two reasons.

a. First, when the parties' obligations are defined by a contract that was negotiated before an alleged antitrust violation, a breach of that contract is simply a breach and does not also inflict "antitrust injury." Antitrust law only provides a remedy for harms that flow from the anticompetitive consequences of the alleged violation, and coincide with the public harm produced by reduced competition. A plaintiff that is protected from the consequences of any reduction in competition by a pre-merger contract cannot suffer antitrust injury as a matter of law. **(Pages 12-16).**

b. Second, Steves has no evidence of injury as antitrust law defines it: a difference between the price Steves paid and the price it *would have paid* "but for" the merger. Instead Steves just calculates what it believes *the contract* requires, which its own expert admits is not the same thing. One clear illustration of that failure is that Steves claims [REDACTED]

[REDACTED]

[REDACTED] Any coherent theory of distinct *antitrust* harm from a merger must compare the present to a hypothetical world in which the

merger did not happen. Steves has not even attempted that work, because its *contractual* theory of harm is maximized by assuming the merger actually took place. When confronted with the fact that [REDACTED], Steves' expert Dr. Tucker admitted in his deposition that [REDACTED]." Dep. Tr. of A. Tucker 111:20-112:9 ("Tucker Tr."), attached as Ex. 1. **(Pages 16-20).**

Steves' complaints about the *quality* of JELD-WEN's doorskins are similarly tied to what Steves thinks the contract requires, not to any theory of the consequences of the merger. It is undisputed that the "thinning" of doorskins, which Steves alleges diminishes their quality, predated the merger. Steves has no concrete evidence to support its impressionistic statements that quality declined in some other way as a result of the merger, and has never even attempted to quantify any *antitrust* quality-related damages other than its claim of inadequate reimbursements. In fact, the only evidence developed in discovery regarding quality complaints shows that rates of doorskin defects and returns *decreased* after the merger. **(Pages 20-21).**

2. Steves' Predictions About Future Injury Are Impermissibly Speculative. Steves' claim for future "lost profits" is premised on the contingent and speculative chain of possibilities that at ***some point in the future***, [REDACTED]. As a matter of law, that imagined possibility is far too speculative and contingent to provide Steves any ripe cause of action, or this Court subject matter jurisdiction. Indeed, the undisputed facts show that Steves is currently purchasing doorskins from JELD-WEN and that JELD-WEN is willing to supply Steves beyond the life of the Supply Agreement. Discovery also has revealed that Steves is [REDACTED].

Basic principles of the common law and of Article III ripeness require an actual present injury, or (for equitable relief) an injury that is imminent and reasonably certain. The mere possibility of harm years in the future, if a plaintiff's worst fears come true, does not create a cause of action or jurisdiction now. **(Pages 21- 27).**

3. Steves' Request For Divestiture Should Be Rejected Now. The Court should reject Steves' extraordinary request that this Court order JELD-WEN to divest CMI nearly five years after consummating the merger and fully integrating it into the company. Since the Supreme Court's decision in *California v. American Stores,* 495 U.S. 271, 295 (1990), no court has ever awarded a private party standing alone relief of that nature, and this case is not the place to start. The Antitrust Division of the United States Department of Justice ("DOJ" or "Antitrust Division") has reviewed this merger ***twice***, including just last year, and found no fault with it. Steves concedes that it slept on its right to bring suit for years, while JELD-WEN irreversibly integrated the operations, employees, and assets of the former CMI into its own business. Courts have regularly rejected private-party requests for divestiture on the basis of laches when the claim is filed even a few days after a fully consummated merger. Laches bars the divestiture claim, and summary judgment is appropriate. **(Pages 29-32).** Further, Steves' claims of future, threatened antitrust injury are mere speculation, rendering divestiture unavailable as a matter of law. **(Pages 32-35).**

The antitrust laws and the remedies they provide simply have no work to do in this case, and Steves has failed—despite every opportunity—to demonstrate otherwise. If Steves is right about what the contract means, then the contract fully protects it from the harm it claims to have suffered. If Steves is wrong about what the contract means, it has no evidence or theory of

injury. This Court should dismiss Steves' antitrust claims and allow the jury to resolve any remaining disputed issues under the breach of contract analysis where they belong.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The May 1, 2012 Supply Agreement

1. On May 1, 2012, JELD-WEN and Steves signed a long-term Supply Agreement. STEVES-000012578, attached as Ex. 2.

2. [REDACTED]

[REDACTED]

[REDACTED]." Ex. 2, STEVES-000012578 at -79.

3. JELD-WEN provided Steves with notice of termination of the Agreement on [REDACTED]. JW-CIV-00336196-97, attached as Ex. 3.

4. The contract will terminate on [REDACTED]. Ex. 3 at JW-CIV-00336197; Dep. Tr. of S. Steves II, Vol. 1 31:22-32:4, May 25, 2017 ("S. Steves II Tr. Vol. 1"), attached as Ex. 4.

5. JELD-WEN has continued to supply Steves with doorskins. Suppl. Expert Report of Carl Shapiro at Ex. SU-5, Aug. 21, 2017 ("Shapiro Suppl. Rpt."), attached as Ex. 5.

6. JELD-WEN has told Steves on multiple occasions that it is interested in negotiating regarding selling doorskins to Steves after the contract terminates [REDACTED]. B. Mallard Dep. Ex. 223 at 1, attached as Ex. 6; Mallard Dep. Ex. 225, attached as Ex. 7; Mallard Dep. Ex. 227 at 1-2, attached as Ex. 8; Ex. 4, S. Steves II Tr. Vol. 1 22:21-23:4.

7. [REDACTED]

[REDACTED] Dep. Tr. of E. Steves, Vol. 1 270:6-271:4, May 23, 2017 ("E. Steves Tr. Vol. 1"), attached as Ex. 9.

8. ████████. Ex. 5, Shapiro Suppl. Rpt. at 31.

9. ████████" Ex. 9, E. Steves Tr. Vol. 1 407:17-21.

JELD-WEN's Change To .110 Thickness Doorskins

10. JELD-WEN was conducting internal testing of 3mm (.110") doorskins in early 2012. JW-CIV-00205100-101, attached as Ex. 10.

11. No later than July 31, 2012, JELD-WEN informed Steves that it had reduced the target thickness of its doorskins to .110." STEVES-000029525, attached as Ex. 11.

JELD-WEN's Acquisition of CMI

12. In 2009, Steves began discussions with CMI regarding a potential combination of the two companies. STEVES-000412795-96, attached as Ex. 12.

13. ████████

14. JELD-WEN and CMI announced on June 15, 2012 that JELD-WEN was acquiring CMI and merging its operations and assets into JELD-WEN, subject to due diligence and the negotiation and signing of a definitive agreement. JW-CIV-00411092-93, attached as Ex. 14; STEVES-000027816, attached as Ex. 15.

15. The acquisition closed on October 24, 2012. Dep. Tr. of R. Merrill 72:18-73:10, attached as Ex. 16; Ex. 9, E. Steves Tr. Vol. 1 42:18-20.

16. [redacted]

[redacted]. STEVES-000021354, attached as Ex. 17.

17. [redacted]

[redacted]. Ex. 2, STEVES-000012578.

18. Steves was aware on June 18, 2012 that JELD-WEN's acquisition of CMI would reduce the number of U.S.-based doorskin manufacturers from three to two. Steves' Objs. & Resps. to JELD-WEN's First Set of Reqs. for Admis. at Resp. No. 12, Aug. 11, 2017 ("Resp. to RFA"), attached as Ex. 18.

19. On July 17, 2012, the Antitrust Division informed JELD-WEN that it had opened a preliminary investigation of JELD-WEN's proposed acquisition of CMI. JW-CIV-00000352, attached as Ex. 19.

20. [redacted]

[redacted]. Ex. 9, E. Steves Tr. Vol. 1 41:12-20.

21. The Antitrust Division closed its investigation of JELD-WEN's proposed acquisition of CMI on September 28, 2012 without taking any action. JW-CIV-00338746, attached as Ex. 20.

22. On February 10, 2016, the Antitrust Division informed JELD-WEN that it had opened an investigation of JELD-WEN's consummated 2012 acquisition of CMI. JW-CIV-00000007-09, attached as Ex. 21.

23. The Antitrust Division closed its investigation into the JELD-WEN/CMI acquisition and merger on May 18, 2016 without taking any action. JW-CIV-00643827-28, attached as Ex. 22.

Steves' Belief That It Experienced Antitrust Injury

24. Steves believes that it experienced quantifiable antitrust damages beginning in at least 2013. Ex. 18, Resp. to RFA No. 44.

25. On August 26, 2014, Sam Steves wrote that Steves should "consider a VERY strong response – and tee up our claim on the overcharge . . . Finally, and perhaps most important ---- the antitrust." STEVES-000706407, attached as Ex. 23.

26. [redacted]. Ex. 9, E. Steves Tr. Vol. 1 120:2-6.

Other Sources of Interior Molded Doorskins in the United States

27. [redacted]. Expert Report of Carl Shapiro at 19, n.81, Jan. 30, 2017 ("Shapiro Rpt.") (citing MASONITE_000001), attached as Ex. 24.

28. [redacted]. Ex. 9, E. Steves. Tr. Vol. 1 170:8-11.

29. [redacted]. STEVES-000003560-61, attached as Ex. 25.

30. [redacted]. Ex. 9, E. Steves Tr. Vol. 1 411:6-11.

31. [redacted] Ex. 9, E. Steves Tr. Vol. 1 189:8-15.

32. [REDACTED]

[REDACTED]

[REDACTED]. Ex. 4, S. Steves II. Tr. Vol. 1 28:13-29:18.

JELD-WEN's Integration of CMI Into The Company

33. As a result of the CMI merger, JELD-WEN closed the Chicago head office of CMI. JW-CIV-00408466 at -67, attached as Ex. 26.

34. As a result of the CMI merger, JELD-WEN closed two of CMI's four door manufacturing plants. J. Morrison Dep. Ex. 294 at 7, attached as Ex. 27.

35. After the CMI merger, JELD-WEN transitioned the CMI sales force into the JELD-WEN organization. Ex. 26, JW-CIV-00408466.

36. After the CMI merger, CMI employees converted to JELD-WEN benefits and payroll. Ex. 26, JW-CIV-00408466.

37. After the merger, JELD-WEN shut down its doorskin plant in Dubuque, Iowa. Dep. Tr. of B. Fedio 288:3-289:1 ("Fedio Tr."), attached as Ex. 28.

38. After the merger, JELD-WEN mothballed its doorskin plant in Marion, North Carolina. Ex. 28, Fedio Tr. 299:2-8.

39. As a result of the CMI merger, JELD-WEN consolidated its doorskin dies to combine the JELD-WEN and CMI product offerings into one streamlined product portfolio. JW-CIV-0037335 at 2, attached as Ex. 29.

40. [REDACTED]. Ex. 29, JW-CIV-0037335 at 6.

41. [REDACTED]. Ex. 29, JW-CIV-0037335 at 2, 5.

42. [redacted]

Ex. 28, Fedio Tr. 331:19-332:9; JW-CIV-00033829-30, attached as Ex. 30.

43. MiraTec and Extira products are manufactured in the Towanda plant, which JELD-WEN acquired through the acquisition of CMI. Ex. 28, Fedio Tr. 12:14-13:15; Dep. Tr. of J. Ambruz 228:17-229:6, July 19, 2017, attached as Ex. 31.

44. It is not possible to physically separate the MiraTec and Extira manufacturing lines from the doorskin manufacturing lines at the Towanda plant. JELD-WEN's Suppl. Resps. to Steves' Second Interrogs. at Resp. No. 17, May 10, 2017, attached as Ex. 32.

45. [redacted]

[redacted] Decl. of B. Fedio, Sept. 22, 2017, attached as Ex. 33.

ARGUMENT

Federal Rule of Civil Procedure 56 requires the Court to grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court of Appeals for the Fourth Circuit has explained that antitrust cases are "particularly well-suited" for summary judgment because it provides a "just, speedy and inexpensive determination" of cases that involve an "unusual entanglement of legal and factual issues." *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1322-23 (4th Cir. 1995).

"[T]he mere existence of some disputed facts does not require that a case go to trial." *Id.* To defeat summary judgment, the non-movant must provide "more than a scintilla of evidence—and not merely conclusory allegations or speculation—upon which a jury could find in its favor." *First Data Merch. Servs. v. SecurityMetrics, Inc.*, 672 F. App'x 229, 234 (4th Cir. 2016). Although permissible inferences from the underlying facts are to be drawn in the light most favorable to the non-moving party, "those inferences must, in every case, fall within the range of

reasonable probability and not be so tenuous as to amount to speculation or conjecture." *Supermarket of Marlinton, Inc. v. Valley Rich Dairy*, No. 97-2314, 1998 U.S. App. LEXIS 21110, at *7 (4th Cir. Aug. 27, 1998) (quoting *Thompson Everett, Inc.,* 57 F.3d at 1323 (4th Cir. 1995)).

I. JELD-WEN IS ENTITLED TO SUMMARY JUDGMENT ON STEVES' SECTION 4 ANTITRUST CLAIM BECAUSE STEVES CANNOT PROVE THE REQUIRED ELEMENTS OF IMPACT AND ANTITRUST INJURY

To recover damages in a private antitrust claim brought under Section 4 of the Clayton Act, a plaintiff must show (1) violation of the antitrust law, (2) direct injury to the plaintiff from such violation, and (3) damages sustained by the plaintiff. *Windham v. Am. Brands, Inc*., 565 F.2d 59, 65 (4th Cir. 1977). "The element of injury in the antitrust context is often referred to as 'impact' or 'fact of damage.' It is the causal link between the antitrust violation and the damages sought by plaintiffs." *In re New Motor Vehicles Canadian Expert Antitrust Litig*., 522 F.3d 6, 19 n.18 (1st Cir. 2008) (internal citation omitted).

For purposes of this argument, we assume that Steves could establish a violation of the antitrust laws (though it cannot). The "mere finding of violation does not result in liability" because "[t]he statute gives a right of action ***only*** to the extent that one has been 'injured in his business or property by reason of anything forbidden in the antitrust laws.'" *Windham*, 565 F.2d at 65-66 (emphasis added) (quoting 15 U.S.C. § 15). Accordingly, "[t]he gravamen of the complaint is not the [violation]; the crux of the action is injury, individual injury." *Id* at 66. Importantly, not all injuries caused by allegedly illegal conduct give rise to damages claims under the antitrust laws. An antitrust plaintiff "must prove more than injury causally linked to an illegal presence in the market." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The plaintiff also must prove that the injury is "antitrust injury": "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts

unlawful." *Id.* The plaintiff's injury must "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation" or the antitrust laws do not provide a damages remedy—although the plaintiff may be entitled to recover under other sources of law. *Id.*

Steves' antitrust claims under Section 4 fail because Steves cannot show that it suffered any injury caused by the 2012 merger, or attributable to any anticompetitive consequences of the merger. Instead, Steves seeks to bootstrap its breach of contract allegations into an antitrust claim by asserting that the 2012 merger somehow gave JELD-WEN the ability to breach the terms of the Supply Agreement. As a matter of law, that is not antitrust injury. Even if Steves had a theory of antitrust injury, Steves has no triable evidence that JELD-WEN's alleged breaches of contract caused Steves to pay more, or receive lower quality skins, than it would have if the merger had never occurred. Steves' evidence of harm is entirely directed at showing that Steves did not get what it thinks it was promised under the Supply Agreement. Steves has no theory or evidence of what conditions would have been "but for" the merger—as illustrated by the fact that [REDACTED] [REDACTED]. As Steves' own expert admitted, he did not [REDACTED] [REDACTED]." Ex. 1, Tucker Tr. 111:20-112:9.

A. Steves' Recycled Breach Of Contract Claims Cannot Establish Antitrust Injury As A Matter Of Law

Throughout this case, Steves has never articulated a theory of harm from the alleged antitrust violation that is in any way different from the breach of contract claims that it simultaneously asserts. As part of its breach of contract claims, Steves asserts that JELD-WEN has overcharged Steves pursuant to the terms of the Supply Agreement and also refused to reimburse Steves for claims of defective doorskins and doors. Steves tries to transmute those

contractual harms into antitrust harms by alleging that JELD-WEN would not have breached the contract but for the merger. *See, e.g.,* Compl. ¶ 21, Doc. No. 5 ("[a]fter the 2012 Merger, JELD-WEN had an incentive to raise prices for doorskins to Steves, despite the existence of the Supply Agreement, and it did so."); *see also id.* ¶ 24 ("Knowing that Steves has no other source for doorskins, JELD-WEN has refused to honor the terms of the Supply Agreement."). The facts do not remotely support Steves' allegation that JELD-WEN's interpretation of the Supply Agreement changed because of the merger. But even if that allegation had factual support, it fails to establish *antitrust injury*—injury of the sort the antitrust laws are designed to remedy—as a matter of law.

The Ninth Circuit addressed exactly this issue in *Orion Pictures Distribution Corporation v. Syufy Enterprises*, 829 F.2d 946 (9th Cir. 1987). Syufy, an owner of movie theatres in Las Vegas, licensed rights to exhibit the movie *The Cotton Club* from film distributor Orion in a contract that included substantial guarantees. 829 F.2d at 947-48. After signing the contract, Syufy purchased the last of its principal competitors and "owned all 23 first run movie screens in Las Vegas." *Id.* at 948. When it finally saw the trade screening of the movie, Syufy repudiated its guarantees to Orion. *Id.* Just like Steves here, Orion brought antitrust claims—alleging that "Syufy's monopolization of the Las Vegas market was for the purpose of reducing the guarantees it paid on films" and that "Syufy's repudiation of *The Cotton Club* guarantees was made possible by its monopolization." *Id.* at 949. The Ninth Circuit squarely rejected that attempt to transform a breach of contract claim into an antitrust claim, explaining that "'[t]he antitrust injury concept . . . requires the private antitrust plaintiff to show that his own injury coincides with the public detriment tending to result from the alleged violation.'" *Id.* at 948 (quoting II P. AREEDA & H. HOVENKAMP, ANTITRUST LAW, ¶ 335.1 at 229 (1986

Supplement)). The Ninth Circuit explained that "[t]he purpose of the antitrust laws is to protect competition" and that "Syufy's alleged monopolization did not affect the competition to license *The Cotton Club* at the time of bidding for the movie." *Id.* at 949. Since "[a]fter *The Cotton Club* was licensed, Syufy's duties to Orion were fixed by its contractual commitment to pay guarantees," "competition was no longer a factor in determining Syufy's obligation to Orion" and "Orion's injury d[id] not 'reflect the anticompetitive effect' of Syufy's alleged monopolization." *Id.* Orion therefore "has suffered a breach of contract, not an antitrust injury." *Id*.

Orion is the case squarely on point, but there are many other cases that reject attempts to transform breach of contract cases into antitrust cases, through careful application of antitrust injury, causation, and directness-of-injury requirements.[1] The *Orion* analysis precludes Steves' antitrust claim here. Steves cannot and does not claim that any reduction of competition attributable to the 2012 merger had any adverse effect on the terms of the Supply Agreement, since that Agreement was signed on May 1, 2012—five months before the CMI acquisition closed. The parties' respective obligations were therefore fixed by a contract that could not have

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[1] *See, e.g., 2600 Woodley Road Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 738-39, 743 (3d Cir. 2004) (plaintiff's claimed antitrust injuries were "inextricably intertwined with its awards on [its] breach of contract claims" and any alleged injury "was caused by a breach of contract" not the alleged antitrust violation); *Valley Products Co, Inc., v. Landmark*, 128 F.3d 398, 403 (6th Cir. 1997) (rejecting claim that defendant terminated a vendor's contract only because of an antitrust violation, because antitrust injury principles "bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation."); *Langer Juice Co., Inc. v. Yantai North Andre Juice Co, Ltd.*, No. CV 06-1354 SVW (CWx), 2006 U.S. Dist. LEXIS 97212, at * 10 (C.D. Cal. Aug. 16, 2006) (dismissing conspiracy claim when plaintiff alleged that defendant apple juice concentrate suppliers entered into a price-fixing conspiracy and in order to effectuate that conspiracy one defendant demanded a higher price than that required by the parties' previously signed supply agreement; plaintiff failed to allege antitrust injury because the "reason for defendant's breach is immaterial" and plaintiff's injury flowed from the breach of the contract, not from the conspiracy).

been affected by any harm to competition caused by the merger. If JELD-WEN has not lived up to its obligations under that contract, the resulting injury to Steves would not "reflect the anticompetitive effect" of the merger or "coincide[] with the public detriment tending to result from the alleged violation." *Orion,* 829 F.2d at 948-49. It just reflects a breach of private contractual promises that predate the merger and have nothing to do with competition in the broader marketplace. If JELD-WEN indeed breached that Agreement, Steves thus "has suffered a breach of contract, not an antitrust injury," *id.* at 946, and must look to its remedies under the contract.

Indeed, under Steves' theory the contract fully protects it from the harm it alleges. If the jury finds that JELD-WEN breached the contract and agrees with Steves' estimates of damages, it will hold that Steves was fully protected by contract from the pricing injury it now claims.[2] If the jury rejects Steves' contract claims, it will have rejected Steves' only theory of overcharge or harm. As explained further below, Steves has no damages evidence on its antitrust count that is distinct from the contract damages that it seeks for the alleged breach. Either way, Steves will not have proven any injury traceable to JELD-WEN's acquisition of CMI.[3]

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[2] For example, courts consistently cast doubt on the viability of antitrust claims brought by parties that were protected from, or hedged against, an alleged market-wide price increase by long-term fixed-price contracts. *See*, *e.g.*, *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467-68 (4th Cir. 2006) (excluding from a class large customers that purchased pursuant to long-term, individually negotiated contracts because evidence that defendant monopolist overcharged customers paying list price could not establish that they were similarly overcharged); *In re Graphics Processing Units Antitrust Litig. ("GPU")*, 253 F.R.D. 478, 489-90 (N.D. Cal. 2008) (excluding from class OEM customers with individually negotiated contracts because there was no evidence that any conspiracy to fix list prices affected them).

[3] Steves also alleges that JELD-WEN "sought to raise prices even further by demanding changes to the contractual mechanism for setting prices." Compl. ¶ 81. Steves was not injured by this "attempt" because, as Steves admits, [REDACTED]" SUF ¶ 8.

In fact, Steves *concedes* that the existence of the 2012 Supply Agreement shields Steves from any harm allegedly flowing from anticompetitive effects of the merger, admitting that: [REDACTED]." Ex. 24, Shapiro Rpt. at 19; *see also* Dep. Tr. of C. Shapiro 166:13-14, attached as Ex. 34 ([REDACTED]). Steves' only argument that it experienced higher pricing on JELD-WEN doorskins is that "JELD-WEN raised prices to Steves *by failing to adhere to the pricing provisions of the Supply Agreement*." Compl. ¶ 81 (emphasis added). If that is true, Steves is fully protected by the Agreement.

B. Steves Has No Evidence That Any Anticompetitive Effect Of The 2012 Merger Caused It To Pay Higher Prices Or Receive Lower Quality Doorskins

Even if Steves' theory were not precluded as a matter of law, JELD-WEN would be entitled to summary judgment because Steves has no evidence or triable case that it actually experienced higher prices or decreased quality under the contract because of ("but for") the merger. Steves' complaints about pricing actually assume that [REDACTED]. Steves has no theory or evidence of what pricing would have been—even under the contract—if the merger had not taken place at all. And the doorskin "thinning" that Steves portrays as a quality issue predated the merger, and would have continued whether the merger happened or not.

1. Steves' Complaints Are About Pricing Under The Contract, Not Pricing "In An Antitrust Sense"

Steves alleges that JELD-WEN was somehow incentivized by the merger to interpret the pricing provisions of the Supply Agreement in a manner less favorable to Steves, and thereby breached the Agreement. Compl. ¶¶ 21, 24. Even if that claim were legally viable, to prove any harm (or "impact") for an antitrust claim Steves would have to show that the prices JELD-WEN actually charged were higher than the prices JELD-WEN would have charged if the merger had never taken place. *See, e.g., GPU*, 253 F.R.D. at 507 ("[I]n order to satisfy Section 4 of the Clayton Act, plaintiffs must demonstrate that they paid a higher price for their graphics card or computer than they otherwise would have paid in the absence of a conspiracy"); *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 513 (S.D. Ill. 2004) (showing of injury requires proof "that plaintiff paid more than the price that would have existed 'but for' the alleged conspiracy"). In an antitrust case, proof of impact must always include proof of a competitive baseline for what prices would have been in the absence of the conduct alleged to violate the antitrust laws. *See Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 422 (5th Cir. 2004) (to demonstrate impact a plaintiff must prove a "purchase at a price higher than the competitive rate"). And impact is never presumed; it must be proved with real evidence. Indeed, although there is some leeway for estimation of the *amount* of damages once the fact of some injury has been established, the existence of some injury or impact "must be proved *with certainty*." *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 327 (5th Cir. 1978) (emphasis added); *see also Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 268 (D.C. Cir. 1981) ("[T]he fact of injury must be certainly proved." (quotation and citation omitted)); *First Data Merch. Servs. Corp,* 672 F. App'x at 238-39 (granting summary judgment because plaintiff relied on

speculation and tenuous inferences in an attempt to prove that it suffered injury because of defendant's allegedly anticompetitive practices).

Months of discovery have revealed that Steves cannot satisfy that burden and has no intention of trying. Steves' economic expert, Dr. Carl Shapiro, [REDACTED] . His analysis consists solely of [REDACTED] . Ex. 24, Shapiro Rpt. at 19-23. The only pricing analysis that Steves presents is [REDACTED] . *See* Expert Report of Avram S. Tucker ¶¶ 56-57, Jan. 30, 2017 ("Tucker Rpt."), attached as Ex. 35; Ex. 1, Tucker Tr. 189:12-14.

That analysis expressly assumes *that the merger took place*. The core of Steves' theory of injury is that [REDACTED] Just as one example, [REDACTED] . Ex. 1, Tucker Tr. 186:22-187:19. [REDACTED] . Put differently, Steves believes that the Supply Agreement gives it the right to share [REDACTED]—and complains that it did not fully receive the *benefits* it was promised.

Dr. Tucker admits [redacted] Ex. 1, Tucker Tr. 190:6-11; *see also id.* 111:20-112:9 ([redacted]). He admits that [redacted] *Id.* 112:22-113:4. He admits that [redacted]. Expert Report of David P. Kaplan at 24, Apr. 14, 2017, attached as Ex. 36; Ex. 1, Tucker Tr. 187:11-14, 189:8-11 ([redacted]). When confronted with that obvious mismatch, Dr. Tucker refused to correct it or to perform any alternative calculations—and instead simply chided JELD-WEN's expert Dr. Kaplan for supposedly forgetting that [redacted] Expert Reply Report of Avram S. Tucker ¶ 88, May 5, 2017, attached as Ex. 37; Ex. 1, Tucker Tr. 188:11-189:7. That is a stark admission that Steves has no theory or evidence of any injury as antitrust law defines it. No theory of *antitrust* overcharges can estimate the "but for" competitive price [redacted]. Conspicuously, neither expert performed any other overcharge calculation.

That failure is fatal to Steves' pricing-based antitrust claims. Steves' experts did not even attempt to estimate what the appropriate contractual pricing would have been in a hypothetical world in which the merger never happened. If they had, then those opinions would have been tested in discovery and JELD-WEN would have had an opportunity to develop rebuttal

evidence—all as contemplated by the Federal Rules. Steves chose not to pursue such evidence in order to present the highest possible estimate of its pricing-based damages. The consequence is that the methodology Steves used is inherently incapable of identifying harm as antitrust law understands it. Dr. Tucker admitted as much at his deposition, conceding that [REDACTED] [REDACTED]." Ex. 1, Tucker Tr. 111:20-112:9.

2. Steves' Complaints About "Quality" Under The Contract Also Fail

Steves' defect claims fail because Steves also has no actual theory or evidence of what doorskin *quality* would have been "but for" the merger. Even assuming that thinning doorskins constitutes a reduction of quality (JELD-WEN contends it enhances quality), the undisputed facts show that JELD-WEN was conducting internal testing of thinner skins before the merger, and actually told Steves about the change in July 2012. SUF ¶¶ 10-11. As a result, the move to thinner skins could not have been caused by the merger. *See Lantec, Inc. v. Novell, Inc.*, 146 F. Supp. 2d 1140, 1154 (D. Utah 2001), *aff'd*, 306 F.3d 1003 (10th Cir. 2002) (granting judgment as a matter of law to defendant on plaintiffs' Section 7 claim because the alleged injury occurred before the merger, thus plaintiffs could not show a causal connection to the merger).

Steves has no empirical evidence that JELD-WEN in any way decreased the quality of the doorskins that Steves purchased after the merger. Neither Dr. Shapiro nor Dr. Tucker analyzed any available data to determine whether JELD-WEN's quality decreased following the merger, nor have they attempted to quantify any quality-related damages apart from Steves' claims of inadequate reimbursements. In contrast, JELD-WEN's expert Dr. Edward Snyder analyzed the data and found that the rate of returns for JELD-WEN's doorskins (both those sold to JELD-WEN's door assembly plants and to external customers) actually declined following the merger. Suppl. Expert Report of Edward A. Snyder ¶ 34 & Suppl. Ex. 12, Aug. 21, 2017, attached as Ex. 38. The fact of harm must be proven "with certainty" in an antitrust case. *Blue*

Bird, 573 F.2d at 327. Steves cannot base a Section 4 claim on such a subjective and impressionistic assertion of decreased quality. *First Data Merch. Servs. Corp.,* 672 F. App'x at 238-39; *see also Kloth v. Microsoft Corp*., 444 F.3d 312, 325 (4th Cir. 2006) (holding that injury caused by defective products is "simply not a type [of injury] for which plaintiffs can recover under the antitrust law.").

II. STEVES HAS NO RIPE CLAIM FOR HYPOTHETICAL FUTURE LOST PROFITS WHEN IT HAS SUFFERED NO PRESENT INJURY, AND ITS FEARS ABOUT THE FUTURE ARE SPECULATIVE AND CONTINGENT

Steves seeks future lost profits from JELD-WEN based on a convoluted and hypothetical chain of events that it claims may result in [REDACTED] Specifically, Steves contends that [REDACTED] [REDACTED]. Ex 35., Tucker Rpt. ¶ 79. It seeks up to [REDACTED] to remedy this hypothetical claim. Suppl. Expert Report of Avram S. Tucker ¶ 31, Aug. 21, 2017 ("Tucker Suppl. Rpt."), attached as Ex. 39. Steves does not, and cannot, allege that it has been injured by this chain of events; none of this has actually happened, and might never happen. Instead, Steves' lost profits claim is wholly dependent on the speculative chain of possibilities that [REDACTED].

Steves concedes that JELD-WEN's notice of termination does not breach the contract; the Supply Agreement explicitly permits JELD-WEN to [REDACTED] [REDACTED]. SUF ¶ 2. Thus, Steves seems to be pursuing these claims as part of its antitrust claim. But putting aside the fact that an exercise of contractual termination rights is not antitrust injury

flowing from a merger, *see supra* n.1, the law has never entertained cases based on *possible* injuries, years in the future, that are speculative and contingent.

For one thing, a claim of that nature simply is not ripe for adjudication under Article III of the Constitution. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998). Accordingly, a party has standing to press its claim in federal court only when it can demonstrate the existence of an injury in fact, that is, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Steves' claim for lost profits is remarkably similar to that rejected by the Southern District of Texas in the recent *SureShot Golf Ventures v. Topgolf, International, Inc.* case. No. H-17-127, 2017 U.S. Dist. LEXIS 135796 (S.D. Tex. Aug. 24, 2017). There, plaintiff SureShot alleged that its competitor, defendant Topgolf, violated Section 7 through its merger with Protracer, a company that developed a proprietary technology for tracing golf balls and licensed that technology to SureShot for use in its "golf entertainment centers." SureShot claimed that after acquiring Protracer, Topgolf refused to give SureShot assurances that it would renew the license when it expired in 5 years and deprived SureShot of access to long-term, continued licensing of the technology. The court dismissed SureShot's claims because they were not ripe for adjudication and SureShot accordingly lacked Article III standing. Specifically, the court held that SureShot had not suffered any harm because Topgolf had not yet denied SureShot access to the Protracer technology, and because speculative threats of future denials could not confer Article III standing for SureShot's claims. *Id.* at *8-11.

Other courts considering speculative and contingent antitrust claims have not hesitated to dismiss them as unripe. *See, e.g.*, *Unity Ventures v. Cty. of Lake*, 841 F.2d 770, 777-78 (7th Cir. 1988) (upholding district court's grant of judgment notwithstanding the verdict on plaintiff's "premature" claim because defendant had not yet reached a decision on whether to allow plaintiff's sewer connection and thus plaintiff had not yet suffered any injury); *Plant Oil Powered Diesel Fuel Systs., Inc. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163, 1185 (D.N.M. 2011) (dismissing antitrust claim as unripe because it was premised on a future and uncertain decision by defendants); *Johnson v. Greater Southeast Cmy. Hosp. Corp.*, 903 F. Supp. 140, 146-47 (D.D.C. 1995), *vacated in part on other grounds* by No. CIV.A. 90-1992, 1996 WL 377147 (D.D.C. 1996) (holding that antitrust claims based on a physician's alleged injuries stemming from announced termination of membership privileges was not yet ripe, because there was "no evidence that plaintiff's membership and privileges have *in fact* been terminated") (emphasis in original).

Even apart from constitutional standing principles, the common law traditionally rejected claims alleging that the plaintiff might or might not suffer an injury, depending on contingent future events. It is a black letter principle of tort law that "[t]he threat of future harm, not yet realized, is not enough." W. Page Keeton et al., PROSSER & KEETON ON TORTS, § 30 at 165 (5th ed. 1984); *see also, e.g.*, *Ball v. Joy Techns.*, 958 F.2d 36, 39 (4th Cir. 1991)(upholding denial of tort claim brought under Virginia law because plaintiffs have not demonstrated a "present, physical injury"); *Henry v. Dow Chem. Co*., 701 N.W.2d 684, 692 (Mich. 2005) (Michigan common law requires plaintiff to assert a "present, legally cognizable injury" and plaintiff cannot recover on a speculative future injury). As the Supreme Court explained in *Associated General Contractors, Inc. v. California State Council of Carpenters*, the antitrust

laws incorporate traditional common law principles concerning matters such as injury and causation. 459 U.S. 519, 532-34 (1983) (describing Congressional intent for the federal antitrust laws to be construed in light of their common law background, including injury and damages concepts such as foreseeability, proximate cause, directness of injury and certainty of damages).

It is important to recognize the distinction between these principles and the somewhat more lenient rules governing the quantification of ongoing future *damages*, once the fact of present injury has been established. In appropriate cases, ongoing future damages stemming from a proven present injury can be estimated, as a matter of "just and reasonable inference." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).[4] But a damages claim based entirely on harm that may never occur was a complete stranger to the common law. The language of the Clayton Act confirms those traditional principles by creating a private right of action for any person "injured in his business or property by reason of anything forbidden in the antitrust laws" to "recover threefold the damages by him sustained." 15 U.S.C. § 15. The only right of action for persons who *might be* injured, someday, but have not yet suffered injury, is the cause of action for equitable relief under Section 16, consistent with traditional common law principles. 15 U.S.C. § 26 (creating a right to seek injunctive relief against "threatened loss or damage").

Steves presents no evidence that it has been currently injured or damaged by JELD-WEN's notice of termination of the Supply Agreement. JELD-WEN has committed to continue to supply Steves until at least [REDACTED]. SUF ¶ 4. Steves' claim for future "lost

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[4] The need for a "just and reasonable inference" precludes damages claims that are based solely on speculation. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 339 (1971) ("[I]t is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.").

profits" depends entirely on a self-serving and speculative *prediction* that [REDACTED] [REDACTED], with no evidence demonstrating that this will happen.[5] To support this claim, Steves piles conjecture on conjecture. First, there is no evidence that JELD-WEN would refuse to sell to Steves, and substantive antitrust law generally precludes courts from submitting a claim to the jury if it depends on a theory of economically irrational behavior. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (holding that there is no genuine issue for trial when plaintiff could put forward no rational motive for defendant to engage in the alleged illegal antitrust conduct). Throughout the parties' disputes, JELD-WEN has always made clear to Steves that it is willing to continue to supply Steves on the spot market and remains open to discussions about a new agreement with Steves. In fact, on the day JELD-WEN noticed termination of the Supply Agreement, it expressed to Steves a desire to "reach an agreement on a more balanced contract" and develop "a long term structure that satisfies both parties." Ex. 3, JW-CIV-00336196. JELD-WEN has repeatedly conveyed to Steves that it remains interested in discussing a supply agreement with Steves, is open to entering into an agreement if the parties can reach appropriate terms, and is willing to supply on an *ad hoc* basis if the parties cannot. SUF ¶ 6.

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[5] In any event, it is doubtful that any decision by JELD-WEN not to supply Steves [REDACTED] could be an antitrust violation. It is black letter law that even a monopolist has the power to decide with whom and on what terms it will deal. The antitrust laws "do[] not restrict the long recognized right of a trader or a manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275 (4th Cir. 2012) (affirming district court's dismissal of plaintiffs' monopolization claims because defendant had no legal duty to offer plaintiff the opportunity to connect to its interchange on the terms and conditions demanded by plaintiff). It cannot be the case that, having merged with CMI in 2012, JELD-WEN is doomed to forever contract with Steves on Steves' preferred terms, or face millions of dollars of damages.

Second, it is highly speculative to suppose that Steves will not have an alternate source of doorskins even if JELD-WEN ultimately opts not to sell to Steves. The undisputed facts show that [redacted]. SUF ¶¶ 27-28.[6] Steves also concedes, as it must, that [redacted]" Dep. Tr. of S. Steves II, Vol. 3 558:21-559:09, Aug. 15, 2017 ("S. Steves II Vol. 3 Tr."), attached as Ex. 40. [redacted]. S. Steves II Dep. Ex. 50, STEVES-000735504-14 at -06, attached as Ex. 41; Ex. 40, S. Steves II Vol. 3 Tr. 564:8-565:4. [redacted]. STEVES-000094655, attached as Ex. 42. Moreover, this potential new source of doorskins is not limited to Steves; [redacted]. H. Heintel Dep. Ex. 12, attached as Ex. 43.

Finally, Steves' own contemporaneous business documents and sworn testimony establish that [redacted]. Steves has [redacted]

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[6] Although Edward Steves claims [redacted]. SUF ¶¶ 30-31. Steves' experts also did not conduct an analysis of [redacted]. Ex. 1, Tucker Tr. 55:2-6.

[REDACTED]. STEVES-000733369, attached as Ex. 44; STEVES-000735011, attached as Ex. 45; Dep. Tr. of S. Steves II, Vol. 2 350:12-352:14, 357:11-358:11, May 26, 2017, attached as Ex. 46; S. Steves II Dep. Exs. 19, 31-32, attached as Exs. 47-49; Dep. Tr. of E. Steves, Vol. 3 657:8-17, Aug. 16, 2017, attached as Ex. 50; Dep. Tr. of S. Steves III 79:22-80:12, May, 16, 2017, attached as Ex. 51.

Of course Steves will downplay all of those possibilities, despite the admitted fact that its business people are actively pursuing them. The issue now is not who makes the more persuasive prediction. Steves' claim that it will suffer future injury is unripe, and must be dismissed, because it depends on contingencies that may or may not occur.

III. STEVES' EXTRAORDINARY REQUEST UNDER SECTION 16 THAT THIS COURT UNWIND THE 2012 MERGER IS BARRED AS A MATTER OF LAW

Steves' separate claim for the equitable relief of divestiture is barred as a matter of law and should be dismissed now.

It is important for this Court to recognize how extraordinary Steves' request for divestiture is. Divestiture of a consummated merger is "a fairly extraordinary remedy, that should not be entered into lightly or without substantial evidence that the benefit outweighs the harm." *Antoine L. Garabet, M.D., Inc. v. Autonomous Techns. Corp.*, 116 F. Supp. 2d 1159, 1172 (C.D. Cal. 2000); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 322 (3d Cir. 2007) (explaining that divestiture is an "extreme remedy"). In the thirty years since the Supreme Court cautiously acknowledged that divestiture could potentially be available to private plaintiffs, *see American Stores*, 495 U.S. at 295, no court has ever awarded that relief to a private litigant standing alone.[7]

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[7] *See Ginsberg v. InBev NV/AB*, 623 F.3d 1229, 1235 (8th Cir. 2010); *Broadcom Corp.*, 501 F.3d at 322 (denying request for "the extreme remedy of divestiture" to cure "[h]ypothetical anticompetitive conduct, speculative monopoly power, and remote injuries"); *Midwestern*

The leading treatise explains that requests for divestiture by private plaintiffs should be approached with great caution, because those requests are less likely "to reflect a thorough assessment of the situation and dispassionate conclusions regarding the public interest" than a similar request by the government, and far more likely to seek "a personal or private gain or to vindicate a purely private loss," IV P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 303e (4th ed. & 2017 Supp.), without appropriate regard for the "far-reaching effects on persons who are not parties to the litigation," *id.* at ¶ 326b. *See also, e.g., Ginsberg*, 623 F.3d at 1235-36 (refusing to order divestiture and noting that "[w]hile the price benefit beer drinkers would gain from divestiture is unclear, a court decree splitting up the combined entities would impose ***obvious hardship*** on the employees and distributors of former A-B and might well damage competition and consumers by crippling the operations of the largest domestic producer of immensely popular products.") (emphasis added). And here of course it is conspicuous that the antitrust enforcement agencies charged with protecting the *public* interest have twice reviewed this merger, yet took no action. Against this backdrop, Steves' Section 16 divestiture claim

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Machinery Co., Inc. v. Northwest Airlines, Inc., 392 F.3d 265, 277 (8th Cir. 2004) (denying plaintiffs' request for divestiture of eleven-year-old merger because doing so was barred by laches and would unduly prejudice defendant); *Taleff v. Southwest Airlines*, 828 F. Supp. 2d 1118 (N.D. Cal. 2011) (divestiture unavailable when plaintiffs filed suit one day following consummation); *South Austin Coalition Cmty. Council v. SBC Commc'ns, Inc.*, No. 99 cv 7232, 2001 U.S. Dist. LEXIS 9850, at *35 (N.D. Ill. June 25, 2001) (denying request for divestiture of consummated merger because plaintiffs failed to allege facts sufficient to show standing and antitrust injury); *Garabet*, 116 F. Supp. at 1172 (doctrine of laches barred private plaintiffs' request for divestiture of merger between suppliers of equipment for laser eye surgeries because plaintiff filed suit two days after the merger's consummation and failed to take any steps to challenge the merger before consummation); *Glendora v. Gannett Co. Inc.*, 858 F. Supp. 369, 372 (S.D.N.Y. 1994) (dismissing complaint requesting the "potentially disruptive" remedy of divestiture); *Ansell Inc. v. Schmid Labs., Inc.*, 757 F. Supp. 467, 485 (D.N.J. 1991) (denying request for divestiture of consummated merger because plaintiff failed to prove that it was threatened with antitrust injury because of the merger).

should rejected now for two independent reasons: laches, and failure to present any non-speculative evidence of threatened injury.

A. Steves' Extraordinary And Strategic Delay In Filing This Suit Means That Its Divestiture Claim Is Barred By The Doctrine Of Laches

One consistent theme in the many cases denying private party requests for divestiture is rigorous application of the equitable doctrine of laches. "Estoppel by laches generally applies to preclude relief for a plaintiff who has unreasonably 'slept' on his rights." *PBM Prods. LLC v. Mead Johnson & Co.*, 639 F.3d 111, 121 (4th Cir. 2011); *see also Kloth*, 444 F.3d at 325-26 (upholding district court's grant of summary judgment for defendant on basis of laches because plaintiffs failed to pursue their injunctive claims with diligence and that failure prejudiced defendant). The cases frequently find that private plaintiffs were "guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant" when the plaintiff waits to challenge an acquisition or merger until after—even just days after—its consummation. In *Garabet*, for example, the court held that the remedy of divestiture of two merged suppliers of equipment for laser eye surgeries was unavailable to plaintiffs because they filed their complaint two days after the merger closed. 116 F. Supp. 2d at 1172-73. The court found that divestiture after consummation would cause the defendants to "suffer serious prejudice and hardship" because the merging companies were already integrated and the acquired company no longer existed as a separate entity. *Id.* at 1173.

Unreasonable Delay. The undisputed facts prove that Steves deliberately and strategically delayed in bringing this lawsuit. JELD-WEN and CMI publicly announced the merger on June 15, 2012. SUF ¶ 14. Steves could have brought a Section 16 claim to enjoin the JELD-WEN / CMI merger on that day, but did not. Instead, Steves waited over four years before filing its Section 16 claim for relief on June 29, 2016. This more than four-year delay is dilatory

as a matter of law; courts have found unreasonable delay when plaintiffs brought suit on the day of, or shortly after, the merger closed. *See, e.g.*, *Garabet*, 116 F. Supp. 2d at 1173 (laches barred suit brought two days after merger consummated); *see also Taleff*, 828 F. Supp. 2d at 1125 (divestiture unavailable when plaintiffs filed suit one day following consummation).

Steves cannot provide any reasonable justification to excuse this delay. JELD-WEN did not conceal the merger or prevent Steves from timely filing its suit. *See White v. Daniel,* 909 F.2d 99, 101 (4th Cir.1990) (holding that plaintiffs' delay in bringing suit was inexcusable and unreasonable where it reasonably should have discovered the facts giving rise to its cause of action years earlier). Here, Steves knew that . SUF ¶ 13. , SUF ¶¶ 12, but ultimately did not purchase any part of CMI. Steves became aware that JELD-WEN was merging with CMI as early as . SUF ¶ 16. Steves further concedes that . SUF ¶ 20.

Steves has no excuse for continuing to sleep on its rights *for nearly four years* following the consummation of the merger in October 2012. Steves believes that it experienced quantifiable antitrust damages beginning in at least 2013. SUF ¶ 24. The company's principals had an internal discussion about an antitrust suit against JELD-WEN in 2014, SUF ¶ 25, but still Steves waited until June 2016 to file suit. In fact, the record indicates that Steves opted not to sue because it chose to instead wield the threat of an antitrust suit as a bargaining chip in ongoing

negotiations with JELD-WEN over the terms of the 2012 Supply Agreement—negotiations in which [REDACTED] [REDACTED]. *Id*. When those attempts at intimidation failed, Steves finally turned to this Court for tardy and unduly prejudicial relief.[8]

Prejudice to JELD-WEN. Steves' delay has resulted in insurmountable prejudice to JELD-WEN because with each passing day—days where Steves knew that it could challenge the merger, and where Steves believed that it was suffering from antitrust injury—JELD-WEN integrated CMI's assets and operations deeper into JELD-WEN. *See White*, 909 F.2d at 101 (explaining that although the burden of proof with respect to laches rests with the defendant, "the defendant is aided by the inference of prejudice warranted by the plaintiff's delay" and that the plaintiff must "be heard to excuse his apparent laggardness and to prove facts manifesting an absence of actual prejudice [to defendant]") (internal citations omitted). As the Eighth Circuit explained in *Ginsberg*, divestiture is "easy to administer" only before the transaction is consummated or if the entity can divest only stock or discrete tangible assets. 623 F.3d at 1234. Where two companies have fully integrated their operations, as have JELD-WEN and CMI, forcing separation is more than impractical, it is likely impossible. *Id*; *see also Taleff*, 828 F. Supp. 2d at 1124 (remedy of divestiture unavailable because "plaintiffs' delay in filing suit

[8] On September 4, 2015, JELD-WEN and Steves signed what is termed a "One Way Standstill Agreement" in which Steves agreed not to file its antitrust claim on that date in exchange for an agreement by JELD-WEN that for a period of 30 days it would not file any lawsuit against Steves without providing a copy of the draft complaint and two-days' notice. Steves concedes that [REDACTED] [REDACTED]. SUF ¶ 26. Of course, by that time, laches had long-since attached to any claim by Steves for Section 16 injunctive relief relating to the 2012 Merger, which had been announced and completed more than three years prior.

meant that the court . . . would have to compel defendants that had already integrated their operations to separate themselves into two distinct companies").

Following the merger, JELD-WEN integrated every business line at CMI into JELD-WEN. JELD-WEN eliminated employees with duplicative positions, closed CMI door plants, closed some of its own doorskin plants and integrated all aspects of the companies, from the front office to sales to purchasing. SUF ¶¶ 33-41. [REDACTED] SUF ¶ 41. Indeed, JELD-WEN has spent [REDACTED]. SUF ¶ 45. JELD-WEN has made large investments in that plant that are critical to its broader operations, and that would be enormously expensive to disentangle. Towanda is home to the MiraTec and Extira production line and [REDACTED]. SUF ¶¶ 42-43. It is not physically possible to separate the MiraTec and Extira manufacturing lines from the doorskin lines at the Towanda plant. SUF ¶ 44. JELD-WEN has [REDACTED]. Ex. 33. Overall, it is clear that any effort to undo this nearly five year old integration at this late date would be highly prejudicial to JELD-WEN. *See, e.g.*, *Garabet*, 116 F. Supp. 2d at 1173 (explaining that when defendant spent $45 million integrating the two companies, the costs and complexities of unwinding the merger would cause serious prejudice and hardship to defendant).

B. Steves' Claims of Threatened Injury Are Impermissibly Speculative And Cannot Support Steves' Request For Divestiture Under Clayton Act Section 16

The threat of antitrust injury is a critical, required element for proving claims for injunctive relief under Section 16 of the Clayton Act. *Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 113 (1986); *Am. Stores*, 495 U.S. at 295-96. To obtain injunctive relief such as divestiture, Steves must "demonstrate a significant threat of injury from an impending violation

of the antitrust laws or from a contemporary violation likely to continue or reoccur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969); *see also Garabet*, 116 F. Supp. 2d at 1170 (plaintiffs must prove "a threatened loss or injury cognizable in equity….proximately resulting from an antitrust violation.").

Steves may not obtain injunctive relief, particularly the extreme remedy of divestiture, based on speculative claims of future injury. In *Ginsberg*, for example, the court denied plaintiff's request for divestiture because the real market facts regarding the distribution system used in the beer market rendered speculative plaintiffs' claim that the merger threatened to raise retail prices for beer. 623 F.3d at 1235. The court in *AMA v. United Healthcare Corp*. also denied plaintiff's claims of threatened injury through the reduction of price competition and compensation because the alleged injury would occur only if multiple "contingencies" occurred. No. 00 Civ 2800 (LMM), 2007 U.S. Dist. LEXIS 18729, at *21-23 (S.D.N.Y. Mar. 5 2007). Accordingly, "the extended nature of this chain of dependent contingencies prevents the threat of antitrust injury alleged here from rising to the level of significant." *Id*. at *23. *Accord South Austin Coalition Cmty. Council*, 2001 U.S. Dist. LEXIS 9850, at *35 (denying request for divestiture because threatened antitrust injury was "speculative and vague").

Steves relies on its expert, Dr. Carl Shapiro, to opine regarding the threat of future antitrust injury in the U.S. doorskin market. The crux of Dr. Shapiro's limited analysis is that the 2012 Merger is automatically harmful to Steves for the simple reason that [REDACTED] [REDACTED]. Ex. 25, Shapiro Rpt. at 30-31. From there Dr. Shapiro [REDACTED] [REDACTED] *Id*. at 30. But this presumption standing alone does not meet Steves' burden of proving the threat of antitrust injury ***to Steves***. As the court

explained in *South Austin*, where plaintiffs also sought to rely on HHI and the size of the merger to seek divestiture under Section 16, a plaintiff cannot prove the threat of antitrust injury "simply by alluding to the proportions of the merger, and leaving it to the court to infer a threat of an antitrust violation simply because the merger is now a fact." 2001 U.S. Dist. LEXIS 9850, at * 13. This is especially true when, as here and in *South Austin*, the merger was reviewed and not challenged by the DOJ. *Id*.

Although Dr. Shapiro further claims that Steves is threatened with future antitrust injury from the 2012 Merger because "[REDACTED]," he also concedes that [REDACTED] Ex. 25, Shapiro Rpt. at 35, 37. This admission is fatal to Steves' claims of antitrust injury because, as described further above, the actual record evidence demonstrates [REDACTED]. *See supra* Section II.

Steves cannot overcome this real world proof of alternative suppliers with [REDACTED]. Ex. 5, Shapiro Suppl. Rpt. at 19, 22-27. Steves has no standing to seek injunctive relief based only on threatened antitrust injury to ***other companies***. *See, e.g.*, *Law v. NCAA*, No. 94-2053-KHV, 1996 U.S. Dist. LEXIS 3479, at *11-12 (D. Kan. Jan. 8, 1996) (denying injunctive relief under Section 16 to coaches who were not threatened with antitrust injury even though other coaches were so threatened; "to grant them injunctive relief, plaintiffs must demonstrate that they

themselves are threatened with antitrust injury"). Steves' failure to prove that ***it*** is seriously threatened with antitrust injury is fatal to its request for divestiture.

If it ever became appropriate to hold a remedies hearing, we are confident that the Court would reject the equitable remedy of divestiture on other grounds as well, including that the overall balance of hardships and the public interest does not favor such extreme relief at this point. Steves has never articulated any theory of harm to Steves itself that could not be adequately remedied through money damages. But the case should never get that far. Steves' request for equitable relief is so plainly barred by laches and its failure to present any evidence of non-speculative threatened injury that this Court should simplify the litigation by granting summary judgment now.

IV. THERE IS NO ACTUAL "CASE OR CONTROVERSY" FOR THIS COURT TO DECIDE REGARDING STEVES' CLAIM FOR DECLARATORY JUDGMENT REGARDING THE SUPPLY AGREEMENT TERMINATION DATE

Finally, this Court lacks jurisdiction to consider Steves' claim in Count IV regarding the termination date of the Supply Agreement because it does not present an actual case or controversy as required by Article III. In Count IV, Steves seeks a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that the effective termination date of the Supply Agreement is [REDACTED]. Compl. ¶¶ 188-92. A declaratory judgment may only issue if there exists "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Here there is no real and substantial controversy between the parties because JELD-WEN has agreed that the termination date of the Supply Agreement is [REDACTED], and that JELD-WEN will continue to supply Steves with doorskins until that date. SUF ¶¶ 4-6. Accordingly, Steves' request for a declaratory judgment should be

dismissed. *See, e.g.*, *Davison v. Plowman*, No. 1:16 cv 180, 2017 U.S. Dist. LEXIS 47157, at *26 (E.D. Va. Mar. 28, 2017) (denying request for declaratory judgment that defendant's policy was unconstitutional, because defendant had changed the challenged policy).

CONCLUSION

For all the reasons stated above, JELD-WEN respectfully requests that this Court grant this motion for summary judgment on Counts I and IV of Steves' case.

Dated: September 22, 2017

Respectfully submitted,

JELD-WEN, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2017, I will electronically file a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the registered participants as identified on the NEF to receive electronic service, including:

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