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

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

PLAINTIFF STEVES AND SONS, INC.'S
MEMORANDUM IN OPPOSITION TO DEFENDANT JELD-WEN'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

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RULES

INTRODUCTION

Defendant JELD-WEN, Inc.'s ("JELD-WEN") motion never disputes that there is evidence that its merger with CraftMaster Manufacturing, Inc. ("CMI") violated Section 7 of the Clayton Act, 15 U.S.C. § 18. (*See* JELD-WEN's Motion for Partial Summary Judgment at 11 ("Mot.").) Instead, JELD-WEN looks for other ways to evade liability for its anticompetitive conduct.

First, JELD-WEN resurrects an argument this Court rejected in denying JELD-WEN's motion to dismiss: that this is simply a contract case wrapped up in antitrust clothing. JELD-WEN argues that any injuries to Steves were due not to the merger, but to JELD-WEN's alleged breaches of the parties' pre-merger contract ("Agreement"). JELD-WEN contends that, as a matter of law, harm resulting from breach of a contract executed before an alleged antitrust violation "is simply a breach and does not also inflict 'antitrust injury.'" (Mot. at 2.)

JELD-WEN's central premise is incorrect. As both the Supreme Court and the Fourth Circuit have recognized, anticompetitive conduct is not immune from antitrust scrutiny—or statutory treble damages—simply because it also breaches a contract. Nor is it the case, as JELD-WEN suggests, that the contractual protections of the Agreement insulated Steves from any anticompetitive effects of the merger. The Agreement—[redacted]—contemplated that Steves would continue to benefit from competition in the doorskin market. Because of the merger, however, no such competition exists, and Steves has had nowhere to turn when, for example, JELD-WEN has imposed unjustified price increases. This is classic antitrust injury.

JELD-WEN also simply ignores that Steves has adduced evidence of antitrust injury *unrelated* to the contract, including JELD-WEN's raising of prices for products it deems to fall

outside of the contract, and its coordination with Masonite to limit sales of doorskins to third-party door manufacturers. This evidence also demonstrates antitrust injury.

Second, JELD-WEN contends that Steves' lost profits claim is too speculative, arguing that it cannot be known whether Steves will be unable to find a new source of supply, or extend its supply arrangement with JELD-WEN, by [redacted] when the Agreement terminates. As courts have recognized, however, a party damaged by an antitrust violation may recover any future damages that reasonably can be proven. There is abundant evidence from which a jury reasonably could conclude that, once the Agreement terminates, Steves will be without any source of doorskin supply, which will force a 151 year-old company to go out of business. Thus, Steves' lost profits claim properly should be presented to the jury.

Third, JELD-WEN asks the Court to find Steves' request for injunctive relief to be barred by laches. The availability of laches to bar a statutory claim is limited where, as here, that claim was brought within the prescribed limitations period. Moreover, laches is a fact-intensive affirmative defense that requires the court to balance the plaintiff's delay, if any, against evidence of the consequent prejudice to the defendant. It is rarely amenable to summary judgment, and this case is no exception. The Court should not assess JELD-WEN's arguments concerning Steves' diligence in seeking an injunctive remedy in isolation, but should wait until all evidence relating to Steves' request for equitable relief has been introduced at trial.

For these reasons, the Court should deny JELD-WEN's motion in its entirety.

RELEVANT FACTUAL BACKGROUND

[redacted]

[redacted] Steves ultimately chose JELD-WEN, both because of the attractiveness of its contract terms and Steves' expectation that JELD-WEN would be a reliable long-term partner. [redacted]

On June 5, 2012, JELD-WEN announced that it would merge with CMI. (Ex. 45 at JW-CIV-00411093.) [redacted]

Unbeknownst to Steves, the Agreement was part of JELD-WEN's strategy to mute opposition to its acquisition of CMI. Because the acquisition would lead to an extremely concentrated market for sellers of doorskins, [redacted] The strategy worked. Steves did not oppose the merger, trusting that the agreement would protect it from any anticompetitive harm.

As Steves would later learn, its trust was misplaced. Soon after the merger, Steves thrived as a competitor in the interior doors market, often at JELD-WEN's expense. [redacted]

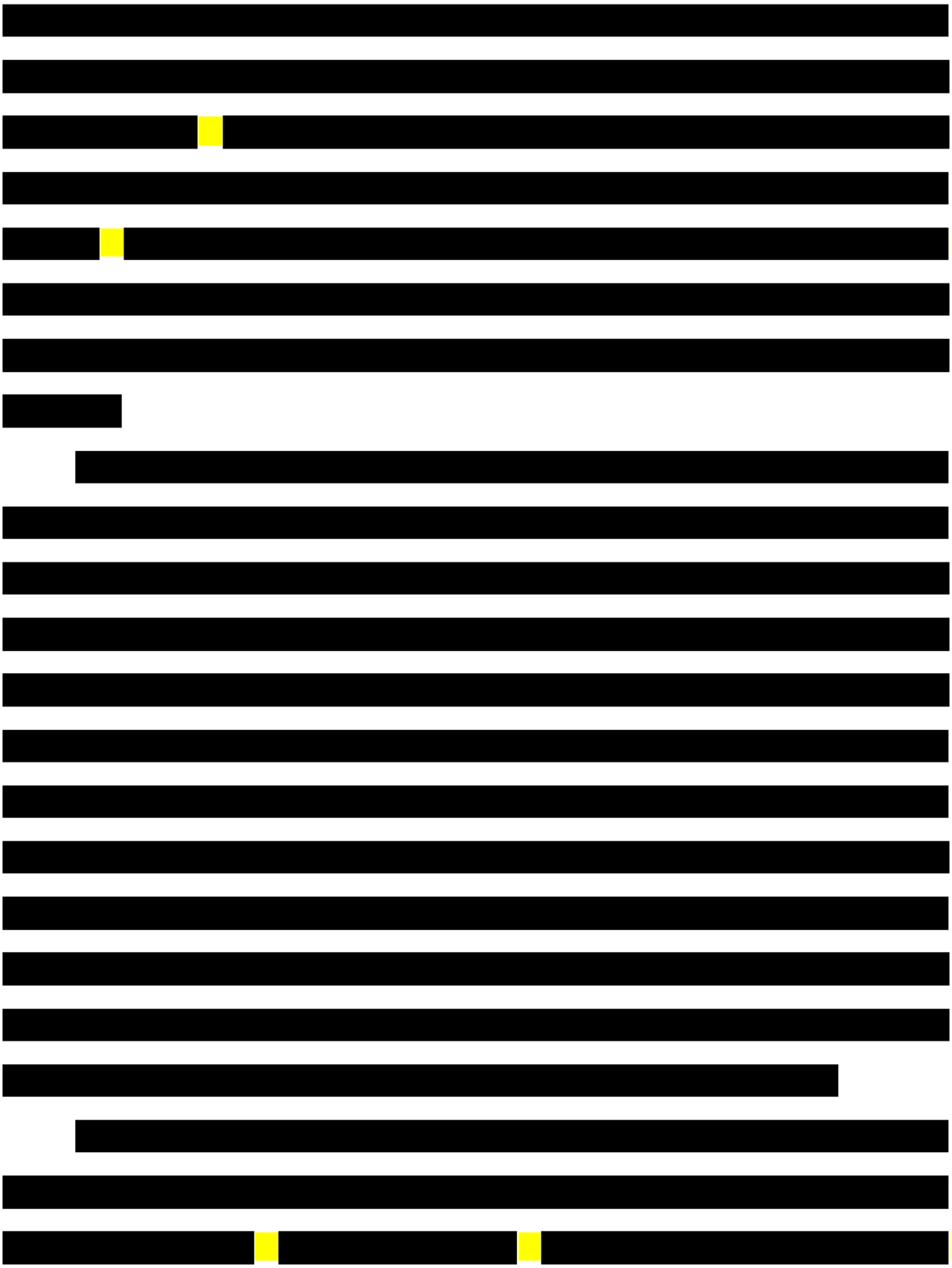
1. ***Price.*** [redacted]

[redacted]

2. ***Quality.*** After the merger was announced, JELD-WEN reduced the quality and thickness of its doorskins. (Ex. 83 at JW-CIV-00635011; Ex. 45 at JW-CIV-00411093; Ex. 54 at JW-CIV-00000868; Ex. 20 at JW-CIV-00502828.) At the same time, JELD-WEN adopted a plan to "[a]djust" its doorskin customers' "quality expectations." (Ex. 72 at 22.) JELD-WEN made it increasingly difficult for customers to return defective products by implementing onerous credit request procedures, threatening to charge for inspections, and refusing or discouraging claims. [redacted]

3. ***Termination.*** [redacted]

JELD-WEN's strategy of using its enhanced market power to shut off Steves' supply of doorskins was facilitated by Masonite, the one other participant in the doorskin market. In June 2014, Masonite announced that it would no longer sell doorskins to independent door manufacturers. (Ex. 80 at JW-CIV-00473868.) [redacted]



[redacted]

RESPONSE TO JELD-WEN'S STATEMENT OF UNDISPUTED FACTS[1]

4. Currently undisputed. JELD-WEN formerly argued the contract would terminate on [redacted]. (Ex. 68 at JW-CIV-00338854.)

6. Undisputed that JW has made these communications. Disputed as to whether JELD-WEN genuinely intends to continue to sell doorskins to Steves after the Agreement terminates. [redacted]

12. Disputed. The document JELD-WEN cites does not establish the fact for which it is cited, and JELD-WEN points to no other evidence tending to establish this purported fact.

28 & 29. Undisputed that Masonite made these communications. Disputed as to whether this was a serious, good faith offer to sell to Steves. [redacted]

31. Disputed. [redacted]

44. Disputed. [redacted]

[1] Steves does not dispute the following facts from JELD-WEN's Statement of Undisputed Material Facts: 1-3, 5, 7-11, 13-27, 30, 32-43. However, Steves does not concede that these facts are material, relevant or admissible.

45. Disputed. [redacted]

[redacted]

[redacted]

[redacted]

STATEMENT OF ADDITIONAL MATERIAL FACTS NOT INCLUDED IN FACTUAL BACKGROUND

Antitrust Injury

[redacted]

Lost Profits

14. [redacted]

15. In July 2014, Mr. Hachigian, who had been complaining about the Agreement's price terms, sent Steves Masonite's announcement that it would no longer sell doorskins to third parties. (Ex. 97 at STEVES-000544506; Ex. 98 at STEVES-000544513.)

[redacted]

[redacted]

Laches

33. [redacted]

[redacted]

LEGAL STANDARD

"Summary judgment is not appropriate unless the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *Bauer v. Lynch*, 812 F.3d 340, 347 (4th Cir. 2016). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating whether the movant is entitled to summary judgment, the court must "view the facts and draw reasonable inferences in the light most favorable to the party opposing the [summary judgment] motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (internal quotation marks omitted).

ARGUMENT

I. STEVES HAS AMPLE EVIDENCE OF ANTITRUST INJURY

JELD-WEN first argues that Steves' only claimed injuries are attributable to JELD-WEN's alleged breach of the Agreement, and that such contractual harm "as a matter of law, . . . is not antitrust injury." (Mot. at 12.) JELD-WEN's argument mischaracterizes the law regarding the interplay between contract and antitrust claims, and inaccurately describes the scope of the injuries Steves claims to have suffered as a result of the merger.

A plaintiff seeking damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, must show that it has suffered antitrust injury, such as increased prices, decreased quality, or lost profits. However, "proving the *fact* of damage under [that] Act is satisfied by. . . proof of *some damage* flowing from the" antitrust violation. *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 US. 100, 114 & n.9 (1969) (emphasis added). "[I]nquiry beyond this minimum point goes only to the amount and not the fact of damage." *Id.* Steves can easily clear this minimal threshold here.

A. An Antitrust Violation Is Not Excused By Also Being A Breach Of Contract

Both the Supreme Court and the Fourth Circuit have recognized that the same conduct can both breach a contract and be an antitrust violation. *See, e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465, 468 n.2 (1982) (addressing conduct that was both an anticompetitive scheme and a violation of an insurance contract); *Int'l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 419 (4th Cir. 1986) (observing overlap in contract and antitrust damages); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1282 (4th Cir. 1987) (upholding verdict for overlapping contract and antitrust damages). This principle is recognized even in one of the cases JELD-WEN cites. *See 2660 Woodley Rd. JV v. ITT Sheraton Corp*, 369 F.3d 732, 739 (3d Cir. 2004) ("[I]n an appropriate case, a breach of contract . . . could result in the kind of injury 'the antitrust laws were intended to prevent.'").

Arguing for a contrary bright-line rule, JELD-WEN puts misplaced reliance on the Ninth Circuit's ruling in *Orion Pictures Distribution Corp. v. Syufy Enterprises*, 829 F.2d 946 (9th Cir. 1987). In *Orion*, defendant theatrical exhibitor Syufy repudiated contractual commitments to display an Orion film in its theaters throughout the southwest and to pay monetary guarantees against ticket sales. *Id.* at 948. Orion alleged damages in the amount of the difference between these repudiated guarantees and the lesser payments it received from replacement exhibitors. *Id.*

at 949. In addition to a contract claim, Orion asserted an antitrust claim based on Syufy's acquisition of a competitor's theaters in Las Vegas, where some of its screens were located. *Id.* Orion alleged that the purpose of the acquisition was to reduce Syufy's *future* guarantees in Las Vegas. *Id.* In affirming the trial court's award of a directed verdict on this claim, the court noted that Orion suffered no antitrust injury: the repudiated guarantees—the majority of which were for theaters outside of Las Vegas—pre-dated and *were not affected* by the merger. *Id.* at 948-49. The court relied on *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987), where the Ninth Circuit had similarly found that plaintiffs could not show antitrust injury based on an alleged conspiracy among movie studios where the complaints related to the legality of commitments made prior to the formation of the alleged conspiracy. *Orion*, 829 F.2d at 948-49.

As the Ninth Circuit itself has recognized, neither *Orion* nor *Newman* stands for JELD-WEN's broad proposition that breaches of a contract entered into prior to alleged anticompetitive conduct cannot constitute antitrust injury. In *Z Channel Limited Partnership v. Home Box Office, Inc.*, 931 F.2d 1338, 1342 (9th Cir. 1991), plaintiff Z Channel brought antitrust claims over its ability to compete with HBO to broadcast cable programming. HBO's challenged conduct included behavior related to the enforcement of HBO and Z Channel's pre-existing contracts with movie distributors. HBO relied on *Orion* and *Newman* to assert the same argument JELD-WEN makes here: "that interpretations and applications of contracts that preexist the anticompetitive activity cannot, as a matter of law, cause antitrust injury." *Id.* at 1342. The Ninth Circuit rejected that broad reading, explaining that the key to *Orion* and *Newman* was "not merely that [the] contracts predated" the antitrust violation, but "that the only *competition* alleged to be injured predated" the alleged anticompetitive activity. *Id.* at 1342 & n.10 (emphasis in original). In contrast, the *Z Channel* court noted, HBO's conduct was alleged

to have had a detrimental effect on competition that still existed *following* execution of HBO's and Z Channel's contracts with movie distributors. Thus, HBO's behavior, while tied to pre-existing contractual obligations, directly exacerbated Z Channel's "struggle for competitive viability in the cable television market." *Id.* at 1343; *see also City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1368 (9th Cir. 1992) (post-*Orion* decision stating, "We are not convinced that antitrust liability may not be predicated on conduct which also happens to create a contract dispute").[2]

That is precisely the situation here. Although the 2012 Agreement between Steves and JELD-WEN committed the parties in certain respects, it did not, as in *Newman* and *Orion*, eliminate competition for Steves' business. Quite to the contrary, specific terms of the contract ensured that Steves could benefit from continued competition in the marketplace:

- [redacted]

Taken together, these terms reflect that, even after entering into the Agreement, Steves should have been able to take advantage of competition in the market for interior molded

[2] The other cases JELD-WEN cites, including *2660 Woodley Rd JV*, 369 F.3d 732; *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 404 (6th Cir. 1997); and *Langer Juice Co. v. Yantai N. Andre Juice Co.*, No. CV 06-1354, 2006 WL 5207229 at *3 (C.D. Cal. Aug. 16, 2006), also involved claims where, unlike here, there was no showing of a causal link between the anticompetitive conduct and the plaintiff's alleged injury.

doorskins. As the evidence reflects, however, the merger, and JELD-WEN's enhanced market power resulting from the merger, eliminated Steves' ability to do so. For example:

Increasing prices as costs decline. [redacted] But it is the merger that has allowed JELD-WEN to commit these breaches without fear of loss of business, because Steves has no alternative source of supply. If such suppliers still existed, Steves would have various means of recourse despite the contract. [redacted] Had the merger not occurred, and healthy competition in the doorskin market continued, Steves could have utilized these contractual safeguards to get a competitive price. [redacted] The merger took away these options; it allowed JELD-WEN, notwithstanding the Agreement, to use its enhanced market power to cause competitive injury to Steves that otherwise would not have occurred.

Decline in Quality. [redacted] Steves believes that JELD-WEN's declining quality also constitutes a breach of contract. But the loss of competition resulting from the merger facilitated JELD-WEN's reduction in quality. [redacted] Thus, without the merger Steves could have avoided at least some portion of the quality problems it has encountered with JELD-WEN's product.

In light of the foregoing, it is wrong for JELD-WEN to suggest that Steves is "fully protected" against antitrust injury by the Agreement, let alone that Steves' expert has "concede[d]" as much. (Mot. at 16.) Dr. Shapiro and Steves have merely recognized that JELD-WEN is somewhat constrained from exercising the *full* force of its new market power against Steves so long as the Agreement is in place.[3]

B. Steves Has Suffered Antitrust Injuries That Are Not Based On Breach Of Contract

JELD-WEN also ignores anticompetitive injuries that fall outside Steves' contract claims. [redacted]

[4] JELD-WEN introduced the Madison and Monroe styles as competitors to Masonite's comparable Craftsman flat panel designs, Lincoln Park and Logan. (Ex. 55 at 2-4.).

[redacted] JELD-WEN justifies this extreme pricing on the (incorrect) basis that the Agreement does not cover new product designs. Steves disagrees with JELD-WEN's interpretation of the Agreement; but what matters for purposes of assessing antitrust injury is that, [redacted]

Another example is JELD-WEN's termination of the Agreement. Steves does not allege termination alone to be a breach of contract.[5] However, the evidence at trial will show that JELD-WEN's decision to terminate directly resulted from the market power it acquired from the merger. [redacted] Common sense suggests that, absent the merger, JELD-WEN would not have adopted this strategy, which would have handed over a profitable doorskin business to CMI or Masonite. However, due to the merger, termination represents a virtual death sentence for Steves' business, and thus benefits JELD-WEN by eliminating a primary molded door competitor.[6]

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[5] But *see* Section IV, *infra* for details on the proper termination date.

[6] [redacted]

Several courts have recognized that the termination of a contract is antitrust injury where, as here, the termination is tied to anticompetitive conduct. *See, e.g.*, *Barber & Ross*, 810 F.2d at 1279 ("A buyer who is injured due to a refusal to deal in furtherance of the seller's anticompetitive scheme has been injured as a direct result of an antitrust violation."); *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299 (4th Cir. 1979) ("While the termination of a supply contract under proper circumstances is not forbidden by the antitrust laws, it is undisputed that a cancellation in the context of the alleged anticompetitive conspiracy would constitute a [p]er se Sherman Act violation," and the fact that defendant "might have caused the same damages by a lawful cancellation of the contract is irrelevant"); *Arnott v. Am. Oil Co.*, 609 F.2d 873, 887 (8th Cir. 1979) (affirming jury award of antitrust lost profit damages based on defendant's termination of lease where evidence supported finding that lessor's actions and custom and practice indicated intent to enter into long-term lease relationship).[7]

Further anticompetitive injuries not tied to any claimed breach of the Agreement are the merger's coordinated effects between JELD-WEN and Masonite, the two remaining U.S. doorskin manufacturers. [redacted]

[7] JELD-WEN argues that "courts consistently cast doubt on the viability of antitrust claims" brought by parties with "long term fixed price contracts." (Mot. at 15 n.2.) But the LTA is not a "fixed price contract"—it is a contract with a price *adjustment* mechanism based on cost information exclusively within JELD-WEN's control, and which JELD-WEN has abused—and neither of the cases cited by JELD-WEN supports its broad claim. Both are instances of a court denying class certification due to a lack of typicality under Federal Rule of Civil Procedure 23(a)(3). That test does not call for the court to weigh whether the members of the class were injured, but whether they were injured in a similar way. *See Deiter v. Microsoft Corp.*, 436 F.3d 461, 467-468 (4th Cir. 2006) (identifying differences between named and absent class members); *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 490 (N.D. Cal. 2008) (same).

[redacted] The effect has been a loss of competitive options, and competitive prices, for Steves as well as other independents.[8]

C. The Evidence Reflects That The Merger Increased Prices

JELD-WEN incorrectly argues that "Steves has no evidence or triable case that it actually experienced higher prices or decreased quality" as a result of the merger. JELD-WEN suggests that Steves must be able to compute the precise prices it would have paid but for the acquisition. (Mot. at 17.) This is not the law. Once Steves establishes that it is subject to "some damage" from the merger, any further questions relate to the amount of damage, an issue for the jury to determine under a relaxed standard of proof. *Zenith*, 395 U.S. at 114 n.9.

[8] *See Laumann v. NHL*, 105 F. Supp. 3d 384, 396-97 (S.D.N.Y. 2015) ("Antitrust injuries come in two basic forms. *First*, anticompetitive conduct is injurious if it results in higher prices. *Second*, anticompetitive conduct is injurious if it limits consumer options."); *Barber & Ross*, 810 F.2d at 1279 n.1 (door company plaintiff was injured by conduct that foreclosed it from purchasing from suppliers other than defendant).

JELD-WEN incorrectly claims that Steves' expert, Dr. Shapiro, did not conduct an "empirical analysis of the price that JELD-WEN would have charged" absent the merger.[9] But the Agreement, entered into prior to the merger and thus before any anticompetitive results of the merger could have impacted its terms, specifies doorskin prices and a mechanism by which such prices were to be adjusted based on changes in key input costs. Thus, the Agreement stands as a benchmark of the pricing conditions that prevailed before the merger.

Steves will show at trial that JELD-WEN has since raised Steves' prices above that competitive benchmark. [redacted] Such a dispute between experts creates a triable issue with regard to the question whether the merger has resulted in increased prices for doorskin customers, including Steves. That factual dispute cannot be resolved on summary judgment.

[9] JELD-WEN cites *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 422 (5th Cir. 2004), for the proposition that "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." (Mot. at 17.) *Robinson* says no such thing. To the contrary, *Robinson* explains that, in the context of a *class certification* motion, establishing a competitive "baseline" price can be one way to eliminate the need for individualized proof of antitrust injury. *Robinson*, 387 F.3d at 422. Because Steves has not filed a class action, it is free to demonstrate antitrust injury through individualized proof of harm.

Lastly, JELD-WEN complains that, [redacted]

JELD-WEN's argument is a red herring. [redacted] This pricing conduct, which is inconsistent with how a firm would be expected to behave in a competitive environment, reflects antitrust injury to Steves. That is all that is required for Steves to establish the antitrust injury element of its claim.[10] Any further "argument goes to the *measure* of damages, rather

[10] Where a plaintiff demonstrates antitrust injury, the appropriate amount of damages is an issue of fact for the jury. *See, e.g.*, *Int'l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 431 (4th Cir. 1986); *World of Sleep, Inc. v. La–Z–Boy Chair Co.*, 756 F.2d 1467, 1478 (10th Cir. 1985). The evidence demonstrates that Steves has suffered antitrust injury resulting from the merger, and thus may seek damages under Section 4. The damages Steves has elected to pursue for purposes of its antitrust claim focus primarily on future lost profits Steves will suffer if forced out of business upon termination of the Agreement, rather than pre-termination damages.

[redacted]

(continued…)

than the *existence* of antitrust injury." *See also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1448 n.19 (9th Cir. 1995) (rejecting argument that "gains" caused by defendant's anticompetitive conduct should offset losses in determining whether antitrust injury exists).

Finally, JELD-WEN dismisses Steves' quality complaints, even though "[c]ourts have repeatedly held that a decline in quality is among the injuries that the antitrust laws were designed to prevent." *New York Medscan LLC v. New York Univ. Sch. of Med.*, 430 F. Supp. 2d 140, 148 (S.D.N.Y. 2006); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund v. Philip Morris Inc.*, 196 F.3d 818, 823 (7th Cir. 1999) ("getting an inferior product for the same money" qualifies as antitrust injury). [redacted]

[redacted]

[redacted]

II. STEVES' CLAIM FOR LOST PROFITS DEPENDS ON FACTUAL DISPUTES THAT SHOULD BE RESOLVED BY THE JURY

Steves principally seeks an injunctive remedy requiring JELD-WEN to divest its Towanda doorskin plant, which would restore competition in the molded doorskin market. In the

alternative, were the Court not to order a divestiture remedy, Steves seeks damages to compensate it for profits it will lose when forced out of business due to lack of doorskin supply upon the termination of the Agreement. JELD-WEN's request that the Court take that alternative remedy away from the jury is based upon a misapplication of the law and a self-serving and one-sided description of the evidence.

A. The Law Permits Antitrust Plaintiffs To Recover Lost Profit Damages

As noted in the preceding sections, the record reflects that Steves has suffered antitrust injury from the merger. Once a plaintiff "has demonstrated some damage [from an antitrust violation], the actual amount need not be proven to the same degree of certainty," *World of Sleep*, 756 F.2d at 1478, and damages "estimates may be based on assumptions so long as the assumptions rest on adequate bases." *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 858 (5th Cir. 1981); *see also id.* at 864 (relaxed standard of proof of damages in antitrust cases is "particularly appropriate" where "the finder of fact must estimate lost future profits").

Moreover, section 4 damages may include future lost profits. As the Supreme Court explained in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39 (1971), "if a plaintiff feels the adverse impact of an antitrust [violation] on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date *and all provable damages that will flow in the future*"; thus a plaintiff can "recover not only those damages which he has suffered at the date of accrual, but also those . . . he . . . will predictably suffer after trial." (Emphasis added). Future damages are unrecoverable only "if the fact of their accrual is speculative or their amount and nature unprovable." *Id.*

Ignoring this case law, JELD-WEN props up its lost profits argument with cases dismissing antitrust *claims* on Article III standing or ripeness grounds where, at the time of suit, the plaintiff had neither incurred *any* injury nor suffered from *any* imminent threat of future

injury. For example, in *SureShot Golf Ventures v. TopGolf, International, Inc.*, No. H-17-127, 2017 WL 3658948, at *3 (S.D. Tex. Aug. 24, 2017), none of the plaintiff's alleged harms had occurred at the time of suit. The plaintiff alleged merely that the defendant would, in the future, decline an option to renew a license for technology it had acquired in a merger, thereby preventing the plaintiff from continuing to compete against it in the entertainment golf facility market. In dismissing the plaintiff's claims as unripe, the court specifically distinguished the plaintiff's claims from cases, such as this one, in which a merger had resulted in anticompetitive effects by the time of suit. *Id*. The other cases on which JELD-WEN primarily relies, none of which involved a Clayton Act merger challenge or a request for lost profits, are distinguishable on the same grounds, in that they each involved a situation where the plaintiff had suffered *no injury* (and was not threatened with imminent future injury) at the time of suit.[11]

B. There Is Substantial Record Evidence Of Both The Fact And The Amount Of Steves' Future Lost Profits Damages

JELD-WEN's claim that Steves' lost profits damages are speculative falls far short of the showing necessary to entitled it to judgment as a matter of law. Normally, both "the fact of injury and the amount of damages are questions for the jury to decide." *Int'l Wood Processors*,

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[11] *See Unity Ventures v. Lake Cty.*, 841 F.2d 770, 774-77 (7th Cir. 1988) (challenge to agreement restricting access to sewage disposal connections unripe where plaintiff had never formally applied for a connection); *Plant Oil Powered Diesel Fuel Sys., Inc. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163, 1184-85 (D.N.M. 2011) (challenge to proposed biodiesel fuel standards unripe where, at the time of suit, standards were only in the "initial stages of development"); *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 903 F. Supp. 2d 140, 146-47 (D.D.C. 1995) (doctor's challenge to purported termination of hospital privileges unripe where, at time of suit, doctor still held those privileges), *vacated in part on other grounds*, 1996 WL 377147. JELD-WEN's other cites, *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991), and *Henry v. Dow Chemical Co.*, 701 N.W.2d 684, 692 (Mich. 2005), are even further afield, in that they merely hold that a plaintiff who has suffered no harm or even prospect of harm cannot seek future damages relating to such non-existent harm.

792 F.2d at 431; *see also Arnott*, 609 F.2d at 887 (length of future lost profits period was factual matter to be resolved by the jury). That is clearly so here.

JELD-WEN describes Steves' lost profits claim as based "entirely on a self-serving and speculative *prediction* [redacted] with ***no evidence demonstrating that this will happen***." (Mot. at 25. (emphasis added).) In fact, there is substantial evidence that, absent an injunctive remedy, this is precisely what will happen.

[redacted]

JELD-WEN further asserts that it will be "willing to supply [doorskins] on an *ad hoc* basis" if the parties cannot reach agreement on a long-term contract. (Mot. at 25.) Even assuming *arguendo* this were so, [redacted]

[redacted] In short, JELD-WEN's contention that there is "no evidence" that JELD-WEN will not be an available source of supply after [redacted] is meritless.[12]

[redacted]

Masonite. [redacted]

Foreign Supply. [redacted]

[12] JELD-WEN submits that it would be "economically irrational" to refuse to sell doorskins to Steves. (Mot. at 25.) As a *de facto* monopolist in doorskin sales who competes with Steves in the molded door market, JELD-WEN has an obvious and powerful economic motivation to cut off Steves doorskin supply: to drive its second biggest competitor out of business and absorb its market share. [redacted]

[redacted]

Self-Supply. [redacted]

[redacted]

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13 [redacted]

This demonstrates that there exists a triable dispute of fact as to whether Steves will be forced out of business when the Agreement terminates, and therefore suffer lost profits.[14]

III. STEVES' CLAIM FOR A DIVESTITURE REMEDY DEPENDS ON RESOLUTION OF FACTUAL ISSUES THAT CAN ONLY BE DETERMINED AFTER TRIAL

In addition to arguing that Steves' damages claim is premature, JELD-WEN argues that its request for a divestiture remedy is stale and barred by laches.

A. The Law Recognizes That Divestiture May Be Necessary To Remedy The Effects Of An Anticompetitive Merger In Private Party Enforcement Actions

"Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *California v. Am. Stores Co.*, 495 U.S. 271, 281 (1990) (internal quotation marks omitted). Divestiture is ordinarily the "most effective" way to "restore competition," which is "[t]he key to the whole question of an antitrust remedy[,] of course." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). As JELD-WEN admits (Mot. at 27), divestiture *is* available to private plaintiffs. *Am. Stores Co.*, 495 U.S. at 295. This is because divestiture "fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger." *Id.* at 285.[15]

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[14] JELD-WEN's motion does not dispute the existence of triable issues of fact as to whether Steves could remain in business without its interior molded door business (SAMF ¶ 32), or the amount of the profits Steves will lose if forced out of business.

[15] Contrary to JELD-WEN's suggestion that that the Court in *American Stores* only "cautiously acknowledged" the divestiture remedy (Mot. at 27), it confirmed that the Clayton Act was "not . . . ambiguous" in authorizing that remedy in private suits. 495 U.S. at 285. The (continued…)

JELD-WEN cites a handful of cases in which courts have declined to order divestiture in private-party lawsuits. (Mot. at 27-28 & n.7.) In these cases, however, the plaintiffs could not establish essential elements of their antitrust claim—*e.g.*, standing or injury—typically because the plaintiffs were neither *customers* nor *competitors* of the defendants.[16] These cases suggest no basis for denying divestiture in a private-party case such as this one, where the private party seeking divestiture (Steves) is both a *customer* (in the doorskins market) and a *competitor* (in the doors market) of the defendant, and is able to establish antitrust injury from a merger.

Although JELD-WEN makes much of the fact that "no court" has awarded divestiture "to a private litigant standing alone" (Mot. at 27), that is not surprising given that there are "very few litigated § 7 cases." *E.I. du Pont*, 366 U.S. at 330. Moreover, as would be expected, most defendants faced with a forced divestiture negotiate a settlement so as to have more input, as in the very cases upon which JELD-WEN relies. *See, e.g.*, *Ginsburg*, 623 F.3d at 1234.

Court merely observed that a private plaintiff, unlike the Government, must establish antitrust injury. *Id.* at 295-96.

[16] *See, e.g.*, *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1170 (C.D. Cal. 2000) (plaintiffs who were neither "purchasers" nor "competitors" of the merging entities lacked standing); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 322 (3d Cir. 2007) (plaintiff did not "compete in the[] markets" where anticompetitive effects would have been felt); *Ginsburg v. InBev NV/AB*, 623 F.3d 1229, 1234 (8th Cir. 2010) (plaintiff beer drinkers were not competitors or direct consumers of merging breweries); *Taleff v. Southwest Airlines Co.*, 828 F. Supp. 2d 1118, 1123 & n.8 (N.D. Cal. 2011) (plaintiffs seeking preliminary injunction against airline merger made only conclusory, unsupported allegations of injury); *S. Austin Coal. 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) (no allegations that plaintiff suffered any injury); *Glendora v. Gannett Co.*, 858 F. Supp. 369, 372 (S.D.N.Y. 1994) (no allegation of any "actual or threatened injury").

B. Genuine Issues Of Material Fact Preclude Summary Judgment For JELD-WEN On Its Affirmative Defense Of Laches

Laches is an affirmative defense not typically amenable to summary judgment. *Kling v. Hallmark Cards Inc.*, 225 F.3d 1030, 1041 (9th Cir. 2000). It requires a court to "balance the plaintiff's delay," if any, with "his excuse for it, against any consequent detriment to the defendant," a "weighing of equities" that "depends on the facts of each case." *West v. Marine Res. Comm'n*, 330 F. Supp. 966, 970 (E.D. Va. 1970). This case is no exception.

Unreasonable delay. Steves filed suit within the Clayton Act's four-year statute of limitations for damages actions. The Supreme Court has held that, where a plaintiff brings suit within the period prescribed by Congress, laches does not apply because there is "'little place' for a doctrine that would further limit the timeliness" of suit. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014); *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 961 (2017) ("laches is a gap-filling doctrine," and where Congress has provided "a statute of limitations, there is no gap to fill"); *ITT Corp. v. Gen. Tel. & Elec. Co.*, 518 F.2d 913, 928 (9th Cir. 1975)[17] (using the limitations period "as a guideline in computing the laches period under § 16"). Accordingly, laches cannot constitute a complete defense to a claim brought within the statutory period. *Petrella*, 134 S. Ct. at 1978. While a court determining injunctive relief may take into account a plaintiff's purported delay in commencing suit, the Supreme Court has instructed that it should do so within the context of a number of "other considerations" relevant to equitable relief, including "close[] examin[ation of] the defendant's alleged reliance on [such] delay." *Id.* at 1977-78.

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[17] *Abrogated on other grounds by Am. Stores*, 495 U.S. at 277-78 (abrogating *ITT* holding that divestiture is not available in private-party Clayton Act lawsuits).

Here, there is a significant factual dispute as to whether Steves can be charged with any unjustified delay at all, let alone whether any such delay should, considered within the context of all of the other factors relevant to equitable relief—*e.g.*, the irreparable nature of Steves' injury, the inadequacy of legal remedies, the hardship to Steves from being denied equitable relief, and the public interest in deterring anticompetitive conduct—disqualify it from a divestiture remedy.

At the time of the merger, Steves erroneously believed it would be safeguarded against any anticompetitive effects of the merger by virtue of its long-term Agreement with JELD-WEN. As explained above (*see supra* pp. 4-6), this belief has turned out to be incorrect. However, Steves' initial belief is certainly understandable, given JELD-WEN's continued insistence, even in the present motion, that the Agreement protects Steves from suffering antitrust harm. (Mot. at 11-27.) [redacted] JELD-WEN should not now be heard to complain that its strategy *succeeded* in misleading Steves as to JELD-WEN's post-merger intentions. "Certainly a party cannot be charged with laches if the delay was induced by the party setting up the laches as a defense." *In re Ind. Concrete Pipe Co.*, 33 F.2d 594, 596 (N.D. Ind. 1929).

When Steves learned that the Agreement would *not* insulate it from the anticompetitive effects of the merger, it took prompt action—well within the four-year limitations period—to assert its rights, in accordance with the procedures spelled out in the Agreement. *See Ray*

Commc'ns v. Clear Channel Commc'ns, 673 F.3d 294, 301-02 (4th Cir. 2012) ("in the laches context, . . . delay is measured from the time at which the [plaintiff] knew" of a violation "sufficient to require legal action"). In June 2014, Masonite publicly announced it would no longer sell doorskins to competing door manufacturers, leaving Steves in the precarious position of having *no* potential alternative skin supplier. (Ex. 80 at JW-CIV-00473868.) Shortly thereafter, and against the backdrop of his complaints about the price terms of the Agreement, JELD-WEN's Kirk Hachigian forwarded that announcement to Edward Steves. (Ex. 97 at STEVES-000544506.) [redacted]

Because the parties' business relationship was partly governed by the Agreement, Steves followed the dispute-resolution procedure set forth therein, seeking to avoid expensive and time-consuming litigation. [redacted]

[redacted] Steves filed this lawsuit on June 29, 2016.

This is precisely the sort of timeline held not to constitute unreasonable delay. *See, e.g.*, *In re Bd. of Educ. of Scotia-Glenville Cent. Sch. Dist. v. Shapiro*, 85 A.D.2d 763, 764 (N.Y. App. Div. 1981) ("nine-month delay in making a demand" was not unreasonable where parties "made efforts to amicably resolve the dispute" during that time); *In re Border Steel, Inc.*, 229 S.W.3d 825, 836 (Tex. App. 2007) (seven-month delay not unreasonable in light of "parties' attempt[] to mediate the dispute" during that time). These facts also distinguish this case from the cases JELD-WEN cites (Mot. at 30) in which courts faulted plaintiffs for not challenging a merger earlier. In those cases, unlike here, the defendant had not lulled the plaintiff into a false sense of security prior to the merger, nor did the plaintiffs engage in any pre-suit dispute resolution efforts with the defendant once their claims arose; rather, the plaintiffs in these cases failed to take *any* action despite knowing well in advance of the merger what allegedly anticompetitive effects they would likely suffer from the merger. *See Garabet*, 116 F. Supp. 2d at 1173 (plaintiffs "fail[ed] to take *any* action for months" despite being aware of their potential claims); *Taleff*, 828 F. Supp. 2d at 1120-21, 1124 (same). JELD-WEN cannot establish that Steves unreasonably delayed in filing suit *at all*, much less that it is entitled to summary judgment on that issue.

Prejudice to JELD-WEN. Nor can JELD-WEN establish that it has suffered undue prejudice as a result of any delay. At the outset, JELD-WEN cannot show any alleged "reliance" on Steves' asserted delay in filing suit, which a court must "closely examine" in determining whether to deny equitable relief on that basis. *Petrella*, 134 S. Ct at 1978. JELD-WEN knew

full well that Steves could file suit within four years of the Merger once it became aware that the Agreement would not protect it. JELD-WEN has no one but itself to blame that Steves is now seeking a legally appropriate remedy for JELD-WEN's anticompetitive behavior.

Moreover, the evidence in the record does not support JELD-WEN's claims regarding the prejudice it would face from divestiture. [redacted] In the absence of any such analysis, assertions by JELD-WEN's attorneys regarding the difficulty divestiture would cause for the company should be given little if any weight, particularly at the pre-trial stage.

There is also significant evidence in the record that JELD-WEN would be able to adjust its operations in response to a divestiture order. Masonite divested the very Towanda plant at issue here in 2002 as a condition to its acquisition of Premdor, *see United States v. Premdor, Inc.*, No. 1:01-CV-1696, 2002 WL 1816981, *4 (D.D.C Apr. 5, 2002), and there is no evidence that Masonite suffered significant harm. [redacted][18]

[18] [redacted]

(continued…)

[redacted] This blatantly monopolistic rationale for [redacted] cuts strongly against JELD-WEN's equitable laches defense because "'he who seeks equity must do equity.'" *Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr.*, 594 F.3d 285, 297 (4th Cir. 2010).

C. Steves' Present Injury And Impending Future Injury Stemming From The Merger Are Sufficient To Warrant Divestiture

JELD-WEN also seeks summary judgment on the ground Steves' request for divestiture is premature, in that Steves has not suffered antitrust injury. (Mot. 32-35.) This argument fails as a defense to Steves' request for injunctive relief for the same reasons it fails as a defense to

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[redacted]

Steves' damages claim, because the evidence reflects that Steves has suffered antitrust injury. Indeed, the propriety of Steves' request for injunctive relief is particularly compelling given that, as JELD-WEN acknowledges, the Clayton Act authorizes a "private plaintiff" to seek such relief to prevent future "*threatened* loss or damage." *See Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 112 n.8 (1986) (citing legislative statements in supporting section 16 that "a man does not have to wait until he is ruined in his business before he has his remedy").

JELD-WEN misplaces reliance on cases finding inadequate, *at the pleading stage*, overly vague allegations of injury (Mot. at 33). *See Ginsburg*, 623 F.3d at 1235 (plaintiffs' alleged injuries were "both speculative and localized"); *Am. Med. Ass'n v. United Healthcare Corp.*, 2007 U.S. Dist. LEXIS 18729, at *21-23 (S.D.N.Y. Mar. 5, 2007) (plaintiffs' alleged injury would come to pass only if four separate "contingencies" came to pass, and complaint alleged no facts suggesting they would); *S. Austin*, 2001 U.S. Dist. LEXIS 9850, at *35 ("[P]laintiffs argue that they have standing by simply alluding to the proportions of the merger, and leaving it to the court to infer a threat of an antitrust violation[.]").[19] These cases are inapposite here, where discovery has disclosed evidence of actual competitive harm directly attributable to the merger.

IV. STEVES IS ENTITLED TO DECLARATORY RELIEF REGARDING THE CONTRACT TERMINATION DATE

Finally, JELD-WEN argues that this Court "lacks jurisdiction" to consider Steves' claim for declaratory relief regarding the termination date of the contract. (Opp. 35.) As further evidence of its anticompetitive behavior, for more than two years, [redacted]

[19] JELD-WEN fails to mention that, in *South Austin*, the Seventh Circuit on appeal explicitly *rejected* the district court's conclusion that the plaintiff had failed adequately to allege antitrust injury, even though their allegations were far less detailed than the factual record here. *See S. Austin Coal. Cmty. Council v. SBC Commc'ns, Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001).

[redacted] The fact that JELD-WEN—with the piercing spotlight of this lawsuit turned upon it—*now* belatedly says it "agree[s] that the termination date of the Agreement is [redacted]" (Mot. at 35) does not moot this case. As the Supreme Court has cautioned, "a defendant claiming that its voluntary compliance moots a case bears a formidable burden": the defendant must show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). Otherwise, "a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Empl. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012).

Here, JELD-WEN offers no assurance that it will continue to adhere to its new position. As late as May 2017, when JELD-WEN filed its Amended Answer in this case, it was disputing Steves' claim regarding the termination date of the contract. (Dkt. No. 248 ¶¶ 189-190.) If there is no surviving dispute, Steves is entitled to judgment in its favor on this issue; Steves is, at least, entitled to include its request for declaratory relief in the remedies phase of this case.

CONCLUSION

For the foregoing reasons, Steves respectfully requests that the Court deny JELD-WEN's Motion for Partial Summary Judgment in its entirety.

Dated: October 20, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I caused a copy of the foregoing to be electronically filed using the CM/ECF system, which will send notification to counsel of record of such filing by operation of the Court's electronic system. Parties may access this filing via the Court's electronic system.

By /s/Lewis F. Powell III
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