No. 19-1397

IN THE
United States Court of Appeals for the Fourth Circuit

STEVES AND SONS, INC.,
Plaintiffs-Appellee,

v.

JELD-WEN, INC.,
Defendants-Appellant.

On Appeal from the
United States District Court for the Eastern District of Virginia
Honorable Robert E. Payne
No. 3:16-cv-545-rep

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEE STEVES AND SONS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Miscellaneous

INTEREST OF THE UNITED STATES

The United States enforces the federal antitrust laws and has a strong interest in ensuring that remedies for antitrust violations restore competition to the market. This brief addresses two issues that impact current and future merger reviews by the Antitrust Division of the U.S. Department of Justice: (1) the application of the equitable doctrine of laches to private-party antitrust suits seeking divestiture of assets after a merger, and (2) the evidentiary significance in a private antitrust suit of a decision by the Antitrust Division not to challenge the underlying merger or acquisition.

The United States urges this Court to recognize that laches does not bar all private-party antitrust suits seeking divestiture filed after the consummation of a merger, particularly those suits in which the private-party plaintiff cooperated with the Antitrust Division's review instead of immediately bringing its own suit to block the merger. The United States also urges that no inference should be drawn from the Division's decision to close an investigation into a merger without taking further action. This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

JELD-WEN, Inc. is a vertically integrated manufacturer of both molded interior doors and doorskins, which are the decorative coverings for molded interior doors. Mem. Op., ECF No. 1783 at 3, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. Oct. 5, 2018) ("Divestiture Op."). Steves & Sons ("Steves") is both a competitor to and a customer of JELD-WEN; Steves manufactures and sells molded interior doors but purchases its doorskins from manufacturers, including JELD-WEN. *Id.*

In May 2012, JELD-WEN and Steves entered into a long-term doorskin supply agreement with a seven-year term, which included provisions governing the prices JELD-WEN could charge Steves and the amount by which JELD-WEN could increase those prices year-to-year depending on various inputs. Divestiture Op. at 4, 16-18, 28. Subsequently, in July 2012, JELD-WEN announced it would acquire Craftmaster Manufacturing, Inc. ("CMI"), another doorskin manufacturer. *Id.* at 3-4, 18. JELD-WEN's entrance into the supply contract with Steves was "part of its plan to secure merger approval" for the CMI deal. *Id.* at 16.

The Antitrust Division investigated JELD-WEN's proposed CMI acquisition and closed that investigation in September 2012 without taking further action. Divestiture Op. at 18-19. JELD-WEN acquired CMI on October 24, 2012. *Id.* at 19.

In September 2014, JELD-WEN requested a price increase from Steves that was not permitted under their contract terms, and which Steves rejected; JELD-WEN then sent notice it would terminate the supply agreement effective September 2021, per the contract terms. Divestiture Op. at 28-31.

In December 2015, after negotiations and mediation with JELD-WEN, Steves met with the Antitrust Division, raising antitrust concerns about the CMI deal. Divestiture Op. at 42. That month, the Division opened an investigation into the deal for a second time. "Steves gave a presentation to the DOJ later that month, and then produced documents to the DOJ in January 2016, in response to a civil investigative demand. On April 7, 2016, JELD-WEN also made a presentation to the DOJ." *Id.* In May 2016, the Division again closed the investigation without taking further action. *Id.*

Shortly thereafter, on June 29, 2016, Steves filed a complaint alleging that JELD-WEN's acquisition of CMI has and will continue to "substantially . . . lessen competition or . . . tend to create a monopoly in the markets for interior molded doorskins" in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Compl. at ¶ 176, ECF No. 1, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. June 29, 2016).

The case was tried to a jury, which found JELD-WEN's acquisition of CMI violated Section 7 and awarded Steves over $100 million in damages for JELD-WEN's antitrust violations and breaches of the supply agreement, as well as future lost profits. Divestiture Op. at 4-5.

Thereafter, Steves sought an injunction requiring JELD-WEN to divest the CMI assets in lieu of the jury's award of future lost profits. Pl.'s Mot. for Equitable Relief, ECF No. 1191, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. Mar. 13, 2018). Steves asked the district court to order JELD-WEN to divest to a "willing independent competitor" the doorskins manufacturing facility in Towanda, Pennsylvania it had acquired through its CMI acquisition and requested that the divestiture be accompanied by a number of other concessions from JELD-WEN, including an irrevocable intellectual

property license, transitional services, opportunities to hire Towanda employees, and doorksin supply agreements. Mem. in Supp. of Pl.'s Mot. for Equitable Relief, ECF No. 1193, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. Mar. 13, 2018).

On June 6, 2018, the United States submitted a statement of interest in the district court in response to Steves's motion seeking divestiture. Statement of Interest of the United States of America Regarding Equitable Relief ("Statement of Interest"), ECF No. 1640, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. June 6, 2018). In it, the United States explained why divestiture "normally is the best way to preserve and restore competition in the relevant market threatened by, or already harmed by, an anticompetitive merger"; outlined the method by which Antitrust Division examines any proposed divestiture to ensure it "addresses the competitive harm caused by the merger and is substantial enough to enable the purchaser to effectively preserve or restore competition"; and urged the court and the parties not to infer anything from the Division's decision not to challenge JELD-WEN's acquisition of CMI. *Id.* at 1, 2 n.1, 5-7.

The district court granted Steves's divestiture request, holding that absent the divestiture, "it is not possible to restore the substantially lessened competition in the market for interior molded doorskins that the jury found was the consequence of the acquisition of [CMI] by JELD-WEN," that Steves had no adequate remedy at law for the antitrust injury it sustained as a result of the merger, that Steves would suffer irreparable injury without the divestiture, that the balance of hardships Steves and JELD-WEN would sustain because of the divestiture tilted in favor of Steves, and that divestiture would serve the public interest. Amended Final Judgement Order at 2-3, ECF No. 1852, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. Mar. 13, 2019). The court also amended the jury's verdict of past antitrust damages for Steves from $12,151,873 to $36,455,619. *Id.* at 2.

In a separate divestiture opinion, the district court examined and rejected a number of JELD-WEN's arguments, including that the affirmative defense of laches should apply to block Steves's divestiture claim because of the years-long delay between the closure of the acquisition on October 24, 2012 and Steves's choice to file suit on June 29, 2016. Divestiture Op. at 117-148.

SUMMARY OF ARGUMENT

The United States files this brief to state its positions on two issues raised in this appeal and urge the Court not to accept JELD-WEN's arguments that would contravene those positions. First, laches should not be uniformly applied to block private-party divestiture suits filed after the consummation of a merger or acquisition. Second, no inference should be drawn from the Antitrust Division's decision to close an investigation into a merger or acquisition without taking additional action. The United States does not otherwise take a position on the district court's decision, the district court's divestiture order, the outcome of the issues raised in this appeal, or the sufficiency of the arguments offered by the parties.

ARGUMENT

I. Laches Should Not Be Applied Uniformly to Private-Party Antitrust Claims Seeking Divestiture Filed After Consummation of a Merger.

Laches is an equitable doctrine that bars relief when a plaintiff has unreasonably and prejudicially delayed in filing suit. "Laches imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)). It "applies to preclude relief for a plaintiff who has unreasonably 'slept' on his rights" and blocks "claims where a defendant is prejudiced by a plaintiff's unreasonable delay in bringing suit after the plaintiff knew of the defendant's violation." *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 121 (4th Cir. 2011). Laches demands a highly fact-specific inquiry; "whether laches bars an action depends upon the particular circumstances of the case." *White*, 909 F.2d at 102.

JELD-WEN wrongly urges this Court to adopt a rigid approach to laches and overturn the district court's conclusion that laches does not

bar Steves's divestiture claim, citing cases that "found that laches barred private-party divestiture claims brought *at any time* after a merger was consummated." Redacted Br. for Defendant-Appellant ("Br.") at 44, ECF No. 35 (June 10, 2019) (citing *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010); *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1125 (N.D. Cal. 2011); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1172-73 (C.D. Cal. 2000)). Although the Supreme Court noted laches may apply to block a "belated" private-party antitrust divestiture claim, it has never stated—and this Court should not adopt—a rule that laches bars every suit filed after the consummation of a merger, or that all claims filed post-consummation are belated. *California v. Am. Stores Co.*, 495 U.S. 271, 294-95 (1990) (noting that laches may apply to "protect consummated transactions from belated attacks by private parties"). A rigid or reflexive application of laches to all divestiture suits filed post-consummation conflicts with the equitable nature of the remedy and could hamper both private and public antitrust enforcement.

Rather than uniformly time-barring suits post-consummation, the doctrine should allow the court to take into account that a plaintiff

actively cooperated with a government investigation of the transaction, or that the potential antitrust harms of a transaction may not have been apparent to the plaintiff before consummation.

A. Plaintiffs May Reasonably Delay Filing to Assist the Government's Merger Review Process.

The Antitrust Division relies on the cooperation of third parties when investigating mergers. JELD-WEN's laches argument risks undercutting such cooperation. Private plaintiffs should not be penalized in a laches analysis because they chose to cooperate with antitrust enforcement agencies.

After opening an inquiry into a merger or acquisition, Division employees contact the customers and competitors of the merging parties as well as other third parties, seeking interviews, in-person meetings, and relevant documents. The information the Division gleans from these third parties is essential to developing the Division's understanding of the market in which the merger is occurring and its potential benefits and harms, crucial to any merger investigation. "Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant." U.S. Dep't of Justice and Fed. Trade

Commission, *Horizontal Merger Guidelines* at 2.2.2 (Aug. 19, 2010). "Customers also can provide valuable information about the impact of historical events such as entry by a new supplier" or "the likely impact of the merger." *Id.* Similarly, "[s]uppliers, indirect customers, distributors, other industry participants, and industry analysts can also provide information helpful to a merger inquiry," and the views of third parties "selling products complementary to those offered by the merging firms often are well aligned with those of customers, making their informed views valuable." *Id.* at 2.2.3.

This investigative process occurs during the same post-announcement, pre-consummation period in which potential private plaintiffs challenging a merger under Clayton Act § 16, 15 U.S.C. § 26, would have their first opportunities to file suit. Applying laches to block suits not filed during this period would unjustly cabin the right of a prospective plaintiff to file a private-party antitrust divestiture claim to a small period of time, in which the plaintiff must race the clock to find counsel, attempt to measure the potential impact of a merger or acquisition on its business, evaluate the strength of its evidence, and weigh the wisdom of filing a time-consuming suit rather than pursuing

other options, including cooperating with an Antitrust Division merger investigation.

It is reasonable for a third party to choose to cooperate with the Division and wait to see whether the government decides to challenge a particular acquisition before itself filing suit. Moreover, public policy should not discourage third parties from volunteering their time and expertise to the Division by forcing a potential plaintiff to focus on whether it should be using its limited resources to file suit rather than inform the government's own inquiry.

B. Plaintiffs May Reasonably Delay Filing Because Harmful Merger Effects Can Take Time to Materialize.

Confining suits under § 16 of the Clayton Act by rigidly applying the doctrine of laches also ignores the reasonable possibility that a party could be injured by a merger after it has been consummated, or that the threat of antitrust injury may not materialize until some time after the merger has closed. *Cf. Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 682 (2014) (in a laches analysis, it might be reasonable for a copyright plaintiff to wait and watch before filing suit because "there is nothing untoward about waiting to see whether an infringer's

exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it"). Unlike the government, a private antitrust plaintiff must show actual or threatened antitrust injury *to itself*, not consumers at large; in a private suit, "a plaintiff must still demonstrate that injunctive relief is necessary to prevent injury to its interests," *Garabet*, 116 F. Supp. 2d at 1170, as compared to a government case, in which "proof of the violation of law may itself establish sufficient public injury to warrant relief," *Am. Stores*, 495 U.S. at 295.

In a case in which the merging parties argue that long-term supply contracts will protect customers from anticompetitive effects post-merger, a customer may reasonably delay filing suit pre-merger based on the concern it will face a standing challenge.[1] If laches barred

[1] Indeed, JELD-WEN argues here that its pre-merger supply contract with Steves protected it from antitrust injury. Br. at 35. According to JELD-WEN, Steves did not have antitrust injury (or, hence, standing to bring a Section 7 claim) unless and until it could prove that JELD-WEN breached the supply contracts (1) by virtue of the merger, and (2) in a manner that left Steves worse off than before the merger. *Id.* at 34-42. Although the United States takes no position on whether Steves demonstrated antitrust injury in this case, the United States does note that it would have been difficult for Steves to anticipate, pre-merger, the precise manner in which JELD-WEN would breach its supply contracts post-merger. If, as JELD-WEN argues, antitrust standing

all post-consummation challenges by private parties, then merging parties could attempt to use contractual promises to undermine customers' standing before consummation, and then efficiently breach those contracts after consummation. In such a case, it may be reasonable for the customer to observe the actual or threatened harm only after the date of consummation, and the laches doctrine should be flexible enough to hold the merging parties responsible for such a scheme.

In sum, laches is a fact-specific doctrine. A court may find it was reasonable for a particular plaintiff to have waited until after consummation to file suit for a variety of reasons. Although the United States does not take a position on the applicability of laches in this case, this Court should not create a categorical rule that laches bars challenges to a merger after consummation.

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requires a customer-plaintiff to demonstrate that the precise manner of breach left it worse off than before the merger, the customer may need to observe the breach before it can bring suit.

II. No Inference Should Be Drawn From the Antitrust Division's Closed Investigations of the JELD-WEN/CMI Transaction.

Contrary to JELD-WEN's suggestion, no inference should be drawn from the Division's closure of its investigations into JELD-WEN's proposed and consummated acquisition of CMI. Br. at 67. As the United States has stated twice previously in this case in response to JELD-WEN's assertions, *see* Statement of Interest at 2 n.1, there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive.

CONCLUSION

This Court should reject any rule uniformly applying laches to block private-party divestiture suits filed after the consummation of a merger or acquisition and any attempt to draw an inference from the Antitrust Division's decision to close an investigation into a merger or acquisition without taking additional action.

Respectfully submitted.

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August 23, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fourth Circuit Rule 29 and Federal Rules of Appellate Procedure 29 and 32(a)(7)(B)(iii) because it contains 2,952 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 14-point Century Schoolbook font for the text and footnote.

August 23, 2019

/s/ Kathleen Simpson Kiernan
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CERTIFICATE OF SERVICE

I, Michael F. Murray, hereby certify that on August 23, 2019, I electronically filed the foregoing Brief for the United States as Amicus Curiae with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF System. Once the brief is accepted for filing by the Clerk's Office, I will send one copy to the Clerk of the Court by FedEx.

I certify that counsel for all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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