No. 19-1397

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STEVES AND SONS, INC.,

***Plaintiff-Appellee*,**

and

SAMUEL STEVES; EDWARD STEVES; JOHN G. PIERCE,

Counter Defendants-Appellees,

v.

JELD-WEN, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia at Richmond, Case No. 16-cv-545-REP The Honorable Robert E. Payne, United States District Judge

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee Steves and Sons, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Steves and Sons, Inc. is not aware of any publicly held corporation that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

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INTRODUCTION

Defendant-appellant JELD-WEN, Inc. violated the antitrust laws when it acquired a competitor, Craftmaster Manufacturing, Inc. ("CMI"). As is typical of an anticompetitive merger, JELD-WEN's victims were its customers, who lost the choice of competing suppliers, paid more, and got less. Among those victims was Steves and Sons, Inc. ("Steves"), a 153-year-old family-owned company whose principal business is making interior molded doors, of the sort commonly used in residential construction. Steves bought from JELD-WEN (and had bought from CMI) a key component of those doors, the decorative facings known as "doorskins." The acquisition forced Steves to pay more for doorskins than it would have in the competitive market before the acquisition. Worse, JELD-WEN is also Steves' rival in making finished doors, and the acquisition gave JELD-WEN so much control over doorskin supply that JELD-WEN adopted (in its words) a "plan…to kill off" door manufacturers like Steves, and be "ready to take [the] opportunity" of seizing their door business for itself. Until this litigation, JELD-WEN's "plan" was on the cusp of success, because

Steves' business was set to perish when its supply agreement with JELD-WEN runs out.

Those are the hard facts, found by a jury, after a full trial. JELD-WEN was entitled to that jury trial, but having lost, it is no longer entitled to peddle its own version of the facts in this Court. Yet JELD-WEN spends thousands of words flouting the most basic rule of appellate review: What matters is what the jury found true, not the evidence it rejected.

For JELD-WEN's unlawful acquisition, the Clayton Act specifies that injured private parties may obtain damages and equitable relief. Here, the jury awarded Steves past damages, and, because JELD-WEN's acquisition had doomed Steves, the jury also awarded the profits Steves will lose when its business fails. But Steves wants to thrive as it has for generations; it does not want to live off a damage award. So after trial, Steves asked for equitable relief instead of those lost profits, in the form of an order directing JELD-WEN to undo its unlawful acquisition by selling off the key asset it obtained—a doorskin factory in Towanda, Pennsylvania (a plant known as "Towanda"). Although private parties rarely seek such orders, Congress has authorized them

in Clayton Act § 16, 15 U.S.C. § 26, because divestiture is "the remedy best suited to redress the ills of an anticompetitive merger." *California v. Am. Stores Co.*, 495 U.S. 271, 285 (1990).

Reviewing the enormous record it had amassed, and putting trust in established principles of equity, the District Court concluded that divestiture was warranted in a 149-page order, full of findings that JELD-WEN all but ignores. The Court established a process to ensure that competition will be restored, to be administered in the first instance by a retired federal judge appointed as Special Master. JELD-WEN points to that result as extraordinary, but if divestiture is ever to be ordered in private litigation—as *American Stores* says it can be—the Court's equitable order shows why this is exactly the right case.

The judgment below is correct and should be affirmed.

ISSUES PRESENTED

1. Whether the jury had sufficient evidence to conclude that Steves was injured by the lessened competition resulting from JELD-WEN's unlawful acquisition of CMI.

2. Whether, after the jury found that JELD-WEN unlawfully acquired CMI, the District Court clearly erred or abused its discretion

in rejecting JELD-WEN's laches defense and finding that traditional equitable factors favored divestiture, "the remedy best suited to redress the ills of an anticompetitive merger," *Am. Stores*, 495 U.S. at 285.

3. Whether the jury had sufficient evidence (a) to conclude that, after the Supply Agreement runs out, Steves' business is not viable due to JELD-WEN's acquisition of CMI, and (b) to make a reasonable estimate of Steves' resulting damages.

4. Whether the District Court abused its discretion in excluding or limiting certain evidence presented at trial under Federal Rule of Evidence 403.

5. Whether the District Court correctly instructed the jury on JELD-WEN's trade-secret counterclaims.

6. Whether the District Court properly entered judgment as between JELD-WEN and the individuals JELD-WEN accused of trade-secret misappropriation, having permitted those individuals to intervene as defendants to JELD-WEN's claims.

STATEMENT OF THE CASE

This case was tried to a jury and to the District Court. Yet JELD-WEN's statement of the case (and its argument) dwell on an

"impermissibly one-sided…version of the facts," *Jordan v. City of Cleveland*, 464 F.3d 584, 588 n.2 (6th Cir. 2006), that persuaded neither the jury nor the Court. JELD-WEN's approach "does violence to the fundamental principle that on an appeal from an unfavorable verdict the appellant (like the reviewing court) must treat the record in a manner most favorable to the appellee, with all reasonable inferences drawn in the same direction." *Id.* Steves presents below the evidence the jury *accepted* and the factual findings the District Court *did make* in its 149-page opinion on equitable relief, augmented by more detailed discussion as necessary under each argument heading. Record citations to the District Court's factual findings or legal rulings are marked with an asterisk (*).

A. Steves' family business

Steves was founded in 1866 in San Antonio, Texas, by Edward Steves, a German immigrant. JA2707:2-9. Steves employs over a thousand people, with door factories in Texas, Virginia, and Tennessee. JA1954:25-JA1955:1, JA1958:14-20. The fifth and sixth generations of the Steves family now manage the company. JA1953:4-21, JA1956:3-9.

Steves makes interior molded doors—the standard type used in residential construction—which it sells to retailers and homebuilders. JA1955:13-19, JA1962:2-18. Such doors are made with a wooden frame and filling material, to which molded doorskins are glued, forming the front and back of the door. JA190 ¶5. The product resembles a solid wood door, but is lighter and can be made and shipped at lower cost. Steves has never made doorskins; it has always purchased them from doorskin manufacturers. JA1968:22-23.

B. The doorskin market before 2012

From 2001 to 2012, there were three doorskin manufacturers: Masonite, JELD-WEN, and CMI. By the end of that period, all three were vertically integrated, meaning that each produced doorskins and used those doorskins internally to make its own finished doors. JA3435*. CMI manufactured doorskins at Towanda. JA3440-JA3442*. The doorskin manufacturers also sold doorskins to other door manufacturers—known as the "Independents," including Steves—which benefitted from competition among those suppliers.

This competition saw manufacturers competing on "[p]rice, quality, service, all those characteristics." JA2582:4-9. For example,

manufacturers created new styles of doorskins to win customers. JA3443*, JA2721:1-4. In 2010-2011, when JELD-WEN demanded higher prices from Steves for doorskins that complied with new environmental regulations, Steves was able to shift its purchasing to Masonite and CMI, which did not demand a similar premium. JA2214:18-JA2217:10. And they competed to win a long-term supply agreement for Steves in 2011-2012, netting Steves substantial savings. JA2211:1-JA2214:17, JA1983:8-13. As Steves' expert witness explained, "That's competition in action." JA2217:9-10.

C. JELD-WEN's acquisition of CMI—and its plan to thwart opposition to that acquisition

In 2012, JELD-WEN acquired CMI (including Towanda). The jury found that acquisition unlawful under Clayton Act § 7, 15 U.S.C. § 18, which prohibits acquisitions whose "effect…may be substantially to lessen competition."

1. CMI was formed in 2001 when Masonite divested Towanda as part of a merger not at issue here. JA2503:21-JA2504:20. In 2011, CMI's owners sought to sell the company, and many bidders expressed interest. JA2507:18-JA2508:5. JELD-WEN prevailed; its acquisition of

CMI was publicly announced in mid-2012 and closed in October 2012. JA3450-JA3451*.

As JELD-WEN's CEO recognized from the very beginning of the bid process, "The anti trust issue is huge." JA1566. Because "JELD-WEN knew full well of the merger's antitrust implications," it formed a plan to subvert the Clayton Act's enforcement mechanisms. JA3561*.

In particular, JELD-WEN decided to notify the U.S. Department of Justice's Antitrust Division ("DOJ") about its acquisition of CMI, but *only after* it entered into long-term supply contracts with Steves and other Independents, "knowing that this oft-used tactic would assuage the concerns of the DOJ and the Independents about anticompetitive effects of the proposed merger." JA3450-JA3451*; *see* JA3448*. Privately, JELD-WEN labeled it a "tactical error to even call the DOJ" before having supply agreements in place. JA1596. When JELD-WEN discussed the acquisition with DOJ, it "emphasized" that it had entered these agreements. JA3451*, JA1601.

2. JELD-WEN entered into such an agreement with Steves (the "Supply Agreement") in May 2012, before JELD-WEN approached DOJ. JA2721:16-18, JA1582 (Supply Agreement). The automatically

renewing agreement would last at least through 2019, and was terminable by JELD-WEN on seven years' notice or by Steves on two years' notice. JA1582-JA1583 ¶¶2-3. Steves could terminate immediately if JELD-WEN gave notice of termination. JA1583 ¶3.a.2.b. The Agreement provided that JELD-WEN's prices would "remain in effect…unless a price increase or decrease" in certain of JELD-WEN's "key input costs" occurred, and established a price-adjustment formula based on those costs. JA1584 ¶6.b-c. But, significantly, the Agreement contained several provisions allowing Steves to purchase doorskins from competing suppliers. JA1583-JA1584 ¶4; *see infra*, p. 35 (detailing those provisions).

3. As JELD-WEN expected, DOJ contacted Steves, and all went according to JELD-WEN's plan: The week after signing the Supply Agreement, JELD-WEN told Steves that this was a "life time deal." JA1594. As a result, "Steves had no reason to believe that there would be anticompetitive effects from the merger because JELD-WEN designed its pre-merger strategy to create that state of mind." JA3562*. Steves told DOJ that "it did not oppose the merger because it believed that the Supply Agreement would prevent JELD-WEN from taking any

anticompetitive actions." JA3451*, JA2721:22-JA2722:23. DOJ shuttered its investigation, and the acquisition closed. JA3451*.

D. The anticompetitive effects of JELD-WEN's acquisition of CMI

The acquisition had profound anticompetitive consequences.

1. JELD-WEN recognized and exploited the advantage it had gained. A large private equity investor in JELD-WEN explained that the CMI acquisition "made us [JELD-WEN] and Masonite the only two manufacturers of [doorskins] in North America, which over time will improve our pricing power." JA1644; *see* JA2231:15-JA2232:5 (expert testimony discussing the presumptive effects of concentrating control over the doorskin market from three suppliers to two).

Internally, JELD-WEN considered "taking price up on customers or killing them off," and acknowledged that its "plan is to kill off a few." JA1803; *see* JA1835 (draft JELD-WEN internal presentation reflecting a strategy to "Reduce External Sales" and be "ready to take the market opportunity" when Independents failed). As to Steves in particular, JELD-WEN looked ahead to a time when it would "exit all the Steves business." JA1857. "Killing off" its customers made sense for JELD-WEN, as Steves' expert explained: "[I]f the independents have trouble

getting door skins, can't make as many doors, that makes more door sales for the two large players, Jeld-Wen and Masonite, to pick up more money selling doors." JA2287:21-24.

Exercising this power (and breaching the Supply Agreement's pricing provisions), JELD-WEN set prices above competitive levels in 2013, 2014, and 2015, despite key input costs that declined each year. JA3460-JA3461*, JA2257:12-JA2262:9. In September 2014, after Steves refused to pay additional charges that JELD-WEN demanded, JELD-WEN gave notice terminating the Supply Agreement effective September 10, 2021. JA3462-JA3463*, JA1788.

The acquisition also degraded the quality of doorskins manufactured by JELD-WEN. JA2001:2-JA2003:6, JA2019:2-5; *see* JA2080:17-JA2083:4. Internally, JELD-WEN acknowledged these "quality issues" at Towanda made "[t]hings…really different from the cmi days" and "all the independents are bitching." JA1645. JELD-WEN's customer service suffered too. JELD-WEN changed the way it handled defective doorskins and stopped reimbursing Steves for door costs when defective doorskins caused finished doors to fail. JA3463-JA3464*; *compare* JA2089:11-17, JA2185:21-22, JA2701-JA2702 (pre-

acquisition practices), *with* JA1908:12-17, JA2098:1-14, JA2548:23-JA2549:6, JA2015:3-23, JA2138:13-JA2139:13, JA1790 ("much more stringent," "hard line" post-acquisition practices). JELD-WEN could do all this because, as a JELD-WEN executive commented about another Independent, "they know they have few options." JA1647.

2. The acquisition also set the stage for Masonite to publicly announce in May 2014 that it "will not sell [its] molded door facings to any other players in the North American space." JA1657. Masonite's CEO specifically told Steves in October 2014 and again in early 2015 that Masonite would not sell doorskins to Steves under a long-term agreement. JA2724:19-JA2725:22, JA2051:7-JA2052:9, JA1445.

As Steves' expert economist explained, after the acquisition Masonite saw the benefit in following JELD-WEN's lead because, "if JELD-WEN is successful in terminating Steves and [other Independents], 20 percent of the market [for finished doors] is potentially up for a share grab effectively between [those] two large players." JA2286:8-JA2288:20. Putting an even finer point on Masonite's decision, in July 2014 JELD-WEN's CEO sent Steves a Masonite presentation "ma[king] clear that Masonite would not sell

doorskins to companies that competed with it in the North American door market, as Steves did." JA3462*; *see* JA3564-JA3565*, JA1672.

3. In the face of all these events, the Supply Agreement proved to be no protection against the loss of competition among JELD-WEN, CMI, and Masonite. Steves could do little to exercise its right to buy some of its doorskins from competing suppliers. JA2718:11-16. No competing suppliers existed to undercut JELD-WEN's price increases and allow Steves to push JELD-WEN to match their prices or lose Steves' business. JA2719:8-16. And even though JELD-WEN's notice of termination nominally gave Steves the right to take its business elsewhere, JELD-WEN's actions had eliminated all viable competing suppliers. As Steves' President explained at trial, Steves didn't and *couldn't* walk away from JELD-WEN because "[Steves] ha[s] no choice. There's no one else for us to buy molded door skins [from]." JA2019:6-10.

E. The impending failure of Steves' business

The upshot is that Steves' days were numbered—marked by the months left until expiration of the Supply Agreement. As the District Court and jury both found, "if Steves cannot obtain a reliable doorskin

supply, its business will soon fail." JA3469*; *see* JA2034:2-12, JA2036:10-17, JA2427:12-15, JA2475:15-JA2476:25.

"[T]he record proves that JELD-WEN cannot be relied upon to supply Steves with doorskins" after the Supply Agreement runs out. JA3466*. JELD-WEN is executing a plan to stop selling doorskins to Independents. JA1835. JELD-WEN has been unwilling to propose terms for a new long-term supply agreement to Steves. JA2543:9-21, JA1454, JA1455, JA1861, JA1456. And Steves cannot turn to Masonite. *See supra*, pp. 12-13.

Furthermore, "Steves cannot fulfill its doorskin requirements from foreign manufacturers or by building its own doorskin plant." JA3468. Foreign suppliers offer only a tiny fraction of the doorskin designs and sizes that Steves needs (JA2044:15-JA2046:15), to say nothing of quality issues with foreign suppliers (JA2048:12-JA2049:25), or the political volatility where some are located (JA2050:1-18). Steves also extensively investigated whether it could build its own doorskin plant, meeting with both equipment suppliers and potential manufacturing partners. JA2038:16-JA2041:7, JA2043:13-JA2044:1. These efforts were fruitless. JA2037:11-JA2038:16, JA2041:8-JA2044:14. In short,

until the District Court granted equitable relief to restore competition in the doorskin market, Steves had no way to continue in business beyond September 2021.

F. The parties' dispute-resolution efforts and the filing of this action

Once the harm to Steves from the acquisition became evident in 2014, Steves moved with dispatch—first pursuing (in late 2014 and early 2015) all the conceivable sources of doorskin supply just described, and then invoking (in March 2015) the multi-step dispute resolution process in the Supply Agreement (JA1585-JA1586 ¶10, JA2727:18-JA2728:10, JA1448-JA1449). In 2015, the parties held face-to-face conferences and a mediation; all failed. JA2728:23-JA2729:3, JA2730:17-19, JA2732:1-7. The parties then entered into a series of standstill agreements in 2015 and 2016 that recited their mutual desire to find a resolution rather than litigate. JA1848, JA1850, JA1851, JA1852, JA1860. When JELD-WEN refused to execute another standstill agreement, Steves filed this action in June 2016. JA2851:2-3; JA188. Steves' complaint asserted antitrust and breach of contract claims. JA227-JA233 ¶¶175-200.

G. Trial on Steves' claims

Steves' antitrust and breach-of-contract claims were tried to a jury over twelve full days. The jury heard live testimony from multiple members of Steves' and JELD-WEN's management, and from CMI's former CEO. The jury also saw video deposition testimony from more than a dozen witnesses, including Masonite's CEO, other members of Steves' and JELD-WEN's management, JELD-WEN's CEO at the time the parties entered into the Supply Agreement, and managers at the large private equity investor in JELD-WEN.

The jury also heard from four expert witnesses. In addition to addressing the topics noted above, Steves' expert economist, Prof. Carl Shapiro, testified that JELD-WEN's acquisition of CMI was presumptively anticompetitive (JA2217:16-JA2232:5), and that, despite his extensive analysis, the only explanation he could find for JELD-WEN's post-acquisition pricing was a loss of competition due to the acquisition (JA2235:8-JA2274:23). He further testified that the acquisition would continue to lessen competition. JA2289:8-JA2299:25. Ave Tucker, an accountant, testified about the damages Steves suffered from JELD-WEN's conduct. JA2430:9-JA2452:17, JA2456:9-JA2487:4.

JELD-WEN's expert economist disputed Prof. Shapiro's conclusions and contended—as JELD-WEN does on appeal—that factors other than the acquisition explained JELD-WEN's price increases. JELD-WEN's damages expert criticized Mr. Tucker's analysis and opined that Steves suffered no cognizable damages.

JELD-WEN's counsel's final words to the jury at closing argument captured (albeit with some hyperbole) the reality that this was a case of conflicting factual accounts—about the acquisition, about its effects, and about how Steves was harmed. JA2689:22-JA2690:3 ("[I]n order to find for Steves in this case, you have to find that every single one of [JELD-WEN's witnesses] lied to you….").

The jury returned a verdict in favor of Steves. The special verdict form reflects findings that JELD-WEN's acquisition of CMI violated the Clayton Act; that this violation caused Steves antitrust injury; that Steves proved both past damages and lost profits; and that JELD-WEN also breached the Supply Agreement in the ways Steves claimed at trial. The jury awarded damages in line with Steves' expert's computations. JA603.

H. Proceedings on Steves' claim for equitable relief

1. The District Court next entertained Steves' request for equitable relief under Clayton Act § 16, which authorizes private parties to seek divestiture to remedy an unlawful acquisition "when appropriate in light of equitable principles," *Am. Stores*, 495 U.S. at 285. In addition to considering the full trial record (JA673, JA1938:20-24), the Court heard three days of further testimony and two days of argument. The parties agreed to permit cross-examination beyond the scope of direct testimony for each witness (JA675), which allowed Steves to make a record through JELD-WEN's witnesses that selling Towanda would be feasible and a relatively small hardship for JELD-WEN.

2. In a comprehensive 149-page decision, the District Court granted Steves' motion for an order directing JELD-WEN to divest Towanda. Applying "well-established principles of equity," *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), the Court recognized irreparable injury of the highest order—annihilation of Steves' business, "which the Court (like the jury) f[ound] would not survive without injunctive relief restoring competition." JA3515*.

This injury also revealed Steves' lack of an adequate remedy at law. Although the jury's lost-profits award would be a partial remedy, Steves has been owned and run by the same family for more than 150 years, and the right to continue a long-established family business "is not measurable entirely in monetary terms." JA3508*(quotation marks omitted). "[W]ith an adequate supply of doorskins, Steves would, as it has for 150 years, continue in business and prosper," something of "incalculable value" far greater than "just liv[ing] off of the damages award." JA3515-JA3516*.

Balancing the relative hardships to the parties, the District Court took JELD-WEN's claimed hardships at face value (JA3519-JA3528*), but found that all "c[ould] be ameliorated by allowing time for an orderly divestiture, by imposing terms to assure JELD-WEN a reliable source of doorskin supply…, [and] by assuring that divestiture occurs in an environment and under circumstances that will produce a reasonable purchase price" (JA3528*). These manageable hardships were outweighed by the mortal threat to Steves of "permanently going out of business." JA3528*.

Finally, the District Court recognized that divestiture would serve the public interest in competition announced by Congress in the Clayton Act. JA3528-JA3531*. Analyzing the evidence, the Court found that "a divested Towanda would provide significant competition in the doorskin market and restore competition that the merger lessened." JA3538-JA3544*; *see* JA3477-JA3484*.

The Court adopted the approach of *Brown Shoe Co. v. United States*, 370 U.S. 294, 306-09 (1962), where the Supreme Court reviewed and affirmed a trial court divestiture order that established a two-step process: order divestiture first, and then—after affirmance on appeal removes any uncertainty about that order—proceed to identify a buyer and carry out the sale. JA3535*. The Court noted that Towanda had been successfully divested in 2002 (JA3440-JA3442*), and that CMI had attracted many serious bidders in 2011-2012 (JA3447*), but recognized that if no suitable buyer emerges this time around, divestiture will not occur (JA3535-JA3537*).

3. The District Court rejected JELD-WEN's laches defense on two independent grounds. *First*, examining a fine-grained timeline of events, it found Steves' delay in filing suit was reasonable—early on,

because Steves had no apparent antitrust claim to assert (something that was part of JELD-WEN's scheme), and later on, because Steves diligently pursued every reasonable option (especially settlement with JELD-WEN) before filing suit. JA3558-JA3574*. *Second*, the Court found no prejudice to JELD-WEN from the delay, because the evidence showed that the timing of Steves' suit made no difference in how JELD-WEN conducted its business. JA3574-JA3580*.

4. The District Court's equitable decree includes both an order directing divestiture and "ancillary" provisions establishing transitional measures to ensure Towanda's viability under new ownership and to minimize JELD-WEN's hardship. *See* JA3547-JA3549*.

Furthermore, "to assure the success of [the divestiture] process, a Special Master [was] appointed." JA3581*. Following briefing, the District Court entered an order detailing the Master's role and responsibilities and, with the parties' concurrence, appointing the Hon. Lawrence F. Stengel, retired Chief District Judge for the Eastern District of Pennsylvania, to that position. JA1423-JA1435*. The Master is tasked with: learning about Towanda, the marketplace, and potential buyers; monitoring JELD-WEN's preservation of Towanda;

developing a plan for divestiture to an appropriate buyer; and carrying out that plan. JA1424-JA1428*. The Master has, with the Court's approval, engaged an accounting firm to assist him (JA1441*) and has visited Towanda.

I. JELD-WEN's trade-secret counterclaims and trial

In parallel to the above proceedings, JELD-WEN brought trade-secret misappropriation counterclaims against Steves. Those claims arose from Steves' retention in 2015 of a consultant—appellee John Pierce, a former JELD-WEN employee—to help Steves determine the accuracy of JELD-WEN's claimed key input costs (which affected pricing under the Supply Agreement). JA2972:3-JA2973:15. Steves also asked Pierce to help it assess the viability of building its own doorskin plant or sourcing doorskins from foreign suppliers. JA2973:16-JA2974:2. Pierce provided Steves information that JELD-WEN later claimed as trade secrets.

Steves produced its communications with Pierce in discovery in the antitrust case. JA2966:5-23, JA2975:12-19. JELD-WEN then brought trade-secret counterclaims against Steves. JA3631-JA3651. The District Court permitted appellees Pierce, Sam Steves (Steves'

President), and Edward Steves (Steves' CEO) (collectively, "Intervenors") to intervene as counter-defendants alongside the company. JA417*, JA418*. A jury found that 59 of the 67 alleged trade secrets were not, in fact, trade secrets. JA825. On the remaining 8, the jury found that Steves had misappropriated JELD-WEN's trade secrets, but had not done so willfully and maliciously, awarding $1.2 million in damages. JA825.

J. The District Court's final judgment

The District Court entered a final judgment that awards Steves its preferred remedies, while avoiding inconsistent or double recovery. JA1409*. In particular, [1] Steves accepted the larger antitrust past damages award in lieu of contract damages, and [2] Steves accepted the equitable relief of divestiture to prevent going out of business in lieu of lost profits for its otherwise-impending demise. JA1410-JA1417*. To facilitate efficient and comprehensive review on appeal, the Court entered judgment on the remedies Steves elected (antitrust past damages and divestiture), and only in the alternative on the second-best remedies (contract damages and lost profits). JA1418-JA1419*; *see*

JA1406-JA1407*. The Court also awarded declaratory relief on the proper interpretation of the Supply Agreement. JA1420-JA1421*.

On JELD-WEN's trade-secret counterclaims, the District Court entered judgment against Steves on the damages verdict (which Steves has paid), denied injunctive relief, and entered judgment for Intervenors because JELD-WEN had not pursued those individuals at trial. JA1420-JA1421*, JA1129-JA1141*.

JELD-WEN filed a bond to stay execution of the money judgment. JA1439*. The Special Master's preparatory activities are not stayed, but divestiture itself is stayed pending this Court's decision. JA1416-JA1417*.

SUMMARY OF ARGUMENT

The District Court presided over a twelve-day jury antitrust trial, heard five more days of testimony and argument on equitable issues, and admitted hundreds of exhibits. JELD-WEN's arguments on appeal are largely attempts to relitigate factual issues already decided by the jury, by the District Court, or both.

I. The jury correctly found that Steves suffered antitrust injury as a result of JELD-WEN's unlawful acquisition of CMI. Most

prominently, the Supply Agreement itself allowed Steves to turn to competing suppliers—an option that Steves could have used to parry JELD-WEN's price increases, but which JELD-WEN extinguished in the acquisition. Steves' expert testimony on causation and damages tracked Supreme Court precedent that allows juries to make "just and reasonable inference[s]" on both subjects.

II. JELD-WEN next invites this Court to make all new findings and reweigh all the factors that led the District Court to order divestiture. This Court should decline. The District Court's painstaking order rightly recognizes that equitable relief is the proper (indeed, only) way to stop JELD-WEN's plan to destroy Steves. Such irreparable injury to Steves far outweighs the impact on JELD-WEN of selling Towanda (a facility that has already changed hands twice in the past two decades). And the public interest in competition favors unwinding unlawful acquisitions where feasible, rather than allowing JELD-WEN to keep the fruits of its illegal acts. Any residual uncertainty about whether divestiture will succeed can be resolved when the Special Master assists the District Court in the sale process.

As the District Court explained, if divestiture will not succeed, divestiture will not occur.

The District Court also correctly rejected JELD-WEN's laches defense. Laches is fact-intensive. Here, the District Court found that Steves acted diligently throughout—indeed, JELD-WEN's *own* conduct is largely what delayed this suit. The record also supports the District Court's alternative finding that JELD-WEN suffered no prejudice, because it would have run its business no differently had Steves sued earlier.

III. The lost profits judgment is a fallback alternative to equitable relief (for example, if divestiture cannot be accomplished). The jury's logic is simple and rooted in the record: Steves depends on doorskins. JELD-WEN has terminated its agreement to supply doorskins to Steves. Steves has nowhere else to turn. JELD-WEN's anything-is-possible attitude toward Steves' survival ignores the record that, beyond the lifeline of the remaining months on the Supply Agreement, Steves is not viable. The jury therefore accepted Steves' expert's projections of the profits Steves will lose when its business ceases.

IV. The evidentiary rulings under Rule 403 that JELD-WEN challenges were sound. Evidence of DOJ's discretionary decision not to bring an enforcement action against JELD-WEN would have unfairly prejudiced Steves and confused the jury about its role. JELD-WEN's evidence about CMI's pre-acquisition financial condition could not satisfy the demanding multi-element test for using an acquired company's financial condition to justify an otherwise anticompetitive acquisition. And the District Court permitted evidence in the antitrust trial that Steves *possessed* (limited) know-how about doorskin production, just not the irrelevant fact of *how* Steves obtained it.

V-VI. As for the trade-secret proceedings, JELD-WEN's arguments regarding jury instructions were variously forfeited below, meritless under relevant authority, or outright harmless as to most of JELD-WEN's asserted trade secrets. JELD-WEN's objection to the judgment for Intervenors ignores that intervenors are full parties to litigation; the eventual consequence of permitting intervention is entry of judgment either against—or in this case, in favor of—the intervenor.

VII. JELD-WEN's extraordinary request for reassignment on remand is unfounded. The district judge committed no error.

Moreover, the sort of errors JELD-WEN asserts are nowhere close to the "unusual circumstances" that warrant jettisoning the expertise the district judge has accumulated about this complex dispute.

STANDARD OF REVIEW

Nearly every issue JELD-WEN raises is subject to a highly deferential standard of review. Many are naked challenges to the sufficiency of the evidence before the jury, yet JELD-WEN never cites the relevant standard of review: Examining an antitrust jury verdict, this Court is "bound to view the evidence in the light most favorable to [Steves] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). And the Court must "disregard all evidence favorable to [JELD-WEN] that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Other applicable standards of review are discussed below.

ARGUMENT

I. Substantial Evidence Supports the Jury's Finding That JELD-WEN's Unlawful Acquisition of CMI Injured Steves

Steves suffered "injury of the type the antitrust laws were intended to prevent and that flows from that which ma[de] [JELD-WEN's acquisition of CMI] unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Here, as in any antitrust case, "the fact of injury and the amount of damages [we]re questions for the jury to decide." *Int'l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 431 (4th Cir. 1986). JELD-WEN does not challenge the District Court's (entirely correct) jury instructions on antitrust injury. JA645. The special verdict form even posed an interrogatory on antitrust injury (JA603), which was added at JELD-WEN's request (JA588-JA589, JA596). By answering that interrogatory affirmatively, the jury made a factual finding that Steves' past damages were materially caused by reduced competition, not by a mere contract breach (or any of the other causes JELD-WEN posits).

The jury's finding of antitrust injury should come as no surprise. Any acquisition that reduces a market from three suppliers to two (JA2224:20-JA2232:5) and drives up prices (JA2235:8-JA2274:23) has

very likely injured competition. In such acquisitions, customers like Steves are on the firing line because they are the first to lose the benefits of competing suppliers. Here, JELD-WEN adopted an obviously anticompetitive "plan…to kill off" its own customers. JA1803.

Indeed, JELD-WEN makes no real effort to defend its legally indefensible acquisition of CMI. Instead, it argues that, contrary to the jury's findings, the unlawful merger did not harm Steves. *First*, JELD-WEN contends that "Steves was fully protected by a contract that"—apparently as a matter of law, regardless of a jury's findings—"precludes a showing that Steves suffered antitrust impact or injury." JELD-WEN Opening Br. ("Br.") 33. *Second*, JELD-WEN quarrels with how Steves' expert economist analyzed causation. *Third*, JELD-WEN mixes apples and oranges to argue that supposed defects in Steves' *damages* analysis shows it suffered no *injury*. Each argument is unsound.

A. The jury correctly found antitrust injury because continuing competition was integral to the parties' relationship—until JELD-WEN destroyed that competition

1. Despite proposing below only the modest jury instruction that "a breach of [contract] *does not by itself establish* an antitrust injury" (JA505 (emphasis added)), JELD-WEN now proposes that such a breach *entirely negates* antitrust injury as a matter of law (Br. 33). JELD-WEN's position on appeal has been firmly rejected as too blunt. "[A]n individual act of misconduct can be the gravamen of more than one wrong to a single plaintiff. Not every antitrust claim in a contract case is simply a contract claim masquerading as a candidate for treble damages." *SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995) (Boudin, J.); *see City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1368 (9th Cir. 1992) ("We are not convinced that antitrust liability may not be predicated on conduct which also happens to create a contract dispute.").

Indeed, both the Supreme Court and this Court have recognized antitrust injury notwithstanding the existence of a contract breach. *See, e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 468 n.2, 481-84 (1982) (holding antitrust injury was adequately pled where conduct

allegedly breached an insurance contract, but would not have occurred "but for the alleged [violation of the Sherman Act]"); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1278-80 (4th Cir. 1987) (antitrust injury existed where breach of contract left plaintiff exposed to anticompetitive tying scheme).

To identify cases in which antitrust injury is *absent*, courts ask whether the plaintiff would have suffered the same injury even without the anticompetitive behavior. For example, in *Brunswick*, the Supreme Court found no antitrust injury because the plaintiffs "would have suffered the identical 'loss'" had their competitors been rejuvenated through lawful means (*e.g.*, bank financing) rather than through an unlawful acquisition. 429 U.S. at 487-88.

That "identical loss" approach resolves the question whether a plaintiff's harm is caused *solely* by a breach of contract, or whether instead the anticompetitive conduct was *also* necessary to cause the loss—in the Supreme Court's words, whether anticompetitive conduct was "a *material* cause of the injury," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (emphasis added). Thus, courts have denied antitrust recovery where the "[plaintiff] would have

suffered an identical loss if the defendants had [breached]…the contract for reasons unrelated to the alleged antitrust violations." *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981); *see SAS*, 48 F.3d at 44 ("[Plaintiff] would have been no less damaged if [defendant] had breached the contract but [not committed the allegedly anticompetitive acts]."); *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 404 (6th Cir. 1997) (similar).

JELD-WEN relies heavily (Br. 31-32) on *Orion Pictures Distribution Corp. v. Syufy Enterprises*, 829 F.2d 946 (9th Cir. 1987), but misapplies *Orion*'s holding. There, antitrust injury was absent because, once the plaintiff film distributor had agreed to license a particular film to the defendant movie exhibitor on certain terms, "competition was no longer a factor in determining [the exhibitor's] obligation to [the distributor]." 829 F.2d at 949. That reasoning is equivalent to the "identical loss" test because, where "competition [i]s no longer a factor" in the parties' relationship, the plaintiff will suffer an identical loss from a contract breach regardless of the attendant competitive circumstances. In *Orion*, for example, the film distributor's loss arose because the exhibitor's last-minute contract breach forced the

distributor to exhibit the film elsewhere, in inferior theaters—the same loss that the distributor would have suffered had the exhibitor breached without engaging in any anticompetitive conduct. *Id.* at 948-49.

2. This case is different in a key way. Evidence at trial showed that before the acquisition, Steves could turn *either* to JELD-WEN (under contract) *or* to the marketplace for suitably priced, quality doorskins. Thus, "competition" *remained* "a factor in determining [JELD-WEN's] obligation to [Steves]," *Orion*, 829 F.2d at 949, and Steves would *not* have suffered an "identical loss" from a contract breach alone, without JELD-WEN's antitrust violation, *Chrysler*, 643 F.2d at 1235. This evidence is not about psychoanalyzing what "emboldened JELD-WEN to breach the Supply Agreement," Br. 32. Rather, two sets of evidence show that JELD-WEN's destruction of competition in the doorskin market was "a material cause"—indeed, a *necessary* cause—"of [Steves'] injury," *Zenith*, 395 U.S. at 114 n.9.

First, specific contractual carve-outs ensured that JELD-WEN would be responsive to—and Steves would continue to benefit from—marketplace competition:

- The Supply Agreement committed Steves to purchase only 80% of its doorskin needs from JELD-WEN. JA1583-JA1584 ¶4. Steves could have obtained the balance from a better quality supplier at better prices.
- Steves could purchase *any amount* of doorskins outside the contract if another supplier beat the Agreement's pricing by 3% or more, unless JELD-WEN matched the competitor's pricing. JA1583-JA1584 ¶4.
- Upon JELD-WEN's notice of termination, Steves could have terminated with immediate effect and bought from a competing supplier. JA1583 ¶3.a.2.b.

As Prof. Shapiro explained, "[c]ompetition will arise when the contracts are up for renewal or possibly if a customer threatens to move, if they have the right under the contract, to move some of their business." JA2244:6-9. But the record shows that Steves could not *actually* resort to any of those protections because the unlawful acquisition left no suppliers willing to compete for Steves' purchases. *See* JA2019:6-10, JA1972:25-JA1973:8, JA2077:12-25, JA2148:4-19; *see also* JA2204:1-12, JA2211:1-JA2218:13, JA2223:3-7, JA2250:3-

JA2252:9, JA2282:23-JA2288:17 (expert testimony regarding Steves' loss of competitive choices). JELD-WEN never explains how a contract that *expressly depends* on competition could "fully protect[]" (Br. 33) Steves from lessened competition.

Second, before the unlawful acquisition, Steves relied on competitive pressures to ensure that it received quality doorskins and suppliers maintained customer-friendly practices. Although JELD-WEN is correct that some quality problems arose before the acquisition, the jury heard ample evidence that, "[a]fter the merger, the quality degradated significantly." JA2019:4-5; *compare* JA2080:17-24 (discussing high-quality of CMI-era doorskins) *with* JA1645 (JELD-WEN employee acknowledging "[t]hings are really different from the cmi days…all the independents are bitching"). Likewise, following the acquisition, JELD-WEN instituted onerous policies for handling defective doorskins and discontinued its practice of reimbursing Steves for door costs when defective doorskins caused finished doors to fail. *Compare* JA2089:11-17, JA2185:21-22, JA270 (pre-acquisition practices), *with* JA2092:12-17, JA2098:1-14, JA2548:23-JA2549:6, JA2015:3-23, JA2138:13-JA2139:13, JA1790 ("much more stringent,"

"hard line" post-acquisition practices). Steves had no meaningful contractual protection against the loss of quality and reimbursement; these are antitrust injuries pure and simple.

In other words, before the acquisition, Steves had *two* ways to obtain quality doorskins at suitable prices: [1] Steves could go to anyone in the market for competitively priced doorskins, and [2] JELD-WEN had promised to sell doorskins at prices determined by a formula in the Supply Agreement. The first source was guaranteed by the antitrust laws, the second source by contract law. JELD-WEN took the first one away through the acquisition, and then its contract breach took away the other, leaving Steves with nothing. Both acts were wrongful, but both were necessary for Steves to suffer the injuries that it did: Steves would not have suffered an "identical loss" from miscalculated contract prices alone, because (absent the acquisition) it would have turned to the competitive market for lower bids. JELD-WEN cites no authority for the strange proposition that, having

committed *two* wrongs, it can now dictate which remedy Steves must elect.[1]

B. Steves' expert's causation analysis was proper

JELD-WEN also attacks Steves' proof of causation, insisting that Steves offered "no but-for analysis at all." Br. 34. But leading authority *rejects* the notion that an antitrust plaintiff must "reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct." *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (per curiam) (en banc).

Rather, Steves offered precisely the sort of antitrust causation analysis approved by the Supreme Court. "[T]he factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants'

[1] In all events, JELD-WEN's antitrust-injury argument based on the Supply Agreement targets *only* Steves' past damages. That argument is irrelevant to lost profits because no contractual lost-profits theory was argued or offered to the jury. JA605-JA607, JA2370:1-22, JA648, JA2686:23-25, JA2162:13-16. Nor is the contract the source of Steves' standing for equitable relief. *See* JA3502-JA3507*.

wrongful acts had caused damage to the plaintiffs." *Zenith*, 395 U.S. at 123-24 (quotation marks and citation omitted).

Prof. Shapiro testified about JELD-WEN's "wrongful acts and their [presumed] tendency to injure [Steves]." *See, e.g.*, JA2224:20-JA2232:5. And he considered whether JELD-WEN's post-acquisition pricing (JA2235:8-JA2255:25) was, in *Zenith*'s words, "attributable to other causes" besides the anticompetitive acquisition. He could find no other explanation. JA2257:7-JA2274:23 (ruling out increased demand, supply constraints, and increased costs as explanations). As Prof. Shapiro explained, this is how an economist "analyze[s] the but-for world in this merger." JA2649:14-JA2654:10.

The trial saw a classic battle of experts on this factual issue. JELD-WEN cross-examined Prof. Shapiro. JA2361:11-JA2384:1. It offered competing expert testimony that Prof. Shapiro's analysis was not "proper" (JA2594:23-25) and that other factors explained the elevated post-acquisition prices (JA2595:1-18). JELD-WEN's counsel attacked Prof. Shapiro's analysis in closing (JA2681:15-JA2682:13), even adding non-economic theories of causation, such as blaming JELD-WEN's bad conduct on JELD-WEN's own CEO (JA2684:7-19). No cause

exists for this Court to second-guess the jury's acceptance of Prof. Shapiro's testimony.

C. The jury's award of past damages was reasonable

1. JELD-WEN also urges that Steves' expert's *damages* computations require rejecting the jury's finding that Steves suffered antitrust *injury*. Br. 34-36. That argument conflates injury and damages: "First, the plaintiff must prove the *fact* of antitrust injury, as part of his *prima facie* case; then, he must make a showing regarding the *amount* of damages, in order to justify an award by the trier of fact." *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 484 (3d Cir. 1998). JELD-WEN's own proposed jury instructions recognized the distinction: "Proving the fact of damage does not require Steves to prove the dollar values of its injury" because "injury and amount of damage are different concepts." JA473; *see* JA643 (as-given instruction to similar effect). Steves proved antitrust injury for the reasons described above.

As for damages, the "vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). An antitrust violator

therefore "is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Rather, it is enough "if the evidence show[s] the extent of the damages as a matter of just and reasonable inference." *Id.* The evidence easily meets that standard.

2. JELD-WEN first complains that Steves' computation of past antitrust damages paralleled its computation of contract damages. Br. 33-35. But that damage computation flowed naturally from Prof. Shapiro's antitrust causation analysis. JELD-WEN's claim that Prof. Shapiro "did not…calculate the market price for doorskins absent the acquisition" (Br. 35) ignores Prof. Shapiro's actual testimony about the nature of the market absent the unlawful acquisition. *E.g.*, JA2381:4-JA2382:1, JA2649:14-JA2654:10.

In particular, prices in the pre-acquisition market were more favorable to Steves, due to competition that JELD-WEN destroyed. The prices and price-adjustment formulas embodied in the Supply Agreement (signed before the acquisition) captured pricing in the pre-

acquisition market. JA2244:14-16, JA2381:4-22. Accordingly, pricing under the Supply Agreement established a suitable baseline to measure either Steves' contract damages or its antitrust damages, albeit for different reasons. For contract damages, the contract defined *JELD-WEN*'s (broken) pricing promise to Steves. For antitrust damages, the contract was a reliable proxy for *market* prices that would have been available from any doorskin supplier if JELD-WEN had not acquired CMI (the "but-for world" that JELD-WEN incorrectly accuses Steves of ignoring).

In turn, the bulk of Steves' antitrust past damages were computed by comparing the pre-acquisition competitive market pricing (reflected in the Supply Agreement) to the inflated prices Steves paid JELD-WEN after the acquisition. JA2650:9-20, JA2459:10-JA2460:12, JA604. Similarly, recognizing that JELD-WEN's quality dropped and its customer-friendly pre-acquisition policies disappeared because the acquisition destroyed competition, *see supra*, pp. 10-12, 36-37, the jury

also awarded antitrust damages relating to post-acquisition quality and damage-reimbursement issues. JA2463:2-JA2465:13, JA604.[2]

3. JELD-WEN also criticizes how Steves' expert handled Towanda in his damages model, arguing that absent JELD-WEN's unlawful acquisition, Steves would not have enjoyed the lower costs that Towanda brought to JELD-WEN. Br. 35, 61-63. That argument is incorrect because it assumes that, absent the acquisition, Steves would have purchased doorskins only from JELD-WEN (and thus not bought doorskins made at Towanda). In that "but-for" world, Towanda would still exist in the market, and as explained above, the Supply Agreement gave Steves access to bids from competing suppliers—including from CMI, Towanda's owner. JA1583-JA1584 ¶4.

More to the point, the reasonableness of this modeling assumption was a question for the jury. When cross-examined, Steves' expert did *not* agree that Steves' doorskin costs would have been higher absent the CMI acquisition, and indeed, testified that his analysis was *correct*

[2] JELD-WEN argues that antitrust damages for defective doorskins were unavailable because JELD-WEN's handling of Steves' defect claims did not breach the Supply Agreement. Br. 38. But JELD-WEN never explains why its compliance with a *contractual* claims process for defects (JA1099*) would be a defense to a *statutory* antitrust claim.

"[b]ecause [he was] not aware that there would be a difference that would be significant as far as [Steves'] access to door skins from CMI." JA2495:6-24.

JELD-WEN "had an opportunity to present expert evidence at trial on this point. It did not." JA1377*; *see* JA2623:17-JA2627:5 (JELD-WEN's expert's admission he did not attempt to quantify the effect of excluding Towanda from Steves' damage model); JA2666:18-20 (similar concession from JELD-WEN's counsel). "Where the defendant adduces no evidence of alternative methodologies or statistics, but merely criticizes those employed by the plaintiff's expert, acceptance of the projections of plaintiff's expert is appropriate." *Int'l Wood Processors v. Power Dry, Inc.*, 593 F. Supp. 710, 726 (D.S.C. 1984) (quotation marks omitted), *aff'd*, 792 F.2d at 431 (approvingly reiterating this point).[3]

II. The District Court Properly Exercised Its Discretion to Order Divestiture

"Antitrust relief should unfetter a market from anticompetitive conduct and pry open to competition a market that has been closed by

[3] In all events, even if JELD-WEN's damages-computation arguments were sound, they would at most justify retrying damages (which JELD-WEN does not seek).

defendants' illegal restraints." *Ford Motor Co. v. United States*, 405 U.S. 562, 577-78 (1972) (quotation marks omitted). The Clayton Act "regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger." *Am. Stores*, 495 U.S. at 285. "The very words of [Clayton Act] § 7 suggest that an undoing of the acquisition is a natural remedy." *Utah Pub. Serv. Comm'n v. El Paso Nat. Gas Co.*, 395 U.S. 464, 471 (1969) (quotation marks omitted).

After presiding over a twelve-day jury trial, hearing five more days of testimony and argument on equitable issues, receiving hundreds of exhibits, and studying hundreds of pages of briefing, the District Court found the facts and equities favored divestiture. JA3433-JA3581*. This Court "review[s] a district court's award of equitable relief for abuse of discretion, accepting the court's factual findings absent clear error, while examining issues of law de novo." *Solis v. Malkani*, 638 F.3d 269, 274 (4th Cir. 2011) (quotation marks omitted).

JELD-WEN does not claim the District Court misunderstood the rules of equity or challenge the Court's findings. Rather, it offers a dozen or so pages describing its own view of the facts, and invites this Court to reverse because "divestiture orders in private antitrust cases

are exceedingly rare" (Br. 56) and, in other cases, "courts have found that laches barred private-party divestiture" (Br. 42).

But this is not the time or place for off-the-cuff reversal. "[The clear error] standard does not permit a reviewing court to reverse a factual finding on the basis that the reviewing court would have decided the case differently." *United States v. Francis*, 686 F.3d 265, 273 (4th Cir. 2012). JELD-WEN fails to acknowledge—much less overcome—this standard.

A. The District Court's evaluation of the traditional equitable factors was sound

A plaintiff seeking equitable relief must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay*, 547 U.S. at 391. Applying these "well-established principles of equity," *id.*, the District Court concluded that divestiture was warranted.

1. *Irreparable injury and inadequacy of legal remedies*

"[T]he likely, if not certain, loss of [Steves'] business is an irreparable injury that cannot be adequately remedied by the future lost profits damages it has been awarded." JA3516*.

a. A plaintiff that "seeks to preserve its existence and its business" faces irreparable injury. *Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981); *accord Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995); *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985).

The jury *and* the District Court found that Steves "will be forced out of business when the Supply Agreement terminates in 2021." JA3505-JA3507*, JA3469*, JA604. "[P]urchases from JELD-WEN, Masonite, or foreign suppliers [will] not provide viable alternative supplies of doorskins," and "building a doorskin plant of its own is not a viable alternative" for Steves. JA3510*; *see* JA3466-JA3469*.

The record supports every one of those findings. *See, e.g.*, JA2427:12-15, JA2475:15-JA2476:25 (Steves requires a reliable

doorskin supply); JA2543:9-21, JA1454, JA1455, JA1861, JA1456 (JELD-WEN's unwillingness to negotiate specific terms of a new supply agreement); JA2051:7-JA2052:9, JA1657, JA1445 (Masonite will not sell doorskins to Steves under a long-term agreement); JA2486:5-JA2487:4, JA1578, JA1802 (Masonite's "spot" prices to Steves were much higher after the acquisition, and uneconomical compared to the prices Steves pays JELD-WEN); JA2044:15-JA2050:18 (inadequacy of foreign supply); JA2037:11-JA2044:14 (Steves' inability to build its own plant).

b. Instead, JELD-WEN insists that Steves faces no irreparable injury (or has an adequate legal remedy) because the jury awarded damages for the profits Steves will lose when its business collapses. Br. 48-49. This argument is at odds with JELD-WEN's position (Br. 57-61) that those very damages are *not* proper here. If Steves cannot collect that damage award, then Steves does *not* have a legal remedy for that injury.

More fundamentally, the injunction here is designed to forestall further harm to Steves, some of which could be remedied in dollars, but much of which cannot. Accordingly, the District Court entered

judgment on Steves' claim for equitable relief, and, only as a second-best alternative, on the lost-profits verdict. Preferring equitable relief over inadequate monetary relief was correct because, as Judge Friendly recognized, "the right to continue a business…is not measurable entirely in monetary terms; [plaintiff] wants to sell [its wares], not to live on the income from a damages award." *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970); *accord Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005). JELD-WEN's contrary reliance on *SAS Institute, Inc. v. World Programming Ltd.*, 874 F.3d 370 (4th Cir. 2017), is misplaced because the plaintiff there—"the world's largest privately-held software company"—faced no threat of extinction, and its claims of irreparable injury "were largely unsupported by evidence." *Id.* at 386, 387.

Applying those principles, the District Court found "compelling evidence of the incalculable value of [Steves'] business, which the Court (like the jury) finds would not survive without injunctive relief restoring competition." JA3515*. "The lost profits award would not provide a supply of doorskins. Rather, the Steves shareholders would…just live

off of the damages award, a choice which…it does not have to make." JA3516*.

c. JELD-WEN's argument for supposedly "less drastic injunctive remedies" (Br. 49) is forfeited; JELD-WEN proposed no such remedy below.

Regardless, an order directing JELD-WEN to supply doorskins to Steves would eventually fail because "there would be no structure in place to foster competition after the Court-ordered prices expire." JA3543-JA3544*. And the District Court was rightly sensitive (JA3544) that the public interest could be disserved by judicially controlling JELD-WEN's conduct through a *perpetual* court-monitored doorskin supply agreement: "Divestiture is 'simple, relatively easy to administer, and sure,' while conduct remedies risk excessive government entanglement in the market." *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 793 (9th Cir. 2015) (citation omitted) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961)); *accord* JA966-JA970 (statement of interest filed by DOJ, emphasizing virtues of divestiture over other forms of injunctive relief).

2. *Balance of hardships*

JELD-WEN's challenge to the District Court's balancing of hardships ignores the Court's systematic factual review of both sides' claims of hardship from granting or withholding relief.

a. The District Court began with the simple and ultimate hardship Steves faced: "If the Court does not order an equitable remedy to restore competition, Steves will likely lose its entire business when the Supply Agreement expires." JA3519*. The balance of hardships "amply" favors a plaintiff that has "shown a significant possibility that it would be driven out of business." *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 58 (2d Cir. 1979) (Friendly, J.).

b. The District Court next turned to the harms JELD-WEN claimed it would suffer if it sold Towanda—largely the same list of harms it retreads in this Court. As the District Court recognized, those claims of hardship were purpose-built for this litigation—JELD-WEN's evidence came "from witnesses who admittedly have not studied the subject and who are biased to present the worst case scenario." JA3484-JA3485*.

Here, JELD-WEN asserts that Towanda is "fully integrated" within its business. Br. 50. But conclusory labels do not decide cases; facts do. Upon compiling an extensive record and studying JELD-WEN's claims, the District Court found something rather less dramatic than "fully integrated." Things as basic as accounting systems, customer ordering, and banking relationships are not integrated *at all*: "[T]he accounting systems for Towanda and for JELD-WEN's 'legacy plants'…remain separate, with Towanda using different accounting software," and "Steves still orders and pays for doorskins from Towanda in the same way it did before the CMI [a]cquisition." JA3452; *see* JA2868:7-JA2870:16, JA2879:18-JA2889:12.

The best that can be said for JELD-WEN's claim of hardship is that, if JELD-WEN sold Towanda, then JELD-WEN could produce fewer doorskins. But JELD-WEN offered no evidence quantifying this effect. JA2859:17-JA2861:5, JA2863:4-14, JA2899, JA2897. And the District Court rejected JELD-WEN's estimates of the impact of divestiture on its earnings as unreliable and belatedly produced. JA3491-JA3492*.

Still, ample evidence showed that the shortfall would not be severe. The industry as a whole (JA2272:11-23) and JELD-WEN's plants in particular (JA3584) were not running at full capacity. JELD-WEN had recently opened another "very large state of the art" doorskin plant. JA2586:2-3, JA2509:22-JA2510:4. And JELD-WEN admitted that it could handle the shortfall if Towanda were *outright lost* to natural disaster. JA2894, JA1747. JELD-WEN simply invites this Court to assume without evidence that an undefined catastrophe will ensue if anyone but JELD-WEN owns Towanda.

The District Court recognized the potential capacity shortfall. JA3486-JA3487*. But the District Court *also* found many ways to mitigate any capacity shortfall. In the short term, JELD-WEN can obtain doorskins from Towanda's new owner (JA3486*, JA1415*), from another JELD-WEN plant (JA3488*, JA1745), or by restarting its currently mothballed Marion plant with very substantial production capacity (JA3488*, JA2785:5-JA2787:10, JA2866:9-17, JA1747). In the

long term, JELD-WEN has the resources and know-how to build a new doorskin plant. JA3489*, JA2788:12-21.[4]

c. The District Court found that the balance of hardships favored granting Steves relief because "all of [JELD-WEN's] claimed hardships can be ameliorated" while Steves faces "a more certain and far more serious harm: permanently going out of business." JA3528*.

JELD-WEN is thus mistaken to suggest (Br. 56) that the District Court assigned JELD-WEN the burden of proof on the balance of hardships. Doubtless, JELD-WEN was in a difficult spot of its own making: It had unlawfully acquired CMI, it had harmed competition, and the scant evidence of hardship it could muster was "rather unreliable" (JA3485*), "belated[]" (JA3491*), "no[t] particularized" (JA3482*), and "speculative" (JA3485*, JA3520*, JA3522*).

But bad conduct and weak evidence is not burden-shifting. Only JELD-WEN could identify its own hardships, and the District Court gave them appropriate weight. It was Steves' burden to show that the

[4] The District Court found these efforts would similarly protect JELD-WEN's customers. JA3523-JA3524*. JELD-WEN's suggestion that divestiture would cause it to *raise* those customers' prices (Br. 52) makes no economic sense because divestiture will *increase* competition. *See* JA3491* (expressing skepticism that price increases "would, or could, be done with a competitive Towanda as a supplier").

balance of hardships as between it and JELD-WEN favored equitable relief. Steves met that burden by proving its own hardships and using JELD-WEN's documents and witnesses' testimony to prove that JELD-WEN's hardships were overstated and could be mitigated through careful structuring of divestiture. *E.g.*, JA3266-JA3276 ¶¶80-146, JA3346-JA3354, JA3411-JA3417.

3. *Public interest*

"The heart of our national economic policy long has been faith in the value of competition." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quotation marks omitted). "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition," and among those measures, "[d]ivestiture is itself an equitable remedy designed to protect the public interest." *du Pont*, 366 U.S. at 326. The District Court had every reason to believe that divesting Towanda would restore pre-acquisition competition, because there would again be three makers of doorskins, rather than two. JA3475-JA3484*, JA3538-JA3544* (District Court's findings); JA2211:1-JA2217:15, JA2224:20-JA2232:5, JA2582:4-

JA2583:1, JA2515:1, JA2694-JA2695 (testimony regarding competitive dynamics with three doorskin suppliers).

a. JELD-WEN's principal complaint is that the District Court disserved the public interest by establishing a process for divesting Towanda before identifying a particular buyer. Br. 52-56. But JELD-WEN never explains how a divestiture *buyer* could be identified without first deciding whether divestiture should occur *at all*. And, amazingly, JELD-WEN fails even to cite the seminal Supreme Court case—*Brown Shoe*, *supra*—that followed the same two-step process adopted by the District Court here.

In taking jurisdiction over a divestiture order entered before a buyer was identified, the Supreme Court in *Brown Shoe* explained why divestiture litigation should proceed in two steps: Divestiture occurs "in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the antitrust laws." 370 U.S. at 309. Thus, the first step is to order divestiture upon proof that

divestiture appears viable and effective; once that is affirmed on appeal, identification of an appropriate buyer can proceed (subject to any necessary further appellate review, *see id.* at 310). "The public interest, as well as that of the parties, would lose by [collapsing the two steps of that] procedure." *Id.* at 309.

The District Court adopted *Brown Shoe*'s two-step approach (JA3534-JA3536*, JA1411-JA1417*), explaining that "it is unrealistic to expect that potential buyers will come forth and be vetted while an appeal looms" (JA3538*). For similar reasons, if JELD-WEN were genuinely concerned about the public interest (to say nothing of its interest in Towanda fetching a good price), it would welcome a deliberate process that attracts the best bidders. At the same time, the District Court recognized that divestiture would serve the public interest only if Towanda is divested to a buyer able to operate Towanda as an independent, effective competitor to JELD-WEN and Masonite. JA3530*. Thus, the District Court will need to evaluate whether buyers meet those qualifications, as its equitable decree is carried out. JA3536*; *see* JA1414*, JA1426*.

JELD-WEN is thus mistaken to suggest that the District Court "did not heed th[e] warning" (Br. 53) from DOJ about the need to identify a buyer before ordering divestiture. After all, DOJ *itself* has sought and obtained divestiture decrees without first identifying a buyer. *See* JA997, JA1018. Rather, the District Court recognized that it must conduct a process to address (and keep an open mind on) the qualifications of buyers that emerge. DOJ has offered no support for JELD-WEN in this Court, evidently satisfied that the District Court crafted a sound process (aided by the Special Master), in which DOJ can continue to provide advice.

b. Accordingly, the relevant public-interest question here is whether the record supports the District Court's "conclu[sion] that a divestiture of Towanda is likely to be competitive and profitable." JA3541*. JELD-WEN's attacks on that conclusion are limited, premature, ignore the Court's findings, and lack merit. Most obviously, those attacks cannot be squared with the simple fact that Towanda was sold twice in the past two decades without incident, most recently with JELD-WEN prevailing over multiple bidders. JA3440-JA3442*, JA2757:21-JA2759:10, JA2804:25-JA2806:7, JA2503:21-JA2504:20

(divestiture of Towanda to newly established CMI in connection with prior merger); JA2769:15-20 (sale of CMI).

First, JELD-WEN complains about Steves' own professed interest in bidding for Towanda. Especially mystifying is its claim that selling Towanda to Steves would not "improve competition, for that would just create a third vertically integrated doorskin/door manufacturer." Br. 53 (citing JA974). But as the District Court recognized, *CMI itself* was a third vertically integrated doorskin/door manufacturer before being acquired, and it competed vigorously in the doorskin market nonetheless. JA3537-JA3538*. Steves' supposed lack of "incentive to recruit a more appropriate buyer" (Br. 54) is both wrong (because Steves' goal is securing a viable and competitive supply of doorskins, no matter who buys Towanda) and irrelevant (because the Special Master will run the bidding process, not Steves, JA1414-JA1417*).

Second, JELD-WEN asserts—failing yet again to acknowledge the District Court's contrary findings—that provisions of the divestiture order will "deter willing buyers" and "threaten the viability of the divestiture buyer." Br. 54 (quotation marks omitted). But the District Court found that a supply agreement between Steves and Towanda's

new owner—at prices to be negotiated—would actually *benefit* Towanda's new owner by guaranteeing a customer for some of its output. JA3548*. And regulating JELD-WEN's purchases from Towanda for a transitional period reflects an equitable compromise among mitigating JELD-WEN's hardships, securing the new owner's access to customers, and ensuring that JELD-WEN cannot continue stifling competition by tying up Towanda's output. JA3549*.

Third, JELD-WEN denies "that Towanda could be a viable stand-alone business." Br. 54. That is not the relevant standard. Divestiture will restore competition if Towanda is acquired by an entity independent from JELD-WEN and Masonite that can operate Towanda as an effective competitor. JA3530-JA3531* (citing authorities). Perhaps Towanda will operate as a "stand-alone business," but it could equally well be part of a vertically integrated business or a business operating in multiple building products markets.

Moreover, the District Court found Towanda would be profitable. CMI was consistently profitable between 2002 and 2007. JA3538*, JA2764:19-JA2765:1, JA2766:12-18. Towanda's doorskin business was profitable between 2009 and 2013, even in low-volume years. JA3538-

JA3541*, JA3584, JA3596:19-JA3599:19, JA2800:22-JA2802:4. Uncontradicted expert testimony put the margin on Towanda doorskins at a healthy 35% in 2012, and that number has recently increased. JA3541*, JA2266:6-22. Towanda also produces other products that JELD-WEN itself describes as "lucrative" (Br. 8), and JELD-WEN admits Towanda is more efficient today than when CMI operated it. JA3477-JA3478*, JA3539*, JA2770:10-20, JA2844:25-JA2845:3.

This evidence is especially encouraging, though it is not the last word when buyers have yet to be vetted. Like any productive asset, Towanda is worth what it can contribute to its owner's bottom line, and bids will reflect that fact. If JELD-WEN's "considerable capital investments in Towanda" (Br. 44) were worthwhile, it will command a good price. If nobody can turn a profit on Towanda, then nobody will bid, and "divestiture will simply not occur." JA3536*. And "[i]f it turns out that the divestiture process yields a buyer that lacks the incentive or the means to operate Towanda competitively, the [District] Court can decline to divest the plant to that buyer." JA3536*; *see* JA1414*, JA1426*. Ultimately, if JELD-WEN believes that the buyer of Towanda is incapable of operating the plant competitively, JELD-WEN

can object in the District Court, JA1429*, and appeal to this Court, 28 U.S.C. § 1291; *see* JA3536-JA3537*. But JELD-WEN offers no basis for overturning now the District Court's finding that suitable buyers will come forward and the sale process will succeed.

B. The District Court correctly rejected JELD-WEN's laches defense on two independent grounds

The affirmative defense of laches "imposes on [JELD-WEN] the ultimate burden of proving [both] (1) lack of diligence by [Steves], and (2) prejudice to [JELD-WEN]." *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). Because the laches analysis "depends upon the particular circumstances of the case," it "is primarily left to the sound discretion of the trial court, and [this Court] may not reverse unless it is so clearly wrong as to amount to an abuse of discretion." *Id.* (quotation marks omitted).

"[L]aches is not [a defense] which can be measured out in days and months"; "what might be inexcusable delay in one case would not be inconsistent with diligence in another." *N. Pac. Ry. v. Boyd*, 228 U.S. 482, 509 (1913) (holding laches did not bar attack on corporate reorganization brought ten years after reorganization). And because

prejudice to the defendant is a distinct requirement, "there is no necessary estoppel [of laches] arising from the mere lapse of time." *Id.*

Because the District Court found *both* that Steves acted diligently in pursuing divestiture (JA3558-JA3574*), *and* that JELD-WEN did not in any event rely to its detriment on Steves' delay in filing suit (JA3574-JA3580*), JELD-WEN faces the steepest imaginable climb on appeal: JELD-WEN must show that, contrary to all of the findings below, it proved both elements of its fact-intensive affirmative defense to a legal certainty. Yet JELD-WEN all but ignores the District Court's findings—it cites them only twice and fails to address the evidence that led the District Court to reject the alternative findings JELD-WEN urges here.

1. *The District Court correctly found that Steves' delay in filing suit was reasonable—and largely attributable to JELD-WEN's own conduct*

a. In analyzing Steves' diligence, JELD-WEN invents a stunning new guidepost: "laches bar[s] private-party divestiture claims brought *at any time* after a merger," Br. 42 (emphasis in original). JELD-WEN's proposal ignores the established principle that "courts of equity…usually act or refuse to act in analogy to, the statute of

limitations relating to actions at law of like character." *King v. Richardson*, 136 F.2d 849, 862 (4th Cir. 1943). Thus, the District Court used the four-year limitations period in 15 U.S.C. § 15b "as a *guideline* for analyzing laches defenses to Section 16 claims." JA3554-JA3555* (collecting appellate decisions so holding); *cf. Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685-86 (2014) (applying like principle to copyright infringement claims).

The cases JELD-WEN cites for vanishingly short laches periods (Br. 42-43) are readily distinguishable. In addition to bringing seriously flawed cases, the plaintiffs in each had *no explanation at all* for their delays, exposing their requests for equitable relief as entirely opportunistic. *See Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010) (also noting absence of proof on the merits); *Antoine L. Garabet M.D., LLC v. Antomonous Techs. Corp.*, 116 F. Supp. 2d 1159, 1171-73 (C.D. Cal. 2000) (also noting doubts that plaintiffs even had antitrust standing); *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1123-24 (N.D. Cal. 2011) (also noting failure to plead irreparable injury, inadequacy of legal remedies, or public interest).

As discussed below, the facts here were quite the opposite—and facts are what matter in laches. If those cases controlled in the categorical way that JELD-WEN suggests, then laches would *always* be a complete defense to post-acquisition equitable actions seeking divestiture—an exception that would swallow the rule of *American Stores*, *supra*, that private parties can indeed seek divestiture.

b. The District Court accurately chronicled in exhaustive detail—often month-by-month—the reasons why Steves' suit was appropriately filed when it was.

Ignoring these findings, JELD-WEN refuses to take responsibility for the fact that the delay was overwhelmingly created by JELD-WEN's own inequitable strategy of disguising its anticompetitive behavior as ordinary commercial dealings. The District Court's findings are damning: "JELD-WEN knew full well of the merger's antitrust implications," so it "developed a plan to enter into long-term supply agreements with independent door manufacturers [such as Steves]." JA3561*; *see* JA1573. "JELD-WEN deliberately decided not to approach the DOJ about the proposed CMI acquisition until those long-term agreements had been entered"; by design, "[t]hat tactic limits the

DOJ's ability to secure evidence necessary to block a merger because customers with supply agreements are less willing to oppose a merger proposed by their supplier and because customers do not have reason to be threatened." JA3561-JA3562*; *see* JA1596, JA1579, JA2817:1-JA2834:10, JA2874:1-JA2878:2 (evidence of JELD-WEN's strategy).

Thus, when JELD-WEN acquired CMI in 2012, "Steves had no reason to believe that there would be anticompetitive effects…*because JELD-WEN designed its pre-merger strategy to create that state of mind*." JA3562* (emphasis added); *see* JA2722:4-JA2723:24 (testimony that the Supply Agreement had this effect on Steves). And at that time, "any [antitrust] claim would have been dead in the water…because there was no existing or threatened antitrust injury." JA3563*; *see Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 301 (4th Cir. 2012) ("'unreasonable delay' does not include any period of time before the [plaintiff] is able to pursue a claim") (quotation marks omitted). Likewise, at first, "[t]here was no reason for Steves to believe that [doorskin quality issues soon after the acquisition] were anticompetitive effects from the merger" or that JELD-WEN's request

to renegotiate the Supply Agreement was anything but an ordinary commercial issue. JA3563-JA3564*; *see* JA2852:3-25, JA2854:6-17.

But this changed in July and September 2014, when JELD-WEN sent a pointed "message…that Steves had to deal with JELD-WEN because the only other supplier (Masonite) was not to be a future source of supply" (JA3565*), and sent notice of termination of the Supply Agreement (JA3566*, JA1788). *See* JA1672 (email from JELD-WEN to Steves attaching Masonite presentation affirming that Masonite "do[es] not sell facings [doorskins] within key N[orth] A[merican] market"). Accordingly, the District Court concluded that "Steves should have known that it faced threatened or actual antitrust injury" in August 2014. JA3566*.

JELD-WEN asserts "that still leaves years of inaction unexplained" (Br. 46), ignoring the District Court's meticulous findings explaining everything that happened after August 2014 (JA3566-JA3572*). Again, it was largely JELD-WEN's own conduct that caused Steves to delay suing. Because Steves faced "a supply dilemma that was then seven years in the future," it "reasonably elected to try to find another reliable source of supply." JA3567-JA3568*. Steves turned to

Masonite in late 2014 and early 2015 (to no avail), as JELD-WEN's conduct became more aggressive. JA3568-JA3569*, JA2724:10-JA2725:22. By early 2015, Steves had similarly explored the "viability of foreign manufacturers" (with disappointing results), and Steves had found it "entirely uncertain whether [it] could afford to build a doorskin plant." JA3569-JA3570*; *see* JA3466-JA3469*, JA2037:11-JA2049:25.

Next, Steves pursued the Supply Agreement's "protracted alternative dispute resolution process." JA3450*, JA1585-JA1586 ¶10. This took time, and it would have been unreasonable to sue while engaged in that mutual process with JELD-WEN. *See, e.g.*, *Piper Aircraft Co. v. Wag-Aero, Inc.*, 741 F.2d 925, 932-33 (7th Cir. 1984) (more than three years of settlement discussions held not unreasonable delay for laches purpose). JELD-WEN's contrary reliance on *Kloth v. Microsoft Corp.*, 444 F.3d 312, 325-26 (4th Cir. 2006), is misplaced because the plaintiffs there knew for years that injunctive relief for the conduct they challenged was being litigated in another forum, and yet did nothing to assert their rights. Here, settlement efforts were the parties' exclusive focus.

In particular, Steves formally "requested an internal conference among senior executives" in March 2015; those conferences occurred in May 2015 (putting JELD-WEN on notice of Steves' antitrust claims). JA3571*, JA2728:14-JA2729:3. In July 2015, Steves requested mediation, which took place in September 2015, followed by mutual standstill agreements in September 2015, October 2015, January 2016, and April 2016. JA3571-JA3572*, JA2730:23-JA2732:7, JA1848, JA1850, JA1851, JA1860. Steves sued in June 2016, immediately after JELD-WEN refused to extend the standstill agreement. JA3572, JA2851:2-3.

The District Court correctly found that this "delay," although cumulatively lengthy, was within the four-year limitations-period guideline, and was at no point unreasonable. Especially when JELD-WEN signaled "a continued desire to attempt to work things out short of litigation," sound public policy and business realities alike made it quite reasonable to seek to resolve "difficult issues…without resorting to litigation." JA3572-JA3573* (collecting authority).

c. In considering JELD-WEN's equitable defense, this Court should—as the District Court did—take special note of JELD-WEN's

inequitable efforts to use its Supply Agreement with Steves to "insulate it[self] going forward after the merger" (JA3578*), and evade accountability under the antitrust laws:

- JELD-WEN entered that contract in the first place to limit DOJ's ability to take action against the acquisition under Clayton Act § 15, 15 U.S.C. § 25.
- JELD-WEN continues to argue that Steves' contractual remedies wholly displace the vital deterrent of the damages remedy in Clayton Act § 4(a), 15 U.S.C. § 15(a).
- And JELD-WEN insists that equitable relief under Clayton Act § 16 is unavailable because Steves delayed filing an antitrust suit under the reasonable belief that it was an equal party to an ordinary contract dispute, not the victim of an unlawful acquisition.

If JELD-WEN were right, then Clayton Act § 7's firm prohibition on mergers and acquisitions whose "effect…may be substantially to lessen competition" means little. Merging parties can stymie the government, neutralize the deterrent of a damages remedy, and

immunize themselves from equitable remedies. Like the District Court, this Court should refuse to lend its equitable sanction to such a scheme.

2. *The District Court correctly found that, regardless of the reason for Steves' delay, that delay did not prejudice JELD-WEN*

The District Court further found that the steps that JELD-WEN claimed it took in reliance on Steves' delay in filing suit—closing certain plants and making certain investments and operational changes—would, in fact, have occurred regardless of when Steves sued. JELD-WEN rehashes those factual issues here. Br. 43-47. The District Court's findings are rooted in two sets of evidence.

First, JELD-WEN's claim of prejudice flows from its decision to close two plants (Marion and Dubuque), and consequently shift some production to Towanda. Br. 7, 43. But the District Court found these were *post hoc* inventions of prejudice: "[T]he Marion plant was mothballed because of the expense of meeting environmental regulations and updating antiquated equipment." JA3576-JA3577*; *see* JA3452-JA3454*, JA3602:14-17, JA2810:4-16, JA2895. And "the decision to close the Dubuque plant was made in 2011, before the merger." JA3576-JA3577*; *see* JA3454*, JA1854.

Second, for part of the relevant period, JELD-WEN was on notice of Steves' claims. JA3577*. Yet "JELD-WEN made substantial investment in Towanda even after it was told by [Steves' attorney] in May 2015 that Steves had antitrust concerns." JA3577*; *see* JA2792:24-JA2793:2, JA2845:4-23. Indeed, this suit has scarcely affected JELD-WEN's decision-making—only a week before the remedies hearing did JELD-WEN's Director of Operations even learn that divestiture of Towanda was a possibility. JA2845:4-JA2846:8.

Ignoring this record and these findings, JELD-WEN seeks reversal on the ground that its prejudice from Steves' delay is "obvious." Br. 45. But its support for this claim is the testimony of a witness (James Morrison) whom the District Court found "lied on his resume" and "lied again, at his deposition and trial." JA3576*. The District Court saw Morrison testify live three times (JA2516:9-11, JA2803:24-JA2804:1, JA2969:8-10), and concluded Morrison was "not to be believed" and "would say anything to support JELD-WEN's cause whether it was supported by facts or not." JA3576*. On that basis, the District Court refused to credit Morrison's testimony about prejudice.

"When a district court's factual findings are based on determinations regarding the credibility of witnesses, [this Court must] give great deference to the district court's findings." *Francis*, 686 F.3d at 273. JELD-WEN never explains how that ruinous credibility finding could be ignored (because JELD-WEN never informs this Court about the credibility finding to begin with). Under all these circumstances, JELD-WEN surely is not entitled to appellate reversal as a matter of law on its equitable laches defense.

III. Substantial Evidence Supports the Jury's Lost-Profits Verdict

Steves hopes it never collects damages for lost profits. Those damages are a distant second-best alternative to the equitable relief that will allow Steves, "as it has for 150 years, [to] continue in business and prosper." JA3516*. But the jury trial on damages occurred before Steves knew whether equitable relief would be available—and even now, Steves does not know for certain that divestiture will be accomplished—so Steves presented and prevailed on its claim for the profits it would have made in the future but for JELD-WEN's anticompetitive acts. JA604. The award is sound.

A. The jury reasonably found that Steves is not a viable business once JELD-WEN's termination of the Supply Agreement takes effect

Steves' lost-profits claim is straightforward: When its supply of doorskins from JELD-WEN runs out in 2021, Steves cannot continue in business.

1. JELD-WEN labels this "speculative in the extreme." Br. 57. But the evidence at trial supports the jury's finding. Most obviously, *JELD-WEN's stated plan* was to put Steves out of business: It planned to "[r]un out contracts" to Independents like Steves, and to be "ready to take [the resulting] market opportunity" in door sales away from Independents, thereby "[i]ncreas[ing] [JELD-WEN's] door market share to make up for the [doorskin sale] volume loss." JA1834. In the words of JELD-WEN's own emails, JELD-WEN will "exit all the Steves business" (JA1857) and Steves will be "kill[ed] off" (JA1803). *See* JA3506-JA3507* (District Court's finding that "JELD-WEN regarded Steves, a significant player in the interior door market, to be an independent to be killed off").

JELD-WEN nonetheless insists that "nothing forecloses the possibility" (Br. 59) that JELD-WEN might not carry out its plan.

JELD-WEN cites nothing in support of its anything-is-possible approach to overturning a jury verdict. The jury rejected JELD-WEN's evidence [1] that "[JELD-WEN] might continue to sell doorskins to Steves after the Supply Agreement expires; [2] that, without JELD-WEN, Steves can satisfy its doorskin needs through domestic or foreign suppliers…; and [3] that Steves could build its own doorskin manufacturing plant." JA3505*. Instead, the jury "decided that Steves will go out of business because Steves cannot find any viable alternative means of doorskin supply." JA3505-JA3506*. The record supports all of these findings. *See supra*, pp. 47-48 (collecting support for parallel findings supporting equitable relief). This Court's review for substantial evidence should end there.

2. Such concrete acts and clear admissions distinguish JELD-WEN's authorities. *Sureshot Golf Ventures, Inc. v. Topgolf*, 754 F. App'x 235 (5th Cir. 2018), involved a plaintiff whose competitor acquired the plaintiff's key supplier. The plaintiff hypothesized that, eventually, the supplier (now under the sway of the competitor) would wrongfully refuse to renew its supply contract. The Fifth Circuit held that the suit was unripe because the plaintiff's allegations all involved

"hypotheticals and future threatened injury" and anticompetitive effects that had not actually occurred at the time of suit. *Id.* at 240-41.

JELD-WEN's other authorities are likewise inapposite because they dismissed (as unripe) challenges to "rule[s] that ha[ve] yet to be enacted," *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 64-65 (2d Cir. 1988), or rules that were "in their early stages of development," *Plant Oil Powered Diesel Fuel Sys., Inc. v. Exxon-Mobil Corp.*, 801 F. Supp. 2d 1163, 1184 (D.N.M. 2011).

Here, by contrast, Steves was already injured at the time of trial, and Steves' supply problem was concrete, not hypothetical. JELD-WEN had already terminated its Supply Agreement with Steves, and it had already breached that agreement with full confidence that Steves had no practical recourse to stay in business. If anything is speculative, it is JELD-WEN's list of "possibilit[ies]" (Br. 59, 61)—all rejected by the jury—that might rescue Steves from being "kill[ed] off" (JA1803).

3. JELD-WEN also contends that the law rejects "the theory that a viable company with ongoing operations will go out of business at some future date." Br. 58. Whatever the rules about "viable compan[ies]," the jury found that Steves is *not* viable because of JELD-

WEN's unlawful acts. The fact that Steves has a lifeline now (while the clock ticks down to the expiration of the Supply Agreement) is irrelevant to whether it is viable during the post-agreement period for which lost profits were awarded.

JELD-WEN's argument is puzzling next to its position on laches. The purpose of equitable relief here is to restore the competition that will save Steves from going out of business, but JELD-WEN invokes laches to contend Steves sued *too late* to avoid that fate. And yet, in the next section of its brief, JELD-WEN says that Steves sued *too soon* to recover the profits it will never earn because it was "killed off" by JELD-WEN's acquisition. Steves believes it sued at the right time to elect *either* remedy, acting diligently when its antitrust injury manifested, even if its fate had already been sealed (absent equitable intervention by the District Court). But at the very least, Steves should have *some* remedy: Either it sued soon enough to obtain equitable relief, or late enough to present solid proof that it is no longer viable when the Supply Agreement ends. There is nothing to recommend JELD-WEN's position that, as matters stand, JELD-WEN should enjoy

the fruits of an unlawful acquisition it doesn't defend, while its victim, Steves, has no remedy at law or equity.

B. The amount of the jury's lost-profits award was reasonable

As discussed above, a jury's assessment of antitrust damages does not require "exactness and precision"; the plaintiff need only show the "extent of the damages as a matter of just and reasonable inference." *Supra*, pp. 40-41 (citations omitted). On its face, the jury's lost-profits verdict is reasonable: It awarded approximately $46.5 million (JA604) to compensate a business with revenues exceeding $200 million in just the one year before trial (JA2149:8-10). That is less than $6 million of profits per year, over the roughly 8-year period considered by Steves' expert.

1. Specific testimony supported that award. Steves' expert used Steves' past profits to estimate the profits Steves would not earn upon going out of business when the Supply Agreement ends. JA2473:14-JA2475:10. "[U]sing past profits as a basis for calculating future lost profits is a widely accepted methodology." *Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC*, 423 F. App'x 274, 285 n.12 (4th Cir. 2011). That method was applied conservatively, estimating just over 8

years of lost profits for a company that has been in business for 153 years. *See* JA2472:2-JA2475:14.

Contrary to JELD-WEN's new-for-appeal position that "some [unspecified] alternative theory" of "future damages might be viable" (Br. 57), JELD-WEN took the calculated risk at trial of presenting no alternative lost-profits computation to the jury. Instead, JELD-WEN and its damages expert attacked Steves' damages expert, arguing that Steves was not entitled to recover lost profits in any amount. *See, e.g.*, JA2628:9-JA2629:1.

Thus, as the District Court recognized after seeing this testimony play out at trial, JELD-WEN "rolled the dice" on whether the jury would accept Steves' expert's computations. JA2666:23-25, JA1375*. No reason exists to rescue JELD-WEN from the consequences of its own trial strategy. *See supra*, p. 44 (discussing *Int'l Wood Processors*, *supra*).

2. JELD-WEN's specific challenges to the lost-profits award lack foundation in the record.

First, JELD-WEN mocks the idea that Steves "will…*immediately* go out of business" when it has no reliable doorskin supply. Br. 57.

JELD-WEN failed to cross-examine Steves' expert on this point. But it was actually a *conservative* assumption: Even if Steves has salvage value after the termination date, some of Steves' door customers will abandon Steves sooner due to uncertainty about its future. *See* JA2742:8-JA2750:14.

Second, JELD-WEN again contends that Steves' damages expert should have removed the lower-cost Towanda plant from the portfolio of doorskin plants in his damage model. Br. 62. As explained above, this was a question of fact on which Steves' expert rejected JELD-WEN's position, and JELD-WEN's expert offered no opinion about how the purported error affected Steves' damages. *See supra*, pp. 43-44.

Third, JELD-WEN claims that Steves benefitted "from the gap in the door market" created when JELD-WEN removed CMI as a rival door manufacturer. Br. 62. Insofar as this "gap" reflects a claim that Steves was "passing on" higher doorskin *prices* to its door customers, JELD-WEN correctly recognizes—as did the District Court—that *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), bars such a defense. Br. 63; JA1394-JA1395.

Alternatively, insofar as JELD-WEN's claim is about the increased *volume* of Steves' finished door sales, JELD-WEN's argument comes without evidence, and merely cites lawyers' arguments. Br. 62-63. True, Steves' market share in the doors market grew between 2012 and 2016. But myriad factors unrelated to CMI's acquisition could equally explain the growth in Steves' door sales, including increased demand for its products combined with superior production capacity, overall improvements in door quality, superior marketing, and exit or reduced sales by door sellers other than CMI. This is the quintessential situation in which, absent other evidence, "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

JELD-WEN's failure to offer any evidence of its own distinguishes this case from *Los Angeles Memorial Coliseum Commission v. NFL*, 791 F.2d 1356, 1366 (9th Cir. 1986), where the trial court erred in limiting evidence of a "damage offset defense" that the defendant sought to present through its experts. Similarly, the defendant's challenge to the plaintiff's expert testimony in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000), was founded in the record; the expert had

"ignored inconvenient evidence" and "failed to account for market events that both sides agreed were not related to any anticompetitive conduct." *Id.* at 1056. No similar situation exists here. Steves was required to present only a reasonable estimate of damages—not one that addressed every conceivable adjustment, regardless of its foundation in the evidence.

IV. The District Court Properly Exercised Its Discretion Under Rule 403 to Exclude Unfairly Prejudicial, Confusing, and Misleading Evidence

JELD-WEN asserts that "numerous evidentiary errors" warrant a new trial, but discusses only three purported errors. Br. 64-72. Each ruling under Federal Rule of Evidence 403 was correct, and none presents "the most extraordinary of circumstances, where…discretion has been plainly abused," warranting reversal, *In re C.R. Bard, Inc.*, 810 F.3d 913, 920 (4th Cir. 2016) (quotation marks omitted).

A. The District Court wisely refused to confuse the jury with evidence about the Government's choice not to bring its own enforcement action against JELD-WEN

1. The District Court correctly refused to admit evidence that DOJ declined to challenge JELD-WEN's acquisition of CMI. As the Court recognized, such evidence has, at best, "limited probative value." JA1393*, JA399-JA400*. "[A]n agency decision not to enforce often

involves a complicated balancing of a number of factors." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Apart from "whether a violation has occurred," the agency must consider "whether agency resources are best spent on [one] violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, [etc.]." *Id.*

Incredibly, JELD-WEN fails to inform this Court that DOJ itself expressly reminded the parties *during this very case* that "there are many reasons why a [DOJ] investigation may be closed, and the fact that an investigation has been closed should not be taken as confirmation that a transaction is either competitively neutral or procompetitive." JA383.

Moreover, the District Court rightly recognized the overwhelming risk of undue prejudice to Steves and confusion of the issues. JA399-JA400*; Fed. R. Evid. 403. The unstated premise of JELD-WEN's argument for relevance is that, if the jury knew about DOJ's inaction, it might be content to substitute DOJ's non-enforcement decision for its own judgment. But Steves was entitled to a jury exercising independent judgment on the trial record, not a jury prejudiced and

confused into thinking it might be second-guessing DOJ. *See Rabon v. Great Sw. Fire Ins. Co.*, 818 F.2d 306, 309 (4th Cir. 1987) (finding reversible error in allowing a "plaintiff in a suit for fire insurance proceeds to present evidence of his nonprosecution…on related criminal arson charges," in part because "such evidence goes directly to the principal issue before the jury and is highly prejudicial").

2. Other courts have taken a similar approach to the admissibility of decisions by DOJ or the Federal Trade Commission to forgo antitrust enforcement actions. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664 (7th Cir. 2002) (Posner, J.); *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 749 F. Supp. 2d 542, 556 (E.D. Ky. 2010) (subsequent affirmances omitted); *In re Carbon Black Antitrust Litig.*, No. 03-CV-10191-D, 2005 WL 2323184, at *1 (D. Mass. Sept. 8, 2005). Below, JELD-WEN sought to distinguish these cases as arising outside the acquisition context, but the nature of JELD-WEN's unlawful conduct is irrelevant to the Rule 403 balance.

JELD-WEN cites no example of an antitrust jury hearing such evidence of non-enforcement. Cases like *Alberta Gas*, *Gabaret*, *Ginsburg*, and *Verso Paper* (cited at Br. 64-65) are inapposite for just

that reason—none addresses whether a *jury* should hear evidence of government inaction.

3. JELD-WEN's alternative proposals (Br. 65-66) lack merit. *First*, based on an offhand half-sentence below (JA3123), JELD-WEN now argues for admission of the evidence subject to a limiting instruction. But "whether the prejudicial and distracting effects of evidence can be adequately moderated by a cautionary instruction is committed to the discretion of the district court." *United States v. Layton*, 767 F.2d 549, 556 (9th Cir. 1985). Given the substantial prejudice and confusion at stake, the District Court exercised sound discretion by nipping the problematic evidence in the bud, rather than giving a confusing and potentially ineffective instruction.

Second, JELD-WEN suggests that the district court could have cured any prejudice by allowing each side to put in evidence regarding DOJ's merger-review process. But that would have spawned a satellite trial about DOJ's internal policies and priorities, at the expense of the actual question for the jury, *viz.*, whether the acquisition was anticompetitive. As the District Court recognized, this "proposed

'curative' explanation compounded the risk of confusion and prejudice." JA1394*.

4. Finally, JELD-WEN suggested that it also needed to inform the jury about statements Steves made to DOJ—*e.g.*, a presentation regarding the CMI acquisition—ostensibly to "attack the reliability and sincerity of Steves' current claim" (JA3119-JA3120). The District Court correctly handled JELD-WEN's attempt to subvert its principal ruling: It recognized that identifying Steves' statements as having been made *to DOJ* would reopen the whole issue of DOJ's merger-review process. But it also recognized JELD-WEN's interest in offering evidence of Steves' prior statements. The Court therefore ordered that JELD-WEN *could* offer Steves' statements *if* described generically as "official statement[s]." JA1881:10-11. And at trial, when JELD-WEN's counsel offered one such statement and was reminded of this ruling, counsel volunteered that it was "fine" and she would "move on." JA2167:23-JA2168:2. JELD-WEN does not explain what difference—beyond undue prejudice—it would have made to tell the jury more about the listener's identity.

B. The District Court properly recognized that evidence about the pre-acquisition financial condition of an acquired company is highly misleading, outside of narrow circumstances not present here

After extensive briefing and argument, the District Court excluded evidence and argument "that CMI would have exited the market had it not been acquired by JELD-WEN," or "that CMI would not have continued to be an effective competitor absent any merger." JA520-JA521* (quotation marks omitted).

1. JELD-WEN misstates the District Court's ruling, which thoroughly explains why JELD-WEN's regurgitated arguments lack merit. JA519-JA540*.

The Court correctly reasoned as follows: Evidence about the acquired firm can "conceptually be probative" of a so-called "weakened competitor" defense (JA537*), under which the defendant shows that an acquisition that is presumptively anticompetitive (due to the high combined market shares of the firms involved) is in truth not anticompetitive (because one firm's historical market share vastly overstates its likely future market share). But here, "JELD-WEN cannot sustain a weakened competitor defense" (JA538*), because the burden of making out that defense is so great, the merging parties'

market shares here were so high, and JELD-WEN's evidence was so inadequate. JELD-WEN claims this reflected the District Court's "view that JELD-WEN's evidence was not *persuasive*" (Br. 70), but the Court's actual ruling was that the excluded evidence was *legally insufficient* to make out a valid defense. Accordingly, the evidence was irrelevant. (Or, equivalently, the exclusion of the evidence was harmless because it could not have properly changed the jury's view of the acquisition.)

The District Court ruled correctly. The weakened-competitor defense is highly disfavored and stringent—the "Hail-Mary pass of presumptively doomed mergers," *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 572 (6th Cir. 2014), and the "weakest ground of all for justifying a merger," *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1339 (7th Cir. 1981). That defense exists "only in rare cases, when the defendant makes a substantial showing that [1] the acquired firm's weakness, which [2] cannot be resolved by any competitive means, [3] would cause that firm's market share to reduce to a level that would [4] undermine the [plaintiff's] *prima facie* case [of substantial anticompetitive effects]." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1221 (11th Cir. 1991) (emphasis added). The policy concern

is palpable: "a merger is a relatively permanent arrangement," while "financial difficulties not raising a significant threat of [outright] failure [of the acquired company] are typically remedied in a moderate length of time." Areeda & Hovenkamp, *Antitrust Law* ¶963a3 (4th ed. 2016) (quotation marks omitted).

JELD-WEN's proffered evidence failed to satisfy these elements in multiple ways. When JELD-WEN acquired CMI, JELD-WEN had a 38% market share of doorskin unit sales, CMI a 16% share, and Masonite a 46% share. JA2230:6-24, JA2220:10-19. In that highly concentrated market, a strong presumption existed that the acquisition would be anticompetitive. JA2223:3-JA2232:5 (expert testimony). A "weakened competitor" defense would have required a "substantial showing of an imminent, steep plummet in [CMI's] market share." *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-CV-47, 2011 WL 1219281, at *58 (N.D. Ohio Mar. 29, 2011) (quotation marks omitted). JELD-WEN proffered no such evidence below (JA535*), and it points to none here. Furthermore, JELD-WEN has never explained why CMI could not have opted for a competitively preferable alternative (such as a financial

restructuring) over an anticompetitive acquisition by JELD-WEN. *See* JA3100.

Instead, JELD-WEN merely cites evidence that, as of 2012, CMI had lost money "every year since 2008." Br. 68. But "financial difficulties do not materially undermine the significance of past market shares of sales. They are relevant only where they indicate that market shares would decline in the future," *Antitrust Law* ¶963a3, something JELD-WEN did not propose to show. Indeed, as JELD-WEN itself recognized, CMI's condition resulted from "the catastrophic housing market crash in 2007" (JA3184), which also led JELD-WEN to seek a capital infusion and Masonite to declare bankruptcy (JA3085). Housing starts have, of course, since improved. JA2597:25-JA2598:8.

This last point alone distinguishes *United States v. General Dynamics*, 415 U.S. 486 (1974), which did not involve a temporary market-wide decline in demand, but rather a permanent change to a single firm's supply: The acquired coal company could not maintain market share because it was running out of coal. *See* JA531-JA533*. And cases like *United States v. International Harvester Co.*, 564 F.2d 769 (7th Cir. 1977), are distinguishable because the evidence there—

unlike JELD-WEN's patchy offering here—actually satisfied the strictures of the "weakened competitor" defense.

2. Beyond that, JELD-WEN's evidence about CMI's condition would at best be "relevant only for its value to impeach" Prof. Shapiro's "method of analysis." JA537*, JA538*. Yet that would come with an unacceptable "risk of jury confusion from evidence about [a weakened-competitor] defense[] not even pled, or minimally argued" by JELD-WEN. JA540*. Once the evidence was found insufficient to support the recognized but demanding defense, the District Court was within its discretion to exclude it altogether and avoid jury confusion. *See Garraghty v. Jordan*, 830 F.2d 1295, 1298 (4th Cir. 1987) (affirming exclusion under Rule 403 where "some of the evidence was arguably relevant" but "its relevance was tenuous at best and the court could rationally find that its relevance was outweighed by the likelihood that the evidence would confuse the jury").

C. The District Court correctly allowed the antitrust jury to hear that Steves *possessed* alleged trade-secret information, while excluding evidence of *how* Steves obtained that information

As the District Court noted in denying JELD-WEN's new trial motion, JELD-WEN's argument regarding the exclusion at the antitrust

trial of certain evidence about alleged trade secrets "entirely mischaracterizes" the ruling below. JA1389-JA1390*.

JELD-WEN is correct that Steves' (rather limited) know-how about doorskin production bears on whether Steves could build its own plant to avoid the anticompetitive effects of the acquisition. Br. 70. But the District Court never excluded such evidence. Rather, the District Court consistently ruled under Rule 403 merely that JELD-WEN could not "introduce evidence respecting *how* the information used by [Steves] *was obtained*." JA401* (emphasis added).

JELD-WEN has never explained why the *source* of the information is relevant to any antitrust issue (let alone addressed the unfair prejudice and jury confusion that such evidence would create).

Regardless, JELD-WEN waived this claim below. It assured the District Court that it was "not attempting to prove that Steves misappropriated JELD-WEN's information; instead JELD-WEN is simply requesting that it be allowed to present to the jury a full accounting of the information Steves possesses regarding entry into the doorskin market." JA3167-JA3168. The District Court allowed JELD-WEN to do just that.

V. The Trade-Secret Jury Instructions Were Correct

JELD-WEN's only challenge to the trade-secret trial is a complaint about two jury instructions affecting a fraction of the alleged trade secrets. Br. 72-74. This Court "review[s] challenges to jury instructions for abuse of discretion" and considers whether "they adequately inform the jury of the controlling legal principles." *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 432 (4th Cir. 2004) (quotation marks and citation omitted).

A. JELD-WEN's challenge to Instruction 31 is forfeited and meritless

1. JELD-WEN failed to preserve any objection to the District Court's instruction regarding the confidentiality requirement for a trade secret. *See* Fed. R. Civ. P. 51(c) (establishing how and when to preserve objection to jury instruction). At neither the charge conference (JA2988:6-7) nor after the instructions were given (JA2996:13-18) did JELD-WEN object.

Pressed below on this forfeiture, JELD-WEN pointed only to a colloquy during an April 2018 hearing on a discovery sanctions motion. JA1942:10-24. But there, the District Court made clear it was "not going to argue the instruction." JA1942:25-JA1943:1. Moreover, that

supposed April objection fails Rule 51's requirement that objections be made in response to the court's proposed instructions, which were not issued until May (JA2982:12-23).

2. Regardless, JELD-WEN acknowledged the accuracy of the principle Instruction 31 embodies, so it cannot establish error (plain or otherwise, *see* Fed. R. Civ. P. 51(d)). JELD-WEN represented that all but one of its alleged trade secrets were *not* combination trade secrets. JA1925:21-24, JA1934:8-10. The disputed portion of Instruction 31 was given for that combination trade secret (JA936), and JELD-WEN prevailed on it (JA838). For the *non*-combination trade secrets, JELD-WEN asserted its intent to prove that the *entirety* of each was confidential and acknowledged that, if it failed, it would lose on that alleged trade secret. JA1933:24-JA1934:5.

The cases cited by JELD-WEN do not suggest any error in Instruction 31. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 419 (4th Cir. 1999), holds only that the presence of an alleged trade secret in a court's public file does not, by itself, necessarily destroy secrecy. JELD-WEN's other cases address only "combination" (sometimes called "compilation") trade secrets. *See AvidAir Helicopter*

Supply, Inc. v. Rolls-Royce Corp., 663 F.3d 966, 972 (8th Cir. 2011) (discussing "[c]ompilations of non-secret and secret information" in "combination"); *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 411 (6th Cir. 2006) (discussing "a unique combination of both protected and unprotected material"); *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 675 (Wash. 1987) (discussing "an information compilation"). JELD-WEN cites no case where a party disavowed that its information was a combination trade secret but still was entitled to the instruction JELD-WEN seeks.

3. In all events, JELD-WEN's position below was that the instruction would matter only to 7 additional alleged trade secrets (JA1943:13-23), making the supposed error harmless as to the other 52 alleged trade secrets that the jury rejected.

B. JELD-WEN's challenge to Instruction 38 lacks merit

1. In challenging Instruction 38, JELD-WEN cites cases defining "willful and malicious" under other laws, but fails to address the meaning of the phrase under the relevant statutes, the Texas Uniform Trade Secrets Act ("TUTSA") and the federal Defend Trade Secrets Act ("DTSA").

For TUTSA, although the current statute reflects JELD-WEN's preferred definition, that definition was added in amendments that expressly apply only to actions filed after September 1, 2017. 2017 Tex. Sess. Law ch. 37, §§ 1, 6, 7. For pre-September 1, 2017 actions (like this case), a TUTSA plaintiff must prove that the defendant "specifically intended to cause the [plaintiff] a substantial injury" to recover exemplary damages. *Eagle Oil & Gas Co. v. Shale Exploration, LLC*, 549 S.W.3d 256, 283 (Tex. Ct. App. 2018).

Similarly, a leading trade-secret treatise concludes that "malicious" in the DTSA means "done…with the intent of injuring the trade secret owner." 1 *Milgrim on Trade Secrets* § 1.01[5][d][ii]; 4 *Milgrim on Trade Secrets* § 15.02[3][h][i]. Instruction 38 fairly reflects that view by requiring "intent to cause injury or harm." JA946.

2. In all events, any error in Instruction 38 was harmless as to the 59 alleged trade secrets that the jury found were not trade secrets to begin with. JA825.

VI. Having Granted Them Permission to Intervene, the District Court Properly Granted Final Judgment for Intervenors

JELD-WEN argues that the District Court should not have entered judgment for Intervenors on "hypothetical claims that JELD-WEN never brought." Br. 75. That argument ignores that entry of judgment as between JELD-WEN and Intervenors was the natural and necessary consequence of permitting Intervenors to intervene. JA1129-JA1141*.

A. Although JELD-WEN asserted trade-secret counterclaims against Steves, the factual allegations personally named Intervenors. (JA3631-JA3651). After a ruling below dismissed some of its counterclaims (JA290*), JELD-WEN sued Intervenors in Texas state court on largely the same factual allegations, in an apparent forum-shopping excursion (JA322). JELD-WEN then moved to voluntarily dismiss its counterclaims here. JA367. In a ruling JELD-WEN does not challenge, the District Court denied that motion to dismiss. JA373*.

Consequently, Intervenors knew they would have to personally defend against JELD-WEN's claims, but it made no sense to litigate in

two forums—Texas and Virginia—and the Virginia case was more advanced. Accordingly, Intervenors moved to intervene by permission as defendants here (JA374, JA377), and in another ruling JELD-WEN does not challenge, the District Court granted those motions to intervene (JA418*). Intervenors answered JELD-WEN's counterclaims, responding to numerous specific allegations by JELD-WEN that they had engaged in wrongful conduct. JA443, JA455. JELD-WEN had leave to amend its counterclaims (JA417), but it never did so, never identified triable issues of fact as to Intervenors, and never requested a verdict against them. After trial, the District Court granted Intervenors' motions for judgment as a matter of law. JA955, JA958, JA1151*.[5]

B. JELD-WEN's failure to litigate its counterclaims against Intervenors was simply an attempt to pocket-veto the District Court's orders by ignoring them at trial, and ignoring them again in this Court.

Although JELD-WEN made a tactical choice to pursue Intervenors in Texas and ignore them below (Br. 74-75), what matters

[5] Based on that judgment, the District Court has since enjoined JELD-WEN from pursuing Intervenors in Texas on claims that raise issues already litigated in Virginia. *See* ECF Nos. 1948, 1949.

is that JELD-WEN asserted counterclaims against Steves, Steves successfully resisted JELD-WEN's strategic effort to dismiss those claims, and Intervenors intervened as defendants to those same claims. "When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985). Thus, an intervenor—and, necessarily, the adverse party—are "vulnerable to complete adjudication…of the issues in litigation between the intervener and the adverse party." *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) (quotation marks omitted).

JELD-WEN's true quarrel is with the order permitting intervention (or with the denial of its motion to voluntarily dismiss its counterclaims). As the District Court explained, JELD-WEN's position that it may freely ignore parties who intervene "sets at naught the legal system that allows intervention." JA1140*. If JELD-WEN were correct, intervention could not serve its purpose of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

C. JELD-WEN cites cases for the general proposition that a court should not grant judgment on claims that have not been asserted. Br. 75. But only one involved an intervenor, and there, the intervenor bizarrely moved for summary judgment on *any* claim that the plaintiff "could raise." *Hudson v. Air Line Pilots Ass'n Int'l*, 415 B.R. 653, 660 (N.D. Ill. 2009). Here, Intervenors sought and received judgment only on specific counterclaims brought by JELD-WEN that directly implicated Intervenors. JELD-WEN's failure to seasonably litigate those claims is a reason to *affirm* the judgment, not vacate it. *See, e.g.*, *Eagle Harbor Holdings, LLC v. Ford Motor Co.*, No. C11-5503, 2015 WL 3407139, at *2 (W.D. Wash. May 26, 2015) (entering judgment against party with the burden of persuasion as to claims it "failed to offer evidence on at trial").

VII. JELD-WEN's Extraordinary Request for Reassignment

JELD-WEN's request to reassign this case on remand is unfounded. As discussed above, no error exists.[6] And even if there

[6] In five single-sentence bullet points, JELD-WEN raises an unintelligible raft of supposed errors. Br. 77-78. Such drive-by assertions should "not be considered but rather regarded as abandoned" because they were not "developed with any fullness." *Martin v.*

were merit to JELD-WEN's claims of error, those errors would be the ordinary kind that appellate courts correct and remand to the judge familiar with the case—not the "unusual circumstances" where the district judge cannot be expected to follow this Court's mandate. *United States v. North Carolina*, 180 F.3d 574, 583 (4th Cir. 1999) (quotation marks omitted). Especially after the complex and extensive proceedings here—in which the parties and the district judge have invested considerable resources—"reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Id.*

JELD-WEN nonetheless levels wild accusations that the district judge "ceased adjudicating this case" with "the reality of fairness." Br. 76. JELD-WEN fails to mention that the District Court freely disagreed with Steves' position, and significant rulings went in JELD-WEN's *favor*. *See, e.g.*, JA1911:8-JA1915:6 (permitting JELD-WEN's suspect and belated claim of merger efficiencies); JA397* (limiting testimony of Steves' damages expert); JA3517-JA3519*, JA3554-JA3557* (rejecting aspects of Steves' hardships and laches analyses);

Cavalier Hotel Corp., 48 F.3d 1343, 1350 n.2 (4th Cir. 1995) (quotation marks omitted).

JA666*, JA1088 (granting JMOL to JELD-WEN on part of Steves' contract damages); JA977* (denying relief for JELD-WEN's prejudicial conduct in trade-secret discovery); JA3657* (denying summary judgment on trade-secret counterclaims). Most obviously, JELD-WEN won a jury verdict and money judgment against Steves in the trade-secret trial (JA864, JA904, JA1419*), which Steves has paid. And even now, JELD-WEN claims trial error only as to 15 of its 67 alleged trade secrets. *See supra*, pp. 95, 96.

JELD-WEN's own conduct, not the district judge, is the true source of its frustration: JELD-WEN unlawfully acquired a competitor. It schemed to silence objections to that merger. It plotted to "kill off" other competitors. And when called to account for all that misconduct, its attorneys could offer only the most desperate and aggressive defense. A seasoned district judge and a diligent jury rejected JELD-WEN's defense, doing what the law provides to set things right.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument because they believe that it may assist this Court in reviewing the substantial record before the juries and the District Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation provided by this Court's order of June 4, 2019 because it contains 17,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced 14-point Century Schoolbook font using Microsoft Word

DATED: September 11, 2019 By: */s/ Benjamin J. Horwich*
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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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