No. 19-1397

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,
No. 16-cv-00545-REP

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

The proceedings below were deeply flawed from start to finish. Steves obtained extraordinary antitrust remedies without even demonstrating antitrust impact or injury. Indeed, Steves is forced to concede that damages that duplicate contractual damages do not qualify as antitrust injury. But that is all Steves ever tried to prove as its antitrust injury, and it is the only measure of damages the jury awarded. Despite JELD-WEN's repeated insistence that Steves needed to prove how it was distinctly worse off relative to a but-for world *without the acquisition*, Steves insisted on trying to prove only how it was worse off relative to a world in which JELD-WEN *complied with the Supply Agreement*. But the Supply Agreement itself fully protected Steves against that injury—as evidenced by the identical contract damages award Steves obtained. Steves now belatedly offers theories as to how it *could* have suffered distinct, non-contractual injuries as a result of the acquisition, but Steves did not present those theories to the jury or employ them in its damages model.

The remedial phase was, if possible, even more problematic. Against a legal backdrop where divestiture is all but unheard of in private-party antitrust cases and courts routinely apply laches to bar efforts to undo a merger even days after consummation, the district court granted divestiture even though it was not requested until four years after the acquisition, and did so despite years of effort (and millions of dollars in investments) to integrate the new acquisition. Steves cannot begin either to excuse the failure to apply laches or to justify that order under equitable principles. The court also ordered nearly $140 million in "future lost profits" premised on the wildly speculative theory that Steves will be driven from the market in 2021, even though other courts have squarely rejected nearly identical requests as too speculative as a matter of law. As a testament to the one-sidedness of the divestiture remedy, Steves prefers it to $140 million, but both remedies are in all events deeply flawed.

These invalid orders and unprecedented remedies were the product of proceedings permeated with legal error. JELD-WEN was repeatedly denied the opportunity to introduce evidence critical to its defense. The court even entered judgment against JELD-WEN on claims it never brought, and has now enjoined JELD-WEN from litigating distinct claims against the individual intervenors in the Texas state court where JELD-WEN has actually brought them. The sum total of these mutually reinforcing legal errors makes clear that the only suitable course at this juncture is to reverse and, to the extent remand is necessary, reassign.

ARGUMENT

I. Steves Cannot Transmute Its Breach-Of-Contract Claims Into Antitrust Claims.

To prevail on its antitrust claim, Steves needed to demonstrate both antitrust impact—*i.e.*, that it was injured relative to a but-for world in which the acquisition did not occur—and antitrust injury—*i.e.*, that it was injured because of a reduction in market-wide competition. Steves proved neither. Despite its best efforts to now wrap those issues in jury findings, its problem is a legal one: Steves' alleged injuries are purely contractual. The injury Steves has asserted throughout this case, and for which it sought *identical* breach-of-contract and antitrust damages, is that JELD-WEN charged it more and gave it less than the Supply Agreement allowed. As Steves now freely concedes, however, those contractual injuries are "of no concern to the antitrust laws." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977). Because Steves has never shown either impact or injury "of the type the antitrust laws were intended to prevent and that flows from that which makes [the challenged acts] unlawful," it has no antitrust claim. *Id.* at 489.

1. Steves begins by attacking a straw man, claiming that a breach of contract does not "*entirely negate*[] antitrust injury." Steves.Br.31. But the question here is whether purely contractual damages can *establish* antitrust injury. The answer is clear: Where the parties' obligations "were fixed by [their] contractual commitment," damages suffered and fully recoverable under that contract "do not constitute antitrust injury." *Orion Pictures Distrib. Corp. v. Syufy Enters.*, 829 F.2d 946, 949 (9th Cir. 1987).

That is not, as Steves suggests, Steves.Br.32, a causation principle, asking whether the breach was the product of anticompetitive behavior. It is instead, as

Steves ultimately concedes, an antitrust injury principle: To demonstrate an "injury of the type the antitrust laws were intended to prevent," *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 311 (4th Cir. 2007), Steves must prove that it suffered something *more* than the "identical loss" it would have suffered had JELD-WEN "'[breached] … the contract for reasons unrelated to the alleged antitrust violations,'" Steves.Br.33 (quoting *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981)); *see also SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995); *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 404 (6th Cir. 1997).

That concession is fatal. Steves' breach-of-contract case and its antitrust case rest on exactly the same injury: the contractual injury that resulted from JELD-WEN's alleged breach of the Supply Agreement. That is why Steves requested, and the jury awarded, the exact same damages on each claim. JA604-05, 2672-73. In Steves' own words, "the same damage flows from the antitrust violation as from the breach of contract." JA2672-73. By Steves' own telling, then, it suffered no antitrust injury.

2. Steves tries to escape that problem by noting that the Supply Agreement allowed it to buy up to 20% of its doorskins from other suppliers; buy additional doorskins from a supplier that could beat JELD-WEN's pricing by 3% if JELD-WEN would not match; and terminate and buy from other suppliers immediately if JELD-WEN sent a notice of termination. Steves.Br.35 (citing JA1583-84).

According to Steves, because it *could* have bought doorskins from other suppliers if they offered lower prices than were available under the Supply Agreement, it suffered antitrust injury if the acquisition prevented other suppliers from doing so.

At least in theory, such a claim might demonstrate that Steves suffered injury apart from its breach-of-contract damages. The problem is, Steves never made such a claim. Steves never tried to prove that CMI or any other supplier would have charged it less than JELD-WEN did for doorskins absent the acquisition—*i.e.*, it never tried to prove antitrust impact. *See* JW.Br.34-35, 37. That would have involved an inquiry into the but-for world that Steves' expert eschewed. Indeed, Steves' expert testified that he had not even *attempted* to estimate what the market price for doorskins would have been had the acquisition never occurred. JA2380. That is because Steves' theory of injury had nothing to do with whether it could have gotten doorskins from someone *other* than JELD-WEN at lower prices but for the acquisition. Instead, the only antitrust injury Steves claimed to have suffered is that "*JELD-WEN* charged Steves higher prices for doorskins than permitted *under the Supply Agreement*" because of the acquisition. Dkt.980 at 1 (emphases added).

Again, there is no better proof than Steves' measure of damages. Steves did not ask the jury to award it the difference between what it paid JELD-WEN and the hypothetically lower prices that CMI or any other supplier would have offered but for the acquisition. Steves offered zero evidence of such hypothetical, but-for prices.

Nor did Steves try to prove that "competitive pressures" would have led JELD-WEN to reduce its prices *below* what the Supply Agreement required, and seek that delta as its measure of damages. Instead, the *only* measure of past antitrust damages Steves sought—and the only measure it got—is the difference between what it paid JELD-WEN and what (it claims) it should have paid JELD-WEN under the Supply Agreement. Not only is that manifestly not a measure of antitrust injury; it is well-nigh the opposite since the Supply Agreement (at least according to Steves) entitled Steves to the *savings* that the acquisition facilitated.

Steves tries to excuse its abject failure to prove what prices would have been in a but-for world by claiming that "[t]he prices and price-adjustment formulas embodied in the Supply Agreement" are "a reliable proxy for *market* prices that would have been available from any doorskin supplier if JELD-WEN had not acquired CMI." Steves.Br.41-42. Setting aside the fact that Steves never supplied any evidence to substantiate its belated and dubious claim that prices on the *spot* market would have been the same as prices under a seven-year long-term contract,[1] that argument is still unavailing. If (as Steves claims) the prices it should have gotten under the Supply Agreement and the prices it could have gotten from another

[1] In fact, the only evidence on that score demonstrated (unsurprisingly) that spot market prices were substantially higher than the prices JELD-WEN charged under the Supply Agreement. JA2134.

supplier but for the acquisition were one and the same, Steves.Br.41-42, then Steves is still left impermissibly claiming as antitrust injury the "identical loss" that it recovered on its contract claims.

3. Steves alternatively claims that it suffered some non-contractual injury because the acquisition purportedly eliminated pre-acquisition "competitive pressures" that ensured that "suppliers" provided "quality doorskins" and "customer-friendly practices." Steves.Br.36-37. But the only supplier that Steves tried to prove ceased providing "quality doorskins" and "customer-friendly practices" was JELD-WEN. And the only way Steves tried to do so was by claiming that JELD-WEN breached the Supply Agreement. This argument thus runs right back into Steves' concession that it cannot claim as antitrust injury losses "identical" to what it could recover had JELD-WEN breached the Supply Agreement "for reasons unrelated to the alleged antitrust violations.'" Steves.Br.32-33.

Indeed, it is even worse than that, for Steves failed to prove that JELD-WEN breached the Supply Agreement by providing low-quality doorskins. Steves now tries to capitalize on that loss by claiming that its purported quality injuries are distinct from its contractual injuries because it had "no meaningful contractual protection against the loss of quality." Steves.Br.37. But the district court rejected Steves' quality claim because Steves failed to prove that JELD-WEN actually sold it defective doorskins. JA1098-1102, 1116-17. Neither the district court nor Steves explained how Steves could plausibly convert a non-injury into an antitrust injury.

4. Ultimately, then, Steves' effort to prove antitrust injury and impact is doomed by its refusal to "construct a hypothetical market, a 'but-for' market, free of the restraints and conduct alleged to be anticompetitive." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2000) (citation omitted). It is not just that Steves failed to prove the extent of its antitrust injury, *contra* Steves.Br.40-41; by failing to even try to prove that it would have been better off than it was under the Supply Agreement in a world without the acquisition, Steves failed to prove any antitrust impact or injury at all.

Steves' last-ditch response is to insist that the but-for requirement does not exist. Steves.Br.38.[2] Neither of the cases it cites supports that radical claim. The *Microsoft* decision—a Sherman Act monopolization case—held only that a court may infer *causation* without a but-for analysis when a plaintiff suffers the obvious antitrust injury of being excluded from the market. *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (per curiam) (en banc). *Zenith* likewise involved

[2] Steves also suggests that its expert did conduct a "but-for" analysis by opining that JELD-WEN would not have breached the Supply Agreement but for the acquisition. Steves.Br.39. But why JELD-WEN breached the agreement is irrelevant to whether some other supplier would have charged Steves lower prices in a world with no acquisition.

exclusion of a potential competitor, and addressed only the burden of proof for establishing the *damages* that result from that obvious antitrust injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Neither case remotely holds that a plaintiff can prove antitrust impact or injury from an allegedly anticompetitive merger without even trying to prove that it would have paid lower prices but for the merger. Simply put, Steves cannot rescue its antitrust claim by belatedly asserting theories of antitrust impact and injury that are utterly divorced from the evidence it presented and the damages it procured.[3]

II. The Divestiture Order Cannot Stand.

Even if Steves had a viable antitrust claim, the unprecedented divestiture order must be reversed. Both laches and the traditional four-factor equitable test preclude that extraordinary relief.

[3] Implicitly recognizing these problems, Steves suggests in a footnote that its failure to prove that it suffered any antitrust injury as a result of JELD-WEN's breach of the Supply Agreement impacts only the $36.4 million trebled past antitrust damages award, not the extraordinary remedy of divestiture or the alternative $140 million future "lost profits" award. Steves.Br.38 n.1. Of course, arguments raised only in passing are waived. *Brown v. Nucor Corp.*, 785 F.3d 895, 923 (4th Cir. 2015). And Steves' argument is doubly waived given that it did not press, and the district court did not embrace, any theory of antitrust injury other than breach of the Supply Agreement below. Instead, the court found *antitrust* injury (as opposed to *generalized* injury) based *solely* on the breach of the Supply Agreement, not on its termination. JA1367-76. In all events, Steves failed to prove that JELD-WEN would not have terminated the Supply Agreement but for the acquisition, let alone that Steves will go out of business without it. *See* JW.Br.39-40; *infra* Part III.

A. Laches Bars Steves From Seeking Divestiture.

Steves cannot cite a single case granting a private party divestiture when it was not sought until *four years* after an acquisition closed. In fact, Steves cannot cite a single case granting a private party divestiture, period. And as it acknowledges, such requests are routinely rejected as untimely even when brought just days after—or even *before*—a merger closes. *See* JW.Br.42 (citing cases).

To be sure, that does not mean that laches categorically bars post-closing divestiture requests. *Cf.* U.S.Br.8-14. But that is because equity abhors categorical rules, not because a private-party divestiture request four years after a merger is ever likely to survive a laches defense. And if there is such a unicorn out there, it is not this case.

As a general matter, equity begins to weigh heavily against divestiture once an acquisition closes given "the hardship and competitive disadvantage resulting from forced divestiture" of a fully integrated asset. *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010). That is not a "stunning new guidepost" "invent[ed]" by JELD-WEN. Steves.Br.63. That is the consensus of courts that have actually considered laches in the merger context—a consensus from which the district court radically departed by invoking inapposite, largely non-merger cases to conclude that a divestiture request is presumptively timely so long as it is brought within the Clayton Act's four-year statute of limitations for damages claims. JA3554-57. In fact, Steves' four-year delay in seeking divestiture was "unreasonable and inexcusable." *Midwestern Mach. Co., Inc. v. Nw. Airlines, Inc.*, 392 F.3d 265, 277 (8th Cir. 2004).

Parroting the district court, Steves asserts that it could not have sued earlier because it suffered no injury until JELD-WEN breached the Supply Agreement. Steves.Br.66-68. But Steves cannot have it both ways. If it in fact stood to suffer antitrust injury even with the Supply Agreement (as it now claims, *see* Steves.Br.36), then it could have and should have challenged the acquisition at its inception. Conversely, if the only injuries it ever stood to suffer were contractual injuries, then it has never suffered any antitrust injury at all. *Supra* pp.2-7. In all events, Steves' no-injury-pre-contractual-breach theory does not excuse its delay even on its own terms, as Steves claimed that JELD-WEN began breaching the contract (at least) as early as August 2014, Steves.Br.67, yet it did not bring suit for *nearly two more years*.[4]

That delay was highly prejudicial. Steves quibbles over details, but it cannot deny that JELD-WEN devoted enormous time, effort, and capital to improving the

[4] Nor can Steves blame JELD-WEN for its delay. Steves.Br.69-70. Because Steves can prove antitrust injury (if at all) only if it suffered (or stood to suffer) injuries from which the Supply Agreement's breach remedies did not protect it, the Supply Agreement cannot excuse its failure to challenge the acquisition earlier.

Towanda plant and integrating it into its operations. JW.Br.43-45.[5] Instead, Steves faults JELD-WEN for continuing to invest in Towanda after learning in May 2015—nearly three years *after* the acquisition—of Steves' belated "antitrust concerns." Steves.Br.72-73.[6] But raising concerns is a far cry from filing a suit seeking divestiture, and JELD-WEN's *continued* investment in a plant it had been developing for three years hardly suggests that JELD-WEN would have made all the same decisions had Steves pressed its objections pre-merger or immediately thereafter. JA2814-15 (testimony that if DOJ had objected to the acquisition, JELD-WEN would have abandoned it). In short, Steves' delay was unreasonable, inexcusable, and prejudicial in the extreme.

B. Traditional Equitable Factors Preclude Divestiture.

Steves fares no better with its efforts to defend the unprecedented divestiture order on its merits, for Steves cannot overcome the reality that "the remedial equities balance overwhelmingly in favor of denying this remedy" after an acquisition has been consummated. *Ginsburg*, 623 F.3d at 1236.

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[5] Steves invokes the district court's finding that James Morrison was not credible because he misstated his academic credentials. Steves.Br.72-73. Even accepting that dubious finding, testimony from numerous other witnesses confirms the obvious prejudice JELD-WEN suffered. *See, e.g.*, JA2514, 2781-82, 2862.

[6] Steves notably does not defend the district court's unsustainable conclusion that JELD-WEN suffered no prejudice because it had recovered most of the cost of its capital investments. *See* JW.Br.46-47.

1. Irreparable injury and adequacy of damages.

To begin, Steves has no injury that cannot be adequately redressed by money damages. Steves sought and obtained not only substantial past damages, but nearly *$140 million* in future damages. That immense award (or even the possibility of a less speculative award) fatally "undermines its claim of irreparable injury moving forward." *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 386-37 (4th Cir. 2017).

Steves claims that monetary damages are inadequate to remedy the (speculative) injury of going out of business. Steves.Br.47-48. But that theory has routinely been rejected in other cases. *See, e.g.*, *DFW Metro Line Servs. v. Sw. Bell Tel. Co.*, 901 F.2d 1267, 1269 (5th Cir. 1990) ("[A]ny potential injury suffered by [plaintiff] (including its going out of business) could be calculated and recompensed in the form of damages"); *HCI Tech., Inc. v. Avaya, Inc.*, 446 F. Supp. 2d 518, 521 (E.D. Va. 2006) ("[E]ven were [plaintiff] to be driven out of business … it does not necessarily follow that this would constitute irreparable harm."), *aff'd*, 241 F. App'x 115, 121 n.7 (4th Cir. 2007). As for the cases Steves cites, none involved a decision that actually *entered* an alternative damages award—a striking confirmation that, to the extent Steves actually proved any future injury, money damages were both available and adequate to remedy it. Steves.Br.47-49.

At the very least, the district court should have limited its equitable remedy to the narrowest injunction necessary to remedy Steves' purported irreparable injuries—a course the court explicitly refused to take. JA3543-44; *cf. Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).[7] The court refused to do so solely on the ground that a narrower remedy "would not restore competition in the industry as a whole" or "aid [other] manufacturers," JA3544, considerations well outside its proper purview, *see* JW.Br.49.

Steves does not defend that flawed reasoning, tacitly conceding that it was inappropriate for the court to appoint itself as a new competition-regulating entity for the doorskin market. Instead, Steves rewrites the court's decision, suggesting it held that an injunction "would eventually fail" to resolve *Steves'* injuries because there would be no structure in place to foster future competition. In fact, the court held the opposite, specifically concluding that it "could solve Steves' supply problem by ordering JELD-WEN to supply Steves' requirements for a long term." JA3543-44. Given that conclusion, the court had no justification for ordering the extraordinary remedy of divestiture of a fully integrated asset.

[7] That JELD-WEN did not propose the narrower remedy the court rejected is irrelevant, Steves.Br.50, for this Court may consider issues decided *sua sponte* below. *See, e.g.*, *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 207-12 (4th Cir. 2013).

2. The balance of hardships and the public interest.

The balance of hardships and public interest also tip sharply against divestiture. Steves claims it will suffer extreme hardship should it lose its business, Steves.Br.51-52, but that claim is extraordinarily speculative, JW.Br.57-61; *infra* pp.19-20. By contrast, the harms to JELD-WEN and its customers are obvious and certain: the loss of JELD-WEN's extensive investment in Towanda and the efficiencies this investment has produced, coupled with the substantial costs of unwinding the long-completed acquisition. JW.Br.7-8, 44-45, 51-52.

Steves largely ignores those costs, other than to claim that JELD-WEN and Towanda were not "fully integrated" because Towanda maintained separate accounting and customer ordering systems. Steves.Br.52. But it does not (and cannot) dispute that Towanda is fully integrated into JELD-WEN's manufacturing system, including its doorskin mix model, and that divestiture would force both entities to unnecessarily duplicate dies and other equipment. JW.Br.51-52; JA3480-83, 3486-87. Indeed, Steves almost completely ignores the massive inefficiencies divestiture would entail, and the increased prices those inefficiencies would produce. JW.Br.51-52; *cf.* Steves.Br.54 n.4 (baldly asserting that it "makes no economic sense" that divestiture would increase prices). Instead, Steves suggests that the only harm JELD-WEN would face is that it would "produce fewer doorskins." Steves.Br.52. Steves' abject disregard for the interests of the customers JELD-WEN would no longer be able to supply as a result is remarkable. But in all events, in the longer term, the anticompetitive inefficiencies divestiture would produce run far deeper than the immediate capacity problems it would create.

On top of that, it is wholly unclear whether divestiture would produce any procompetitive benefits. As the United States explained below, the effect of a potential divestiture on competition depends on the identity of the proposed buyer and the terms of the divestiture order. JA970-73. Here, the only potential purchaser who has expressed interest in Towanda is Steves—and for the reasons the United States explained, selling the plant to Steves would do little if anything to improve competition in the doorskin market. JA974. Instead, that would merely create another vertically integrated door manufacturer, and hence would still leave "no independent suppliers." *Id.* Absent "an independent buyer with the ability and incentive to operate as a vigorous competitor in the doorskin market," JA975, there is not even a theoretical basis to believe that divestiture will improve competition.

Steves relies heavily on *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), but that decision is inapposite. First, the part of *Brown Shoe* Steves invokes reviewed whether the divestiture order was *final*, not whether it was well-reasoned. *Id.* at 308-11. More importantly, the plaintiff seeking divestiture in *Brown Shoe* was the United States. *Id.* at 296. When the government seeks divestiture, its only incentive is to promote competition, so it has every reason to recruit the most appropriate buyer and to seek divestiture only when an appropriate buyer is available. JA3531 (listing factors DOJ considers when deciding whether to seek divestiture). Under those circumstances, it may well be appropriate to order divestiture "without first identifying a buyer." Steves.Br.58. In a private action, by contrast, "[n]either party … can be expected to advocate for the interests of a potential buyer when the buyer's interest diverges from their own, as it almost certainly will." JA973. Given Steves' admitted interest in buying Towanda itself, it has no meaningful incentive to recruit a more appropriate buyer, *contra* Steves.Br.59—making the court's decision to deem divestiture equitable without first identifying a suitable buyer wholly inappropriate, JW.Br.53-54.

Steves' claim that the divestiture order's onerous conditions would benefit the divested entity is equally unpersuasive. Steves.Br.59-60. As the United States explained, those conditions "threaten the viability of the divestiture buyer and distort competition on price and quality." JA974. And while Steves suggests that a divested Towanda could be profitable, the evidence it cites in fact shows that Towanda made a profit on its doorskin business only during the 2009-2013 housing bubble. JW.Br.54-55; *contra* Steves.Br.60-61. Steves has no response to the unrebutted evidence that Towanda as an independent entity could not sell the volume of doorskins necessary to remain profitable, JA3478, Dkt.1652 at 6-11, or absorb the increased costs it would face if removed from JELD-WEN's sales, administrative, and technological infrastructure, JW.Br.54-55.

Instead, Steves just asks this Court to kick the can down the road, assuring that if no suitable bidder emerges, then divestiture will not occur. Steves.Br.61-62. But a plaintiff seeking equitable relief—especially the extraordinary remedy of divestiture—must show that the balance of hardships and public interest actually *do* favor the remedy it seeks, not just that things might possibly work out. Steves cannot insist that JELD-WEN should be forced to shoulder the immediate costs of a looming divestiture and endure a long, expensive, and highly disruptive divestiture process—including paying for extended supervision by a special master—when Steves produced no evidence that a suitable buyer exists.

In the end, the district court's decision confirms the inappropriateness of its divestiture order. The court recognized that it could not determine on the existing record whether divestiture would actually bring any benefits, let alone whether any such speculative benefits would outweigh the substantial and immediate harms to JELD-WEN, Towanda, and the public. JA3521, 3527-28, 3536-37; JW.Br.55-56. Steves cannot justify the court's inexplicable decision to weigh that uncertainty in *favor* of divestiture. In the face of that legal error, and the clear weight of the equitable factors, the extraordinary and unprecedented divestiture order cannot stand.

III. The District Court's Alternative Award Of Lost Profits Is Wholly Speculative And Unsupported.

A. Steves' Speculative Theory Cannot Support Its Extraordinary Damages Claim.

Steves' assertion that it can recover almost $140 million today because it will necessarily go out of business as soon as the Supply Agreement terminates is far too speculative as a matter of law. Indeed, Steves does not cite *any* case in which a court has ordered future damages on the theory that a thriving business will abruptly shutter several years hence. Instead, Steves contents itself with attempting to distinguish the cases arrayed against it, arguing that they involved "hypotheticals and future threatened injury." Steves.Br.75-76 (quoting *SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc.*, 754 F. App'x 235, 240-41 (5th Cir. 2018)). That, of course, is no distinction at all. *See* JW.Br.57-61.

Indeed, there is nothing remotely "concrete" about Steves' hypothetical "supply problem." Steves.Br.76. At present, Steves is getting all the doorskins it wants. Its future damages claim is premised on the *hypothetical* possibility that it will no longer be able to do so when the Supply Agreement terminates *in September 2021*. Steves is thus in the exact same position as the *SureShot* plaintiff, who claimed that the defendant would refuse to enter into a new contract when the parties' current contract expired two years later, and hence drive SureShot out of business. *See SureShot*, 754 F. App'x at 240-41. That claim was speculative as a matter of law when advanced by SureShot, and it is just as fatally speculative when advanced by Steves.

After all, there are numerous alternative sources of doorskins available to Steves once the Supply Agreement terminates. JW.Br.59-61; *contra* Steves.Br.74-75. It could buy doorskins from JELD-WEN, either on the spot market or via a new long-term supply agreement, JA1455, 2169-73, 2575-77; find another supplier, like Masonite, JA2132-35, 2174-77, or a foreign manufacturer, JA2058-61, 2064-70; or even build a new doorskin-manufacturing plant (for far less than $140 million), JA2075-76.[8] In fact, Sam Steves admitted at trial that Steves is actively pursuing these options. JA2053-54. Given these manifold alternatives, Steves' claim that its business will necessarily fail when the Supply Agreement terminates is speculative as a matter of law.

Finally, there is nothing "puzzling" about the fact that Steves sued too late for the extraordinary remedy of divestiture, but too early for an extraordinary future-damages theory premised on the prospect that it would be driven out of business several years hence. Steves.Br.77-78. If Steves believed that the acquisition would harm competition and injure Steves with or without the Supply Agreement, then it

[8] For instance, Steves conveniently ignores the evidence that, just five days before it filed its complaint, a foreign supplier offered Steves doorskins at a price lower than JELD-WEN's. JA1450-51, 2164-66. And Steves found those doorskins of sufficient quality to purchase and use. JA2064, 2429.

could have and should have sought to block JELD-WEN's Towanda acquisition before it was consummated. And if Steves offered a more modest future damages theory (perhaps projecting higher costs in the but-for world for a reasonable number of years), it would be fully ripe now. But there is nothing puzzling or inconsistent with faulting Steves for waiting years too long to seek divestiture and for pursuing a shoot-the-moon future damages theory premised on a wildly uncertain future event.

B. Steves Improperly Sought Damages for Profits It Would Have Earned *Because of* the Acquisition.

The extraordinary damages award suffers from an independent flaw: It includes profits that Steves claims it should have earned *because of* the allegedly anticompetitive acquisition. Both Steves' past damages model and its future damages model fail to account for benefits Steves derived from the alleged anticompetitive conduct, by baking into their calculation the cost reductions created by JELD-WEN's integration with and improvements to the Towanda plant, and by ignoring the increase in market share that Steves captured when CMI exited the door market. *See* JW.Br.61-63. Because Steves made no adjustment to its damages model to exclude "benefits which would not have been received … 'but for' the [allegedly] anticompetitive conduct," its damages claim fails as a matter of law. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986).

Steves concedes the error, admitting that it used its past profits to estimate future profits without adjusting for the portion of those past profits earned *because* *of* the challenged conduct. Steves.Br.78-79. Like the district court, it blames JELD-WEN for choosing not to present its own damages model. Steves.Br.79-82. But the burden to present a damages model that fits an actionable theory of antitrust injury is on the plaintiff. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 36 (2013); *Concord Boat*, 207 F.3d at 1057. JELD-WEN had no obligation to do more than challenge Steves' model as irreparably flawed. JW.Br.63.

Steves cannot escape this problem by dismissing the need to exclude cost savings from the acquisition in its damages model as "a question of fact." Steves.Br.80. Profits that a plaintiff earned or would have earned *because of* the challenged conduct *cannot* constitute damages as a matter of law. JW.Br.61-62; *L.A. Mem'l*, 791 F.2d at 1367. Steves contends that it was not required to account for its increased share in the doors market because "myriad factors unrelated to CMI's acquisition could equally explain [that] growth." Steves.Br.81. But again, the burden was on *Steves* to present an adequate damages model. Unlike *Bigelow v. RKO Radio Pictures*, this is not a case where Steves is missing "more accurate data which the [alleged] misconduct has rendered unavailable." 327 U.S. 251, 265 (1946). Steves simply opted to rely on a wildly inflated damages model, even after JELD-WEN highlighted its legal flaws. Having done so, Steves cannot now claim that it is entitled to keep its award simply because the jury agreed with its factual accounting of "damages" that are not legally recoverable.

IV. The District Court's Multiple Evidentiary Errors Require A New Antitrust/Breach-of-Contract Trial.

A. DOJ Evidence.

Steves wisely does not defend the district court's holding that the fact that DOJ (twice) investigated but never challenged the CMI acquisition was "not relevant." JA399. Instead, it argues only that the evidence's risk of prejudice outweighed its probative value. Steves.Br.82-86. But courts routinely afford weight to agency inaction when reviewing private antitrust suits even though such decisions may involve competing considerations. JW.Br.64-65 (collecting cases). Steves gives no reason why the presence of a jury should change that rule—especially when the court had several ways to minimize any potential prejudice. JW.Br.65-66.

The court erred even more egregiously by excluding the fact that Steves told DOJ in 2012 that it had no objection to the acquisition, and then told DOJ in 2015 that doorskin prices had not risen. The resulting harm to JELD-WEN is obvious, *contra* Steves.Br.86; there is an overwhelming difference between a prior inconsistent statement to *federal antitrust enforcement authorities*, and a prior inconsistent statement to "somebody," *see* JW.Br.66-67. By preventing JELD-WEN from presenting that evidence in its full context, the court eviscerated its persuasive force. Like the district court, *see id.*, Steves makes no attempt to explain how that evidence can be considered more prejudicial than probative. Evidence is not *legally* prejudicial just because it undermines one side's case.[9]

B. CMI Evidence.

Steves does not dispute that the court's exclusion of evidence that CMI was in severe financial distress was unprecedented. JW.Br.67-68. Instead, Steves argues that this evidence was legally insufficient to sustain a weakened competitor argument. Steves.Br. 70-71. That is not a defensible argument for wholly excluding the evidence—especially when the only prejudice either the court or Steves has identified is the possibility that the jury might have *accepted* that legally valid defense. JW.Br.69-70; *see* JA539; Steves.Br.91.

Steves' defense of the exclusion of this evidence is particularly remarkable given its newfound theory that it suffered antitrust injury because CMI was not there to undercut JELD-WEN's prices. If (contrary to reality) Steves' theory really had turned on whether it could have purchased doorskins at lower prices *from CMI*, then it would have been well-nigh inexplicable to preclude the jury from considering evidence that CMI, as Steves itself admits, was on the verge of bankruptcy.

In all events, the district court was wrong even on its own terms. Given the undisputed financial difficulties CMI faced, a reasonable jury could easily have

[9] Given that the court had already threatened JELD-WEN with a mistrial if it mentioned DOJ, the fact that counsel for JELD-WEN was willing to "move on" without pressing the point is hardly surprising. JA1881, 2167-68.

concluded that CMI was so weak that "no substantial lessening of competition occurred or was threatened" by the challenged acquisition. *United States v. Int'l Harvester Co.*, 564 F.2d 769, 774 (7th Cir. 1977); *see* JW.Br.70-71. Steves' contrary argument rests on an unjustifiably stringent view of the weakened-competitor defense. Steves.Br.88-89. In fact, settled Supreme Court precedent demonstrates that evidence supporting a weakened-competitor defense is generally admissible, *see United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 506-07 (1974), and numerous other courts have followed suit, *see* JW.Br.68-69 (citing cases). Steves gives no plausible reason why this should be the first case ever to find evidence of an acquired firm's weakened financial condition to be more prejudicial than probative.

C. Trade Secrets Evidence.

The district court erred by excluding evidence that Steves hired Pierce to obtain JELD-WEN's trade secrets to evaluate building its own doorskin plant. That evidence—showing not just that Steves had that information, but that it was willing to pay a former JELD-WEN employee to acquire it—was obviously relevant to the jury's evaluation of how serious Steves was about entering the doorskin market. JW.Br.70-71. Even if JELD-WEN could somehow have introduced the *fact* of Steves' knowledge without mentioning how Steves obtained it, *see* Steves.Br.91-92, that unwarranted restriction would have deprived the information of its necessary context and made it practically useless to the jury.[10] That evidence was equally relevant to impeach Sam Steves, who testified falsely that it is "highly unlikely" that Steves will build a doorskin plant because "we obviously don't know how to do it ourselves." JA2037. Steves cannot explain why JELD-WEN should have been prohibited from refuting that testimony by showing that Steves hired Pierce to obtain that very information.

V. The District Court's Instructional Errors Require A New Trade-Secrets Trial.

The district court's instructional errors require a new trade-secrets trial. *First*, the court wrongly limited its instruction that "a trade secret may exist if some, or even all, of its individual elements are public" to only one of the trade secrets at issue. JA936, 2991; *see* JW.Br.72-73. Steves cites no case holding that this principle applies only to "combination" trade secrets. Steves.Br.94-95. Nor did JELD-WEN forfeit this argument, given that the court decided to limit that instruction to only one of JELD-WEN's claims only after closing argument. JA1357-58; *contra* Steves.Br.93-94.

Second, the court erred by defining willful and malicious trade-secret misappropriation to require an "intent to cause injury or harm" rather than just a

[10] Contrary to Steves' waiver claims, Steves.Br.92, JELD-WEN consistently sought to introduce "[t]he full extent of Steves' efforts" to enter the doorskin market, JA3167.

"conscious disregard of the rights of another." JW.Br.73-74. The Texas statutory amendment that Steves cites simply codified prevailing law, *contra* Steves.Br.95-96, and Steves cites no case adopting its preferred treatise's definition, *contra* Steves.Br.96; *see* JW.Br.73-74 (citing cases).

VI. The District Court Erred By Entering Judgment For Intervenor-Defendants On Claims That JELD-WEN Never Asserted.

Steves admits that JELD-WEN "never identified triable issues of fact as to" the individual intervenor-defendants, "and never requested a verdict against them." Steves.Br.98. Yet it nonetheless argues that the district court could enter judgment in their favor simply because it had permitted them to intervene. Steves.Br.97-100. Indeed, Steves has even succeeded in procuring from the district court an extraordinary injunction prohibiting a state court from adjudicating the claims that JELD-WEN has *actually* brought against Intervenor-Defendants—including *non*-trade-secrets claims that JELD-WEN did not press against *anyone* in this case. Dkt.1948; Dkt.1949. Unsurprisingly, Steves cites no case embracing that novel rule. Its position would eviscerate the principle that a plaintiff is the master of its own complaint and the rule that preclusion is to be decided by the court in which claims are *actually* brought, and would encourage litigants to preempt ongoing litigation by intervening in a court that they think will be more sympathetic. JW.Br.74-76. Neither the Federal Rules nor established caselaw permits that result.

VII. This Case Should Be Reassigned On Any Remand.

This Court should reassign this case on any remand. This is not a matter of a handful of isolated errors. The district court converted a breach-of-contract dispute into an unprecedented antitrust action only by ignoring established legal requirements and remedial limits and by skewing the evidence considered by the jury to all but foreordain its verdict. Correcting those errors is important, but preventing their recurrence and ensuring the appearance of a fair trial on remand counsel in favor of reassignment. *Accord E.I. DuPont De Nemours & Co. v. Kolon Indus., Inc.*, 564 F. App'x 710, 716 (4th Cir. 2014); *United States v. North Carolina*, 180 F.3d 574, 583 (4th Cir. 1999).

CONCLUSION

This Court should reverse or vacate the judgment.

Respectfully submitted,

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September 13, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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September 13, 2019

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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