UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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

JELD-WEN, INC.'S OPPOSITION TO STEVES AND SONS, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to the Court's instruction on February 13, 2018, Defendant JELD-WEN, Inc. ("JELD-WEN") hereby submits this Opposition to Plaintiff Steves and Sons, Inc.'s ("Steves") Motion for Judgment as a Matter of Law regarding the efficiencies JELD-WEN realized from its 2012 acquisition of Craftmaster Inc. ("CMI").

INTRODUCTION

A focal point for Steves in this trial has been that Steves must be able to obtain the full assortment of 477 SKUs of JELD-WEN doorskins in order to compete in the marketplace. Steves has repeatedly touted the fact that it sells doors to its customers using all those types of doorskins, and dismissed potential doorskin suppliers as insufficient replacements for Steves' business because they could not provide all of those options. The ability for Steves to obtain those 477 SKUs undoubtedly is a large competitive benefit to Steves. But the uncontroverted evidence is that it is only through the merger with CMI that Steves was able to obtain all of those SKUs. Indeed, since Steves was required under the Supply Agreement to purchase at least 80

percent of its doorskins from JELD-WEN, in the absence of the acquisition there is no way Steves would have been able to offer the breadth of SKUs it currently offers to its customers.

JELD-WEN's witnesses in this trial have testified that the acquisition of CMI has led to significant efficiencies, both in terms of the above-mentioned consolidation of doorskin designs as well as the consolidation and redeployment of doorskin manufacturing amongst JELD-WEN's plants. JELD-WEN's witnesses in this trial have testified that those efficiencies are specific to the merger, are verifiable, and are benefits to JELD-WEN's consumers, including Steves. Steves never attempted to rebut any of that evidence at trial. Nonetheless, now Steves is seeking to have this Court order that the factfinder not be permitted to consider those efficiencies as part of its deliberations on the effects of the CMI acquisition on competition. To our knowledge, no court has done that before—and with good reason. Granting Steves' request would essentially amount to an improper prejudging of liability in this case.

As Steves' own filing acknowledges, in merger analysis efficiencies are weighed against anticompetitive effects in order to determine whether a transaction substantially lessens competition. *See* Plaintiffs Steves and Sons, Inc.'s Memorandum in Support of its Motion for Judgment as a Matter of Law ("Memo") at 5 (*citing FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016) (requiring "clear evidence showing that the merger will result in efficiencies that will offset the anticompetitive effects and ultimately benefit consumers")) (Doc. No. 988). As the court in *Saint Alphonusus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.* stated, the "focus [is] on whether efficiencies in the relevant market negate the anticompetitive effect of the merger in that market." 778 F.3d 775, 790 (9th Cir. 2015).

In this case, there has been no determination that the merger has led to anticompetitive effects. That is something the jury will begin examining in hours when it deliberates on whether

JELD-WEN's acquisition of CMI violates Section 7 by substantially lessening competition. And as they consider that ultimate issue, they, like every factfinder in every Section 7 case, should be permitted to consider the procompetitive benefits of the acquisition and do the proper weighing. Because efficiencies are not considered in a vacuum, but rather are measured against anticompetitive effects, a finding by this Court that JELD-WEN has not met its burden of presenting sufficient efficiencies to let the matter proceed to the jury necessarily means that this Court is prejudging not only the efficiencies but also the anticompetitive effects of the transaction.

JELD-WEN respectfully submits that the Court should not allow Steves to encroach on the jury's holistic evaluation of the acquisition's overall effect on competition, which the law requires. *See generally FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991).

ARGUMENT

I. STEVES' RULE 50 MOTION MISSTATES THE LAW ON EFFICIENCIES

A. JELD-WEN May Use Efficiencies Evidence To Rebut Steves' Prima Facie Case

The Court should dismiss out of hand Steves' argument regarding the availability of an efficiencies defense as a matter of law. Steves does not dispute—nor could it—that multiple circuit courts recognize the use of efficiencies evidence to rebut a plaintiff's prima facie showing under Section 7 and to determine whether an acquisition is illegal. *U.S. v. Anthem, Inc.*, 855 F.3d 345, 354 (D.C. Cir. 2017); *Univ. Health*, 938 F.2d at 1222 (efficiencies evidence is "useful in evaluating the ultimate issue—the acquisition's overall effect on competition"). Steves trots out the same cases it did three weeks ago to wax philosophical on the proper role of efficiencies in merger analysis. But those cases are no more relevant now than they were then. None of Steves' cases hold or even suggest that efficiencies may not, as a matter of law, be considered in

a jury's determination of whether a merger violates Section 7. **Indeed, Steves has not pointed to a single case in which a court has determined that efficiencies cannot be considered in a merger analysis**. JELD-WEN submits that this Court should not be the first.

Instead, courts have observed that "evidence that a proposed acquisition would create significant efficiencies benefitting consumers is useful in evaluating the ultimate issue—the acquisition's overall effect on competition," and therefore bears directly on the jury's assessment of the plaintiff's case. *See, e.g.*, *Univ. Health, Inc.*, 938 F.2d at 1222; s*ee also Saint Alphonsus*, 778 F.3d at 791 (considering efficiencies in terms of "rebutting the prima facie case"); *ProMedica Health Sys., Inc. v. FTC.*, 749 F.3d 559, 571 (6th Cir. 2014) ("parties to a merger often seek to overcome a presumption of illegality by arguing that the merger would create efficiencies that enhance consumer welfare"); *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 440 (5th Cir. 2008) (noting that courts consider "in their evaluation of an anti-trust case . . . such other factors as the ease of entry and likely efficiencies."). As these cases, and indeed the cases Steves cites in its brief, show, efficiencies are properly considered in an antitrust case.

B. The Law Does Not Does Not Require JELD-WEN To Set Forth Proof Of Extraordinary Efficiencies

Steves next urges the Court to misapply the standard for evaluating cognizable merger efficiencies. Steves appears to contend that in all instances, an efficiencies defense requires "proof of extraordinary efficiencies." Memo at 4. But that is not the case. The law does not require JELD-WEN to demonstrate that its claimed efficiencies are "extraordinary" absent a finding by the jury that Steves has established its prima facie case and demonstrated that any adverse competitive effects of the merger are likely to be *particularly substantial*. There has been no such finding here, and Steves may not leapfrog its obligations to prove its claims in

order to impose an additional burden on JELD-WEN that is unwarranted at this stage in the analysis. Indeed, one need only look at the case Steves cites on the issue of "extraordinary efficiencies" to recognize the misstatement of law. In *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001), the court determined that the efficiencies had to be extraordinary after it had first made a determination regarding the strength of the FTC's prima facie case. That was appropriate for the Court to do there, as it was the factfinder. But for the Court to make a similar determination here would mean that the Court is determining the strength of Steves' case—something that jury should be deciding.

This notion that efficiencies requires a weighing against anticompetitive effects is also contained in the Horizontal Merger Guidelines. Under those Guidelines, the ultimate factfinder may consider whether a merger's claimed efficiencies offset any anticompetitive concerns in determining whether a merger is ultimately illegal. *See* U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines*, § 10, at 30 (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#9 (*last visited* Feb. 13, 2018) ("Merger Guidelines") ("The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.") (footnote omitted). As the Merger Guidelines make clear, "the greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through the customers" in order to conclude that the merger is not anticompetitive. Merger Guidelines at § 10 at 30. Accordingly, "when the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive." *Id.*

Again, in this instance the jury has made no such prima facie determination, nor has it assessed whether any adverse competitive effects of the merger are likely to be particularly substantial. Accordingly, there is no basis for Steves' claim that JELD-WEN must prove that the merger's efficiencies were "extraordinary," and the Court should reject this argument.

II. THE EVIDENCE OF THE 2012 MERGER'S EFFICIENCIES IS UNCONTROVERTED

JELD-WEN's acquisition of CMI resulted in substantial, verified, and merger-specific efficiencies, which directly benefited customers. Steves has not even attempted to rebut that evidence.

A. The Merger Permitted The Combined Company To Offer Customers A Full Doorskin Product Line Offering For The First Time

Throughout this trial, Steves has made the availability of a full line of doorskin products from its doorskin supplier a pivotal part of its case. In opening statements, Steves' counsel repeatedly stated that Steves sells 477 different styles and sizes "because that's what their customers want." Transcript of Trial Proceedings ("Trial Tr.") 196:16-19 (Jan. 29, 2018); *see also* Trial Tr. 420:3-20, 423:1-4 (Feb. 7, 2018) (testimony from Sam Steves that "THE COURT: . . . But you basically needed 477 to meet the demands of your customers[?] THE WITNESS: To fill our orders, yes, sir."). Steves allegedly cannot replace JELD-WEN's volume—which today affords Steves the range of designs it purports to need—because, according to Steves, no foreign doorskin supplier carries a full doorskin product line with the 477 SKUs that Steves sells to its customers. Buying from foreign suppliers with less than a full product line, its counsel explained, is "not a viable option for Steves." *Id.* 197:1-7.

The uncontroverted evidence in this case, however, is that JELD-WEN's ability to supply Steves with the full product line of doorskins it uses for its doors arose only **as a result of JELD-WEN's merger with CMI**. As Bob Merrill, the former CEO of CMI and recent EVP of

Sales and Marketing for JELD-WEN testified, prior the merger, neither JELD-WEN nor CMI possessed a full doorskin product line; only through combination did the merged entity offer doorskin customers like Steves "the broadest line of door skin designs in the industry." *Id.* 1401:24-1402:25. This efficiency flowed directly to doorskin customers like Steves, by allowing them to "offer all designs to their customers, allow[ing] them to approach customers that they couldn't approach before because they didn't have the offering." *Id.* Given Steves' repeated statements tying their success with certain customers to their access to a full product—and their insistence that such access is crucial to Steves' viability, Steves can hardly claim that the merger's creation of a "one-stop" shop resulted in anything other than an extraordinary, verifiable, and merger-specific efficiency with direct benefits for Steves.[1]

B. The Merger Permitted The Combined Company To Save $10-$11 Million Which It Used To Benefit Doorskin Customers Through Lower Prices, And Reinvestment In New Products and Enhanced Service

The acquisition additionally allowed CMI and JELD-WEN to reduce costs and more efficiently produce doorskins by consolidating its manufacturing among their existing plants. James Morrison, the executive in charge of identifying potential synergies resulting from the merger, testified as follows:

> Q: Okay. Now, you also mentioned, I believe, some issues with respect to consolidation of plants.
> A: Yes. Jeld-Wen -- the acquisition of CMI provided Jeld-Wen with an opportunity to close two of its older, high-cost plants and replace that capacity with lower cost production out of Towanda.
> Q: And how does that change benefit customers of Jeld-Wen and CMI?

[1] After repeatedly touting the importance of having all 477 SKUs, it is curious that Steves asserts in its memorandum that "[c]ombining these two distinct offerings into one smaller offering surely made things better from JELD-WEN's perspective, but from the consumers' perspective it is merely the elimination of choice." Memo at 6. Perhaps this is just an acknowledgment by Steves that it is not impacted by the merger in the same way it assumes other customers are.

> A: By virtue of improving the earnings of CMI and Jeld-Wen, it benefits the customers by providing a greater ability to have service, new product design, R&D. All of the things -- marketing collateral, materials.

Id. at 1592:22-1593:11 (Feb. 8, 2018). Mr. Morrison also explicitly testified that these efficiencies were merger-specific—they could not have been achieved absent the merger because CMI and JELD-WEN were the only two companies that could have consolidated the operations in that way—and that the efficiencies were achieved post-merger. *Id.* at 1591:15-1595:22. These merger-specific measures in turn resulted in $10 to $11 million in cost-savings, which JELD-WEN passed on to its customers through investments in new products and new marketing support.[2] *Id.* at 1594:25-1595:22. Indeed, Philip Orsino, the CEO of JELD-WEN who bought CMI, confirmed that this efficiency was a primary reason for the purchase. *Id.* at 1524:13-21. Mr. Merrill further testified that the cost savings permitted JELD-WEN to charge lower prices than it could have to certain customers absent the efficiencies. Tr. 1401:7-23 (Feb. 7, 2018) (explaining that by lowering costs, "we wouldn't have to raise [customer] prices quite as much in order to return our margins to a better level" and confirming that "those reductions in price increases, went to the benefit of the door skin customer"). Steves' assertion that JELD-WEN's cost reductions did not result in lower prices is thus flatly contradicted by the record. As JELD-WEN noted, if Steves is suggesting that not raising prices as much as one otherwise could does not constitute a price reduction, that is incongruous with its theory of overcharge that it is submitting to the jury today.

[2] Steves' critique that these efficiencies represent a tiny percentage of JELD-WEN's annual revenues (Memo at 6) misses the point. The cases Steves cites are forward-looking cases where the efficiencies are hypothetical. In this instance, the testimony is that these efficiencies were achieved and resulted in the benefits to consumers, as testified to by JELD-WEN's trial witnesses.

Indeed, this testimony on the millions of dollars in merger-specific efficiencies directly to the benefit of customers stands unchallenged and unrefuted. Steves' own economist, Professor Shapiro, agrees that in analyzing competitive effects, "if there are claims of merger-specific efficiencies, then I would take that into account." *Id.* at 1054:15-19 (Feb. 6, 2018). Yet, he admits he never did that in this case. *Id.* at 1056:15-19 (Feb. 6, 2018) (admitting he has "not quantified benefits . . . of merger-specific efficiencies associated with this merger"). Thus, as the Court pointed out, Professor Shapiro has no basis to judge or dispute the testimony of Mr. Merrill and Mr. Morrison:

> Q: Well, you understand that there was testimony in this case from Jeld-Wen witnesses that went to the issue of efficiencies; have you read that testimony?
> A: Yes, I have.
> Q: You are not here to judge or dispute that testimony, are you?
> THE COURT: He can't, so let's go on.

Id. at 2397:18-24 (Feb. 13, 2018).

To the extent that Steves simply challenges these efficiencies as insufficient to overcome any yet-to-be established prima facie showing, that is a question for the jury to resolve, and is inappropriate for Rule 50 disposition. And, to the extent that Steves quibbles over the method by which these efficiencies were calculated or their verifiability, Steves had the ability to question JELD-WEN's witnesses on these topics at trial. Steves made a strategic decision not to, and must now live with the ramifications of that decision. *See Penn State Hershey*, 838 F.3d at 350 ("we do not second-guess the business judgments of Hershey's able executives").

CONCLUSION

For the reasons set forth above, the Court should deny Steves' motion for judgment as a matter of law on JELD-WEN's efficiencies defense.

Dated: February 14, 2018 Respectfully submitted,

JELD-WEN, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February 2018, I will electronically file a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the registered participants as identified on the NEF to receive electronic service, including:

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