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

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

PLAINTIFF'S OBJECTIONS TO PROPOSED JURY INSTRUCTIONS AND VERDICT FORM

Plaintiff Steves and Sons, Inc. respectfully submits these objections to the proposed jury instructions transmitted to the parties by the Court.

As an initial matter, Steves intends to, and hereby does, preserve its contention that the Court should instead give the jury instructions proposed initially by Steves in this case. A copy of these instructions are attached hereto as Exhibit A. Steves respectfully submits that these instructions constitute a complete and accurate statement of the legal principles applicable in this case.

That said, Steves recognizes that the Court has decided to give the jury a different set of instructions. Steves thus will use the Court's draft jury instructions as the basis for proposing further modifications. These proposed modifications are reflected in Exhibits B and C attached hereto. Exhibit B is a redline showing Steves' proposed modifications relating to the Court's draft, and Exhibit C is a clean (i.e., non-redline) draft of the jury instructions reflecting Steves' proposed modifications.

Steves submits the following explanations regarding its proposed modifications.

Jury Instruction No. 27 (Relevant Geographic Market): Steves proposes a minor edit to the Court's proposed Jury Instruction No. 27, "Relevant Geographic Market." Steves' contention is that the relevant geographic market is interior molded doorskins ***used*** in the United States. The proposed edit clarifies that contention and also tracks the language in the following sentence regarding JELD-WEN's contention.

Jury Instruction No. 28 (Effect of the Acquisition): First, Steves proposes modifying the language in the paragraph carrying over from page 1 to page 2 of the Court's proposed instruction entitled "Effect of the Acquisition." The reason for this proposed modification is that, as currently drafted, the instruction tends to suggest to the jury that non-market-concentration evidence may only ***rebut*** the market-concentration evidence. In fact, the evidence also may serve to ***confirm*** the conclusions the jury may draw from the market-concentration evidence. *See, e.g.*, *FTC v. Consol. Foods Corp.*, 380 U.S. 592, 598 (1965) ("Moreover, the post-acquisition evidence here tends to confirm, rather than cast doubt upon, the probable anti-competitive effect which the Commission found the merger would have."); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 92 (D.D.C. 2011) (finding that the "totality of the evidence confirms" inference of likely anticompetitive effects arising from market-concentration evidence). The jury accordingly should be instructed that the other evidence may either confirm ***or*** rebut the evidence of market shares and market concentration.

Second, Steves proposes minor modifications to the list of bulleted factors to make clear that the jury may consider these either as factors that confirm the market-concentration evidence ***or*** as factors that rebut the market-concentration evidence.

Third, in the discussion of the first bulleted factor, Steves has proposed replacing the phrase "any actual anticompetitive effects" with the phrase "anticompetitive effects such as

increases in price or decreases in quality." Steves respectfully submits that it may be confusing to the jury to use only the phrase "actual anticompetitive effects" in an instruction meant to define that very concept. Instead, it would be more appropriate to refer specifically to effects such as increases in price or decreases in quality. These are the two main types of potential post-acquisition anticompetitive effects that are at issue in this case—as is often true with Section 7 challenges. *See, e.g.*, *H & R Block*, 833 F. Supp. 2d at 81 (noting that a "raise [in] prices" and a "reduc[tion in] quality" are examples of "anticompetitive effect[s]"); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 43 (D.D.C. 2017) (same).

Fourth, in the discussion of the second bulleted factor (entry), Steves proposes the following alternative language:

> Whether the ability of new suppliers to enter the relevant market, or of existing suppliers to expand their presence in the relevant market, will be timely, likely, and sufficient to deter or counteract the anticompetitive effects of the merger so that the merger will not harm customers.

This alternative language is appropriate because, in making reference to entry that is "timely, likely, and sufficient to deter or counteract" the anticompetitive effects of the merger, it directly tracks the relevant language in Section 9 of the Horizontal Merger Guidelines, which has also been adopted in the case law. *See, e.g., Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 429-30 (5th Cir. 2008); *H & R Block,* 833 F. Supp. 2d at 73; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 133 (D.D.C. 2016); *United States v. Energy Sols., Inc*., 265 F. Supp. 3d 415, 443 (D. Del. 2017).

Not only are the key concepts of ***timeliness***, ***likelihood***, and ***sufficiency*** well-established by the relevant law, these concepts also will aid the jury in evaluating the significance of evidence regarding potential entry. The jury has heard from numerous witnesses regarding the possibility of constructing a doorskin plant or importing doorskins. The law makes clear that

such possibilities are, by themselves, insufficient to counteract the anticompetitive effects of a merger. Rather, only possibilities that satisfy the ***timeliness***, ***likelihood***, and ***sufficiency*** requirements can counteract the anticompetitive effects of a merger. Steves believes that none of the evidence regarding potential entry comes close to meeting this standard. At a minimum, however, the jury should be instructed that evidence of entry matters only if the entry is timely, likely, and sufficient to counteract the anticompetitive effects of the merger.

Fifth, Steves has proposed nonsubstantive edits to the final bulleted factor (efficiencies) to clarify to the jury that efficiencies may be considered only if *all* of the four requirements (extraordinary in degree; not achievable without the acquisition; verifiable rather than speculative; and benefitting consumers) are met.

Jury Instruction No. 39 (Elements of the Claim and Burden of Proof): With respect to Steves' claim that JELD-WEN breached Section 1 of the Supply Agreement, Steves proposes deleting paragraph 1(b), as its concepts are subsumed in paragraph 1(a). In other words, if Steves proves by a preponderance of evidence that "the term 'full range of JELD-WEN molded doorskin products' includes the so-called 'Madison' and 'Monroe' styles" (as stated in 1(a)), then it necessarily has proven that "the pricing provisions related to that 'full range of JELD-WEN molded doorskin products' apply to those styles" (as stated in 1(b)). There is no dispute between the parties – and no evidence has been submitted otherwise – that the pricing provisions of the Supply Agreement apply to the Madison and Monroe products if Steves proves that those products are, in fact, covered by the Supply Agreement. Asking the jury to separately make that finding could lead to jury confusion.

Second, Steves proposes a minor modification to 1(c) to clarify it, in line with the modifications proposed above.

Third, Steves proposes modifying 3(b) to reflect that Steves was not required to provide notice in certain situations (*e.g.* with respect to doors built with doorskins that later were identified as defective). As explained in *Reserves Development LLC v. R.T Properties, L.L.C.*, 2011 WL 4639817, *7 (Del. Super. Ct., Sept. 22, 2011), "[a]n overriding truth is that the law does not require a futile act." Where "[t]he record in [the] case shows that written notice of a default . . . would not have led to agreement or compromise" – as is the case here with respect to JELD-WEN's decision not to reimburse for the cost of doors built with doorskins that later were identified as defective – notice is not required. *Id. See also id.*, fn. 38.

In addition to modifying Jury Instruction No. 39 to reflect the above-noted principle, Steves proposes to include its originally-proposed jury instruction on "Requirement of Notification of Breach" (identified as Ins. No. 42 in Steves' proposed jury instructions (Exh. A) and new Jury Instruction No. 40-A in the redline and clean version of the Court's proposed instructions (Exhs. B and C, respectively)).

Jury Instruction No. 40 (Construction of Ambiguous Terms): Steves seeks to modify section (3) of this instruction to reflect that evidence of a party's ***undisclosed*** intent or understanding is not relevant to the construction of ambiguous terms where the other party did not know or have reason to know of such belief. *See, e.g.*, *United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A. 2d 810, 835 (Del. Chanc. 2007) ("the private, subjective feelings of the negotiators are irrelevant and unhelpful to the Court's consideration of a contract's meaning, because the meaning of a properly formed contract must be shared or common").

Verdict Form: Steves preserves its contention that the Court should use the verdict form proposed by Steves (Dkt. No. 938-3). That said, Steves recognizes that the Court has decided to use a different verdict form. Steves thus will use the Court's draft verdict form as the basis for

proposing further modifications. A redline of Steves' proposed modifications to the verdict form are attached as Exhibit D, and a clean version is attached as Exhibit E. Steves proposes these modifications in an effort to simplify and clarify the form for the jury.

Dated: February 12, 2018

Respectfully submitted,

STEVES AND SONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I caused a copy of the foregoing to be electronically filed using the CM/ECF system, which will send notification to counsel of record of such filing by operation of the Court's electronic system. Parties may access this filing via the Court's electronic system.

By /s/ Lewis F. Powell III
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