JURY INSTRUCTION NO. 27

RELEVANT GEOGRAPHIC MARKET

THE RELEVANT GEOGRAPHIC MARKET IS THE AREA IN WHICH JELD-WEN FACES COMPETITION FROM OTHER FIRMS THAT COMPETE IN THE RELEVANT PRODUCT MARKET AND THAT CUSTOMERS CAN REASONABLY TURN TO FOR PURCHASES. WHEN ANALYZING THE RELEVANT GEOGRAPHIC MARKET, YOU SHOULD CONSIDER WHETHER CHANGES IN PRICES OR PRODUCT OFFERINGS IN ONE GEOGRAPHIC AREA HAVE SUBSTANTIAL EFFECTS ON PRICES OR SALES IN ANOTHER GEOGRAPHIC AREA, WHICH WOULD TEND TO SHOW THAT BOTH AREAS ARE IN THE SAME RELEVANT GEOGRAPHIC MARKET. THE GEOGRAPHIC MARKET MAY BE AS LARGE AS GLOBAL OR NATIONWIDE, OR AS SMALL AS A SINGLE TOWN OR NEIGHBORHOOD.

IN THIS CASE, STEVES CLAIMS THAT THE RELEVANT GEOGRAPHIC MARKET IS ~~FOR SALES OF~~ INTERIOR MOLDED DOORSKINS USED IN THE UNITED STATES. JELD-WEN CONTENDS THAT STEVES HAS NOT PROVEN THAT INTERIOR MOLDED DOORSKINS USED IN THE UNITED STATES IS THE RELEVANT MARKET.

AUTHORITY: Am. Bar Ass'n Antitrust Section, Model Jury Instructions in Civil Antitrust Cases 113 (2016); 3A O'Malley, Grenig & Lee, Federal Jury Practice and Instructions, § 150:133 (6th ed. updated Feb. 2018).

JURY INSTRUCTION NO. 28

EFFECT OF THE ACQUISITION

YOU MUST DECIDE WHETHER THE EFFECT OF THE ACQUISITION OF CMI BY JELD-WEN MAY BE SUBSTANTIALLY TO LESSEN COMPETITION OR MAY TEND TO CREATE A MONOPOLY IN THE RELEVANT PRODUCT AND GEOGRAPHIC MARKETS. STEVES MAY SATISFY THIS ELEMENT EITHER BY SHOWING A REASONABLE PROBABILITY OF A SUBSTANTIAL LESSENING OF COMPETITION IN THE FUTURE OR BY SHOWING A SUBSTANTIAL LESSENING OF COMPETITION THAT HAS ALREADY OCCURRED.

YOUR DETERMINATION OF THIS QUESTION MUST BE MADE IN LIGHT OF SEVERAL FACTORS. YOU MUST FIRST CONSIDER THE MARKET SHARE OF THE ACQUIRED AND ACQUIRING COMPANIES, AND THE EXTENT OF CONCENTRATION IN THE INDUSTRY. AN ACQUISITION THAT PRODUCES A FIRM CONTROLLING AN UNDUE PERCENTAGE OF THE RELEVANT MARKET AND RESULTING IN A SIGNIFICANT INCREASE IN CONCENTRATION IS A SIGNIFICANT FACTOR. "CONCENTRATION" REFERS TO THE NUMBER OF COMPANIES SELLING A PRODUCT IN THE RELEVANT MARKET, AND THEIR RESPECTIVE PERCENTAGES OF SALES IN THAT MARKET. IN ADDITION TO THIS STATISTICAL EVIDENCE OF MARKET CONCENTRATION, YOU MAY ALSO CONSIDER EVIDENCE OF THE STRUCTURE, HISTORY, AND PROBABLE FUTURE OF THE RELEVANT MARKET IN DETERMINING THE ANTICOMPETITIVE EFFECTS OF THE MERGER.

~~HOWEVER,~~ YOU SHOULD ALSO CONSIDER OTHER EVIDENCE, WHICH MAY EITHER CONFIRM OR REBUT THE EVIDENCE OF MARKET SHARES AND MARKET CONCENTRATION. FOR INSTANCE, THIS EVIDENCE MAY (OR MAY NOT)

ESTABLISH THE VIGOR OF COMPETITION OR AFFIRMATIVE JUSTIFICATIONS IN SUPPORT OF THE ACQUISITION. SIMILARLY, THE EVIDENCE MAY (OR MAY NOT) ~~, OR~~ SUGGEST THAT THE EVIDENCE OF MARKET SHARES AND MARKET CONCENTRATION ~~INTRODUCED BY STEVES~~ DOES NOT ACCURATELY REFLECT ~~AN~~ THE ACQUISITION'S PROBABLE EFFECTS ON COMPETITION. IN ASSESSING THIS EVIDENCE, YOU MAY CONSIDER SEVERAL FACTORS, INCLUDING:

- THE PRESENCE OR ABSENCE OF ~~ANY ACTUAL~~ ANTICOMPETITIVE EFFECTS SUCH AS INCREASES IN PRICE OR DECREASES IN QUALITY FOLLOWING THE ACQUISITION;
- WHETHER THE ABILITY OF ~~STEVES~~ NEW SUPPLIERS TO ENTER THE RELEVANT MARKET, OR OF ~~DOMESTIC OR FOREIGN COMPETITORS OF JELD-WEN TO ENTER OR~~ EXISTING SUPPLIERS TO EXPAND THEIR PRESENCE IN THE RELEVANT MARKET, WILL BE TIMELY, LIKELY AND SUFFICIENT TO DETER OR COUNTERACT ANY ANTICOMPETITIVE EFFECTS OF THE MERGER SO THAT THE MERGER WILL NOT HARM CUSTOMERS;
- WHETHER ~~THE CONTINUATION OF~~ ACTIVE PRICE COMPETITION DID OR DID NOT CONTINUE IN THE RELEVANT MARKET AFTER THE ACQUISITION; AND
- THE EFFICIENCIES OR BENEFITS TO THE PURCHASERS OF INTERIOR MOLDED DOORSKINS THAT ~~WILL~~ MAY RESULT OR HAVE RESULTED FROM THE ACQUISITION. HOWEVER, YOU MAY ONLY CONSIDER EVIDENCE OF SUCH EFFICIENCIES IF YOU FIND THAT ALL OF THE

FOLLOWING ARE TRUE: (1) THAT THE EFFICIENCIES ~~THEY~~ ARE EXTRAORDINARY IN DEGREE; (2) THAT THE EFFICIENCIES ~~IF THEY~~ COULD NOT HAVE BEEN ACHIEVED WITHOUT THE ACQUISITION; (3) THAT THE EFFICIENCIES ~~IF THEY~~ ARE VERIFIABLE, AND NOT MERELY SPECULATIVE; AND (4) THAT THE EFFICIENCIES ~~IF THEY~~ BENEFIT CONSUMERS.

AUTHORITY: 3A O'Malley, Grenig & Lee, Federal Jury Practice and Instructions, § 150:134 (6th ed. updated Feb. 2018); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 346-52 (3d Cir. 2016); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 785-92 (9th Cir. 2015); FTC v. H.J. Heinz Co., 246 F.3d 708, 715-20 (D.C. Cir. 2001); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1218, 1222-23 (11th Cir. 1991); NBO Indus. Treadway Cos., Inc. v. Brunswick Corp., 523 F.2d 262, 273-75 (3d Cir. 1975), vacated on other grounds sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

JURY INSTRUCTION NO. 39

ELEMENTS OF THE CLAIM AND BURDEN OF PROOF

TO PREVAIL ON ITS BREACH OF CONTRACT CLAIMS, STEVES MUST PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT:

(1) AS TO THE ALLEGED BREACH OF SECTION 1 OF THE SUPPLY AGREEMENT:

(a) THE TERM "FULL RANGE OF JELD-WEN MOLDED DOORSKIN PRODUCTS" INCLUDES THE SO-CALLED "MADISON" AND "MONROE" STYLES;

~~(b) THE PRICING PROVISIONS RELATED TO THAT "FULL RANGE OF JELD-WEN MOLDED DOORSKIN PRODUCTS" APPLY TO THOSE STYLES;~~

~~(c)~~(b) JELD-WEN DID NOT CHARGE PRICES FOR MADISON AND MONROE STYLES SET FORTH IN THE PRICING PROVISIONS OF THE SUPPLY AGREEMENT~~THOSE PRICES~~, INSTEAD SELLING THOSE STYLES TO STEVES ONLY IF STEVES PAID THE HIGHER PRICES; AND

~~(d)~~(c) AS A RESULT, JELD-WEN CAUSED STEVES DAMAGES IN THE FORM OF OVERCHARGES;

(2) AS TO THE ALLEGED BREACH OF SECTION 6:

(a) THAT PROVISION REQUIRES THE ADJUSTMENT OF PRICES TO BE PAID BY STEVES UPWARD OR DOWNWARD DEPENDING ON WHETHER THE SO-CALLED "KEY INPUT COSTS" INCREASED OR DECREASED;

(b) JELD-WEN DID NOT ADJUST THE PRICES IT CHARGED STEVES WHEN THE KEY INPUT COSTS DECREASED; OR

(c) IN THE YEARS WHEN JELD-WEN INCREASED THE COST OF KEY INPUTS, JELD-WEN USED KEY INPUT VALUES THAT WERE HIGHER THAN THE ACTUAL INCREASE IN THOSE KEY INPUTS; AND

(d) JELD-WEN WRONGFULLY OVERCHARGED STEVES IN THE AMOUNTS CLAIMED; AND

(3) AS TO THE ALLEGED BREACH OF SECTION 8:

(a) JELD-WEN SHIPPED JELD-WEN MOLDED DOORSKIN PRODUCTS TO STEVES THAT DID NOT MEET JELD-WEN'S SPECIFICATIONS, WERE NOT OF A QUALITY SATISFACTORY TO STEVES, AND WERE NOT FIT FOR THEIR INTENDED PURPOSE;

(b) STEVES GAVE NOTICE THEREOF TO JELD-WEN AND AN OPPORTUNITY TO INSPECT THOSE DOORSKINS, OR PROVED THAT DOING SO WOULD HAVE BEEN FUTILE;

(c) JELD-WEN DID NOT REIMBURSE STEVES FOR THE PRICE OF THOSE DOORSKINS; OR

(d) JELD-WEN DID NOT REIMBURSE STEVES FOR THE COST OF DOORS MANUFACTURED BY STEVES THAT INCORPORATED DEFECTIVE DOORSKINS SOLD TO STEVES BY JELD-WEN; AND

(e) JELD-WEN'S FAILURE TO REIMBURSE STEVES CAUSED THE LOSSES CLAIMED.

JURY INSTRUCTION NO. 40-A

REQUIREMENT OF NOTIFICATION OF BREACH

TO RECOVER FOR BREACH OF CONTRACT, STEVES MUST NOTIFY JELD-WEN OF THE BREACH WITHIN A REASONABLE TIME AFTER IT DISCOVERS OR SHOULD HAVE DISCOVERED THE BREACH. A BUYER NOTIFIES A SELLER BY TAKING REASONABLE STEPS TO INFORM THE SELLER UNDER ORDINARY CIRCUMSTANCES, REGARDLESS OF WHETHER THE SELLER ACTUALLY COMES TO KNOW OF THE ALLEGED BREACH. NO PARTICULAR WORDS OR FORMS ARE REQUIRED. NOTICE NEED NOT BE WRITTEN. CONVERSATIONS, CONFERENCES, AND CORRESPONDENCE THAT CALL JELD-WEN'S ATTENTION TO THE DEFECT IN THE PRODUCT CAN CONSTITUTE NOTICE OF JELD-WEN'S BREACH. MOREOVER, WHILE NOTICE IS GENERALLY REQUIRED, IF THE EVIDENCE PROVES THAT JELD-WEN WOULD HAVE REFUSED OT CURE A BREACH OF COMPENSATE STEVES FOR A BREACH EVEN IF STEVES GAVE NOTICE, THEN STEVES WOULD BE EXCUSED FROM THE REQUIREMENT THAT IT PROVIDE NOTICE WITHIN A REASONABLE TIME.

AUTHORITY: Del. P.J.I. Civ. § 9.24 (2000). *See Reserves Dev. LLC v. R.T. Prop., LLC.*, 2011 Del. Super. LEXIS 421, *23 (Del, Super. Sept. 21, 2011).

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JURY INSTRUCTION NO. 40

CONSTRUCTION OF AMBIGUOUS TERMS

AS TO THE ALLEGED BREACHES OF SECTION 6 AND SECTION 8, STEVES AND JELD-WEN INTERPRET THE TERMS OF THOSE PROVISIONS DIFFERENTLY. IT IS YOUR TASK TO DECIDE WHAT STEVES AND JELD-WEN INTENDED THE DISPUTED TERMS TO MEAN WHEN THEY ENTERED INTO THE SUPPLY AGREEMENT.

IN DETERMINING THE INTENT OF THE PARTIES, YOU MAY CONSIDER:

(1) THE ACTUAL LANGUAGE USED IN THE SUPPLY AGREEMENT;

(2) THE CONSTRUCTION ACTUALLY GIVEN TO THE TERMS BY THE PARTIES AS SHOWN THROUGH THEIR CONDUCT DURING THE PERFORMANCE OF THE CONTRACT AFTER THE CONTRACT ALLEGEDLY BECAME EFFECTIVE AND BEFORE THE INSTITUTION OF THIS LAWSUIT. THE PARTIES' CONDUCT AFTER A CONTRACT IS MADE SHOULD BE GIVEN GREAT WEIGHT IN DETERMINING ITS MEANING; AND

(3) THE HISTORY OF NEGOTIATIONS, EARLIER VERSIONS OF THE CONTRACT, AND CUSTOMS IN THE INDUSTRY. IN CONSIDERING THE HISTORY OF NEGOTIATIONS, YOU SHOULD CONSIDER ONLY EVIDENCE OF WHAT BOTH PARTIES KNEW OR SHOULD HAVE KNOWN. EVIDENCE OF ONE PARTY'S UNDISCLOSED INTENTIONS OR UNDERSTANDINGS IS IRRELEVANT.

AUTHORITY: Del. P.J.I. Civ. § 19.15 (2000) (modified); LSVC Holdings, LLC v. Vestcom Parent Holdings, Inc., No. CV 8424-VCMR, 2017 WL 6629209, at *6 (Del. Ch. Dec. 29, 2017); Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 313 (Del. Ch. 2002); *United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007).