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

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

STATEMENT OF INTEREST OF THE UNITED STATES

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INTEREST OF THE UNITED STATES

On March 29, 2022, this Court invited the United States to file a submission in this case, specifying that it "would find particularly helpful if the brief amicus curiae were to address the parties' views of the relevant market and the concept of vertical integration as those views are expressed in ECF Nos. 2209, 2222, and 2227." Dkt. 2230 at 1. Pursuant to that invitation, the United States respectfully submits this statement of interest under 28 U.S.C. § 517. This statement focuses on the principles that the Special Master applied in conducting its analysis, as the United States has not conducted an independent investigation into the facts underlying the remedy questions before the Court, such as the specific facts and circumstances relevant to the adequacy of particular divestiture buyers.

BACKGROUND

JELD-WEN, a manufacturer of doorskins and molded doors, acquired Craftmaster International, Inc., a vertically integrated competitor, in 2012. Four years later, Steves & Sons (Steves), a manufacturer of molded doors and a customer (for doorskins) of JELD-WEN, challenged the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18. Steves alleged that the transaction substantially lessened competition in the relevant market of doorskins used in the United States by eliminating a competitor and, more relevant here, by foreclosing supply to non-vertically integrated customers. A jury found that the transaction violated Section 7. This Court was then faced with the challenge of remedying an unlawful merger after consummation. The Court ordered JELD-WEN to divest the Towanda manufacturing facility, *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 345 F. Supp. 3d 614, 625, 668 (E.D. Va. 2018), and the Fourth Circuit affirmed, *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 723 (4th Cir. 2021).

This Court tasked a Special Master with supervising the divestiture process, which involved several potential purchasers vying for the assets. The Special Master filed a Report and Recommendation on February 15, 2022, recommending in part that a particular bidder not be considered an adequate purchaser based on concerns that the bidder's acquisition of the divested assets would itself be potentially anticompetitive. An objection was lodged to that portion of the Report and Recommendation.[1]

ARGUMENT

The preferred remedy for an unlawful merger is to prevent it from happening in the first place, but this Court finds itself in the challenging position of seeking to remedy a merger after consummation. Since it necessarily cannot result in relief as complete as *ex ante* prohibition, a divestiture remedy must be implemented with great care to fully restore as much as possible the competition that was lost as a result of the transaction. The Special Master appropriately considered, in evaluating potential divestiture buyers, the competitive risks that could result from a potential divestiture transaction that would give rise to vertical integration by effectuating a vertical merger (a merger between companies at different levels of a supply chain).[2] There are many reasons why competition may be harmed in such circumstances, including that the vertical integration allows the merged firm to limit or foreclose rivals' access to an important input on

[1] Many recent filings in this case have been heavily redacted or filed under seal in their entirety.

[2] A divestiture is itself subject to Section 7 of the Clayton Act and therefore must not substantially lessen competition. Under certain conditions, the divestiture transaction may be subject to review by the federal antitrust enforcement agencies under the Hart Scott Rodino (HSR) Act. *See* 15 U.S.C. § 18a. Under the HSR process, covered transactions must file certain required information and respond to additional requests for information that federal antitrust enforcers determine are necessary to determine if the transaction may substantially lessen competition or tend to create a monopoly. No such investigation has yet been undertaken with respect to any proposed divestiture transaction here, and the Antitrust Division's comments are limited to broad principles that may be useful to the Court.

competitive terms. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Moreover, it was appropriate for the Special Master to be skeptical that claimed efficiencies would justify such a vertical merger.

I. Post-Consummation Divestitures Should Restore Lost Competition in the Relevant Market Without Creating New Competition Issues

It is hornbook law that the "relief in an antitrust case must be effective to redress the violations and to restore competition." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). "[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). "Antitrust relief should unfetter a market from anti-competitive conduct," *Ford Motor*, 405 U.S. at 577, and importantly "is not limited to the restoration of the *status quo ante*," *id.* at 573 n.8. In this case, a jury found in 2018 that JELD-WEN's 2012 acquisition of Craftmaster is unlawful, *see* Dkt. 1022, because the merger resulted in a substantial lessening of competition in the doorskins market. *Steves*, 345 F. Supp. 3d at 626.

Mergers and acquisitions that violate Section 7 are ideally blocked outright before consummation. An injunction blocking the merger requires less oversight and provides more certain relief against the potential anticompetitive effects of the transaction than other types of antitrust remedies. And "it is extraordinarily difficult to unscramble the egg" after an anticompetitive merger closes. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 353 (3d Cir. 2016) (quotation marks omitted); *see also FTC v. University Health, Inc.*, 938 F.2d 1206, 1217 n.23 (11th Cir. 1991). Thus, courts with the option of outright prohibition typically decline to accept proposed divestiture "fixes" offered up by merging parties because of their attendant risks. *See, e.g.*, *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 72-73 (D.D.C. 2017) (rejecting proposed divestiture); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 73-76 (D.D.C. 2015) (same). *Accord* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES 118-21 (2014) (suggesting divestitures are often insufficient to eliminate the competitive harm from the merger); *du Pont*, 366 U.S. at 328 (rejecting as ineffective the partial divestiture ordered by the district court and holding that "the Government is entitled to a decree directing complete divestiture" of the acquired firm); Assistant Attorney General Jonathan Kanter, Remarks to the New York State Bar Association Antitrust Section, January 24, 2022, at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york. Accordingly, the Antitrust Division has a strong preference for an injunction blocking the consummation of an unlawful transaction over a partial or post-consummation divestiture.

Yet in some situations, such as this case, it is too late to prevent the unlawful transaction because the merger was not challenged until after consummation. When that happens, a court-approved remedy must be crafted to "effectively pry open to competition a market that has been closed by defendants' illegal restraint[]," *Int'l Salt Co. v. United States*, 332 U.S. 392, 401 (1946), and "eliminate its consequences," *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1979). A divestiture is often an essential part of the remedy, *see du Pont*, 366 U.S. at 330-31 ("Divestiture has been called the most important of antitrust remedies."), and its scope and structure must be closely scrutinized to maximize the likelihood of fully restoring competition.

Courts may also need to order additional measures beyond divestiture to restore lost competition in the relevant market—particularly where an illegal acquisition was consummated many years before, leading to a significant loss of competition in the relevant market. As the Supreme Court has explained, while "[d]ivestiture is a *start* toward restoring the pre-acquisition situation," a court must keep in mind the broader goal that "[t]he divestiture should also eliminate the anticompetitive consequences" of the illegal merger even if additional relief is also necessary. *See Ford Motor*, 405 U.S. at 574 (emphasis added) (affirming ordered divestiture and additional equitable relief). As an inherently imperfect solution, divestiture relief should be undertaken with high standards for completeness and efficacy. *Cf. Steves*, 988 F.3d at 729 (Rushing, J., concurring) ("After a merger closes. . . divestiture becomes decidedly more complex. The passage of time exacerbates those complexities. . . .").

Because the purpose of the divestiture is to *restore* competition to the relevant market, the Special Master was correct to consider whether the acquisition of divested assets by particular bidders could *harm* competition. *Cf. Aetna*, 240 F. Supp. 3d at 72-73 (rejecting proposed divestiture as it was not "likely to be able to replace fully the competition lost by the merger"). Whether awarding the divested assets to a potential bidder would harm competition is relevant to assessing the remedy's effectiveness—i.e., whether competition in the relevant market would be restored—because otherwise it could work directly against that goal. Given the difficulties of implementing an effective post-merger divestiture in the first instance, *see supra* pp. 3-4, courts should be exceptionally wary of a divestiture transaction that itself may harm competition. "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *E. I. du Pont*, 366 U.S. at 326. A remedy that presents competitive risk falls short of that important goal. Further, as a divestiture transaction ultimately would need to pass muster under federal antitrust law, *see supra* note 2, competition questions raised by a divestiture that could delay or prevent its consummation (and in turn impact its timeliness) would be relevant to the divestiture's effectiveness.[3]

In evaluating the potential bidders, the Special Master appears to have followed many of the same general principles the Antitrust Division would apply if faced with the need to evaluate a potential divestiture buyer.

II. Vertical Mergers Can Raise Serious Anticompetitive Concerns

Vertical mergers can pose significant risks to competition, "creat[ing] harms beyond higher prices for consumers, including decreased product quality and reduced innovation." *United States v. AT&T*, 916 F.3d 1029, 1045 (D.C. Cir. 2019). For example, vertical mergers can harm competition by foreclosing from the independent segment of the market inputs or distribution relied on by rivals. *See, e.g., Brown Shoe*, 370 U.S. at 323-24 ("[B]y foreclosing the competitors of either party [to a vertical merger] from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, which deprives rivals of a fair opportunity to compete") (citation omitted, cleaned up). Thus, a vertical merger may enable the merged firm to undermine its rivals by abusing control of competitively significant inputs or distribution, lessening competition by weakening the competitive threats the merged firm faces. *See id.* at 324 n.40 ("[A] vertical merger may disrupt and injure competition when those independent customers of the supplier who are in competition with the merging customer, are forced either to stop handling the supplier's lines, thereby jeopardizing the goodwill they have developed, or to retain the supplier's lines, thereby forcing them into competition with their own supplier.").

[3] For acquisitions—including divestitures—that create vertical concerns there is a high likelihood that an in-depth review of the acquisition would be required under the HSR process.

Also by way of example, vertical mergers can harm competition in other ways, such as by giving the merged firm access to its competitors' competitively-sensitive information, *see* Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENFORCEMENT 1, 25 (2016) (describing how competitively sensitive information transferred from rivals to the merged firm "might be misused strategically . . . to pre-empt and thereby deter pro-competitive actions by non-merging firms"); by decreasing incentives to facilitate entry, *see id.* at 15 (noting that the fear of entry by a supplier or distributor can itself serve as a competitive constraint); by raising barriers to entry by requiring potential competitors to enter multiple levels of a supply chain, *see id.* at 38; or by diminishing actual or future competition by facilitating coordination, *see* Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1977 (2018) (noting vertical mergers can exacerbate competition concerns by facilitating horizontal coordination among the newly merged firm and other vertically integrated firms).[4]

In evaluating vertical mergers that present a risk of foreclosure, courts look to a number of factors, starting with "the size of the share of the market foreclosed." *Brown Shoe*, 370 U.S. at 328. Moreover, as the Supreme Court has noted, a "trend toward concentration in the industry" is an "important factor to consider" in a court's evaluation of a transaction's "probable future effect." *Brown Shoe*, 370 U.S. at 332. Courts also give substantial weight to the harmful effect that a vertical merger may have on non-integrated independents. *See id.* ("The necessary

[4] The competitive risks of vertical mergers have been recognized by Congress. The Anti-Merger Act of 1950 amended Section 7 of the Clayton Act, broadening its coverage of transactions subject to the Act that may substantially lessen competition to include not only horizontal stock acquisitions, but any merger or acquisition—horizontal, vertical, or otherwise. *See* 15 U.S.C. § 18. "That § 7 was intended to apply to all mergers—horizontal, vertical or conglomerate—was specifically reiterated by the House Report on the final bill." *See Brown Shoe*, 370 U.S. at 317 n.31 (citing H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11).

corollary of these trends is the foreclosure of independent manufacturers from markets otherwise open to them."); *United States v. Kennecott Copper Corp.*, 231 F. Supp. 95, 103-05 (S.D.N.Y. 1964) ("Kennecott was the only one of these major producers which relied upon independent fabricators for a substantial part of its copper sales."), *aff'd*, 381 U.S. 414 (1965); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 613 (S.D.N.Y. 1958) (noting acquired firm had served as "a substantial source of supply to independent fabricators").

To evaluate whether a proposed divestiture would suffice to restore competition rather than risk harm through vertical integration, the inquiry must evaluate the *current* market conditions, including market conditions that have already deteriorated as a result of the merger. "There is no power to turn back the clock. Rather, the relief must be directed to that which is necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute." *Ford Motor*, 405 U.S. at 573 n.8 (quotation marks omitted); *see also Massachusetts v. Microsoft Corp*., 373 F.3d 1199, 1215 (D.C. Cir. 2004) (affirming the district court's adoption of "forward-looking" antitrust remedy that did not bear a direct relation to the underlying violation); *Aetna,* 240 F. Supp. 3d at 59-72 (rejecting proposed divestiture as insufficient to restore competition lost after extensive review of market conditions).

The Special Master appropriately applied these principles here by looking to current market conditions when assessing the possibility of vertical foreclosure that could harm competition. While three vertically integrated companies competed before the unlawful merger, that status quo no longer exists. The proper remedy analysis must focus on the competitive effects of the divestiture transaction in the current market, including any additional risks of vertical foreclosure given the relevant changes since the merger. In particular, pre-merger, three vertically integrated market participants "competed vigorously in selling" doorskins to independent distributors. *Steves & Sons*, 345 F. Supp. 3d at 667. Post-merger, by contrast, Masonite stopped supplying independents, *see id.*, and JELD-WEN's internal documents post-merger also indicated its intention to "stop selling to the Independents altogether over the next few years," *Steves & Sons*, 988 F.3d at 702. These indications suggest further vertical integration may pose competitive risks. *See* Salop, *supra* p. 7, at 1977 ("Foreclosure also can facilitate anticompetitive coordination in the upstream or downstream markets."). Indeed, the Fourth Circuit expressly recognized vertical anticompetitive risks regarding this particular divestiture order. "If Steves does buy Towanda, each of the three doorskin suppliers would be vertically integrated. That's not ideal for promoting competition, as the three suppliers would share a collective incentive not to sell to the Independents." *Steves*, 988 F.3d at 723 (affirming divestiture remedy, even if "not ideal," as more procompetitive than the then-existing situation of two vertically integrated firms).[5]

Thus, while the United States has not at this point undertaken an independent investigation and offers no conclusions as to the outcome of the analysis, the factors that the Special Master considered in evaluating the bidders—including the likelihood any particular buyer might diminish competition in the relevant market by, e.g., undermining independent distributors—were relevant to assessing the effectiveness of the remedy. *See* Report and Recommendation, Dkt. 2189, at 23. Such considerations inform whether a divestiture would effectively restore competition.

[5] The United States has previously recognized the potential for anticompetitive effects from this divestiture as well in a prior statement of interest submitted in this case. *See* Department of Justice Statement of Interest (June 6, 2018), Dkt. 1640, at 11. If all of the doorskins manufacturing facilities were owned by vertically integrated firms, then "[t]he remaining door makers would have no independent suppliers from which to purchase doorskins, and could be competitively disadvantaged by the divestiture to a rival with which they compete in the molded door market." *Id.*

III. Courts Are Appropriately Skeptical of Claimed Merger Efficiencies

In evaluating potential buyers, the Special Master also addressed claims that a divestiture effectuating a vertical merger could give rise to efficiencies. Courts are generally quite skeptical of claimed efficiencies in merger cases, as is the Antitrust Division. The Supreme Court has held that "a merger the effect of which may be substantially to lessen competition is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963) (quotation marks omitted); *see also FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."). And multiple circuit courts have expressed doubt that alleged merger efficiencies can be a defense to an otherwise anticompetitive merger. *See Penn State Hershey*, 838 F.3d at 347; *United States v. Anthem, Inc.*, 855 F.3d 345, 353 (D.C. Cir. 2017); *St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys.*, 778 F.3d 775, 790 (9th Cir. 2015).

As to the particular type of efficiency called "elimination of double marginalization," there is ample reason for skepticism. Even as a theoretical matter, double marginalization may be eliminated by merger *or* contract; any efficiency achievable by contract between the parties is not properly considered a benefit specific to their merger. *See* Salop, *supra* p. 7, at 1970 ("[D]ouble marginalization may have been totally or partially eliminated in the premerger market by contracts with quantity forcing or 'nonlinear' pricing."); *see also United States, et al. v. Comcast, et al.*, No. 1:11-cv-00106, Competitive Impact Statement (Filed Jan. 18, 2011), at 30 ("[M]uch, if not all, of any potential double marginalization is reduced, if not completely eliminated, through the course of contract negotiations.").

In addition, the relevant market is the upstream (input) doorskins market, so that is the proper focus of the analysis. *Cf. St. Alphonsus*, 778 F.3d at 791 ("The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate."). Benefits from any efficiencies demonstrated only in the downstream (final product) doors market are not relevant to the effectiveness of the divestiture in restoring competition in the upstream market. *See Philadelphia National Bank*, 374 U.S. at 370 (rejecting the argument that "anticompetitive effects in one market could be justified by procompetitive consequences in another"). The Special Master's analysis appears consistent with these principles.

CONCLUSION

The Special Master applied correct principles related to the anticompetitive potential of a vertical merger and was appropriately skeptical of the impact of potential efficiencies. When unable to prohibit an anticompetitive underlying transaction, the remedy imposed should as much as possible address the harm. In assessing the inherently risky process of divestiture, the Special Master appropriately considered the potential for additional competitive harm from vertical consolidation as a factor weighing against a divestiture that would raise those risks, and was appropriately skeptical of claimed efficiencies.

May 9, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, I electronically filed via CM/ECF a copy of the foregoing which will then send a notification of such filing to all counsel of record.

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