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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW ON STEVES' CLAIM FOR THE EQUITABLE RELIEF OF DIVESTITURE

REDACTED VERSION FILED PUBLICLY

Defendant JELD-WEN, Inc. ("JELD-WEN") hereby submits this Reply Memorandum in Support of its Motion for Judgment as a Matter of Law on Plaintiff Steves and Sons, Inc.'s ("Steves") Claim for the Equitable Relief of Divestiture.

INTRODUCTION

At closing arguments, Steves' counsel stood before the jury and stated that "[t]he contract is going to end, and Steves has no alternative source of door skins. So if you find that Jeld-Wen violated the Clayton Act, then what you can do is award Steves the damages it's going to suffer for that violation." Trial Tr. at 2627:2-7 (Feb. 14, 2018) ("Trial Tr."). Steves' counsel told the jury that its future damages for violation of Section 7 amounted to $46,480,581, and that that figure was a "reasonable estimate[]" under the law, "fully supported by the evidence." *Id*. at 2629:3-8, 2630:17-18.

By quantifying in monetary terms the future harm Steves asserts it will suffer from JELD-WEN's acquisition of CMI, Steves has made clear that it has available an adequate remedy at law for its Section 7 claim. Both the Supreme Court and this Court have held that having an adequate remedy at law precludes a plaintiff from even *seeking* a remedy in equity. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962) ("The ***necessary prerequisite to the right to maintain a suit*** for an equitable accounting, like all other equitable remedies, is . . . the absence of an adequate remedy at law.") (emphasis added) (footnote and citations omitted); *LMP Holdings, LLC v. PLY Enters., LLC*, No. 3:12-CV-440, 2012 WL 4344302, at * 5 (E.D. Va. Sept. 21, 2012) (Payne, J.) (while pleading of alternative remedies is allowed, that does not "change the fact that a necessary element to the award of equitable relief is the lack of an adequate remedy at law."). Indeed, in *Taleff v. Southwest Airlines Co.*—the only Section 7 case to deal with this precise issue—the court relied on the fact that the plaintiffs had expressed their alleged harm in terms of monetary damages as proof that they had "not demonstrated that the remedies available at law, such as monetary damages, would be inadequate." 828 F. Supp. 2d 1118, 1123 (N.D. Cal 2011). Based on that determination, the court in *Taleff* did not permit plaintiffs to maintain a claim for divestiture, and there is no reason this Court should diverge from that result.

Steves has no legitimate basis for its request that this Court should conduct a hearing and award it equitable relief in the form of divestiture to remedy the exact same harm for which it sought lost profits. Indeed, Steves has not presented a coherent legal theory to support its position—vacillating between asserting this is an election issue between two remedies that redress the same legal injury (*see, e.g.,* Steve's Opp'n to JELD-WEN's Mtn. for Judgment as a Matter of Law ("Opp. Br.") at 12 (Feb. 12, 2018) (Doc. No. 980)), and claiming that this Court must determine that Steves' lost profits award does not adequately remedy the harm Steves says

it suffered from the merger (*see, e.g.,* Steves' Suppl. Resp. to JELD-WEN's Mtn. for Judgment as a Matter of Law as to Election of Remedies ("Suppl. Resp.") at 6 (Feb. 23, 2018) (Doc. No. 1045)). At this juncture, it is even unclear whether Steves still maintains, as it represented to the Court, that it could not obtain both lost profits and divestiture. Opp. Br. at 12.

What is clear is that Steves' position reflects a fundamental misunderstanding of the necessary analysis. The question is not, as Steves maintains, whether it ***has*** received a monetary award that adequately compensates it for the future harm it alleges will flow from the CMI acquisition. Rather, the question is whether a monetary award ***could*** adequately compensate Steves for that harm. *See Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) ("Where the harm suffered by the moving party ***may*** be compensated by an award of money damages at judgment, courts generally have refused to find that harm irreparable.") (emphasis added). On that question, there should be no dispute.

At trial, Steves made the strategic decision to argue to the jury that its loss of business could be fairly remedied by a monetary award of lost profits. It could have argued, as others have in other cases, that the loss of its business was irreparable and unquantifiable. It chose not to do so, and it must now live with that decision. While Steves now presents certain ways in which it claims the lost profits award *it asked for* does not encompass everything it wants, those supposed inadequacies reflect tactical choices made by Steves to maximize the likelihood the jury would not find its lost profits calculations overly speculative. Those factors do not, in any way, suggest that an adequate remedy was unavailable to Steves. Indeed, as an example, Steves now argues that its lost profits remedy may be inadequate because it only provides lost profits through 2029, even though Steves would likely earn profits beyond that point. But as Steves' counsel made clear in closing, the reason the lost profits calculation stops at 2029 is not because

Steves could not calculate lost profits beyond that date, but rather because Steves "didn't want to come in here and overreach." Trial Tr. at 2628:1-4. By now continuing to seek divestiture, and pointing to that limitation as supposed proof of the inadequacy of its remedy at law, Steves is in fact overreaching—and it should not be permitted to do so.

ARGUMENT

I. STEVES IS NOT ENTITLED TO ELECT BETWEEN FUTURE LOST PROFITS OR DIVESTITURE

Steves argued to the jury that as a result of JELD-WEN's acquisition of CMI, Steves was going out of business in 2021 when its contract with JELD-WEN terminated. As counsel made clear in explaining its lost profits claim, "it's forced out of business in September of 2021 and it no longer has an access to door skins and so it can no longer make doors and so it's out of business. . . . They don't want to go out of business. They want to last for another 150 years. But that's not in Steves' hands and it's not in your hands. The contract is going to end, and Steves has no alternative source of door skins." Trial Tr. at 2626:20-2627:4. Steves told the jury that the damage it was going to suffer as a result of that supposed antitrust violation was the value of the loss of its entire business, which it calculated to be $46,480,581 in lost profits, and that Steves was entitled to that full amount from the jury. *Id*. at 2627:5-7, 2629:5-8.

Steves appears to acknowledge that the equitable relief of divestiture that it is seeking would be directed at remedying the precise same harm for which it sought that monetary compensation in the form of lost profits. Suppl. Resp. at 2 n.1. So the question this Court must now answer is whether, in light of the fact that Steves has quantified the loss of its business in monetary terms and thereby acknowledged that it can be monetarily compensated for the loss of its business, Steves can still seek equitable relief designed to remedy the same exact harm. Steves' position appears to be that it can still seek and obtain an equitable remedy, and then

presumably sit down and choose whether to keep the monetary award or equitable award. To be clear, Steves has not pointed to a single case that has ever permitted a party to make such an election—and we are likewise not aware of such a case. That is because a party is not entitled to seek an equitable remedy, particularly an equitable remedy in the form of injunctive relief, where it has an adequate remedy at law. This is not a controversial proposition—it has been recognized by both the Supreme Court in *Dairy Queen* (a case cited by Steves in its papers) and this Court in *LMP Holdings* (a case Steves omitted in its papers), and countless other Circuit and District Courts. *See*, *e.g.*, *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) ("The absence of an adequate remedy at law is a precondition to any form of equitable relief."); *Lichtenberg v. Besicorp Grp. Inc.*, 43 F. Supp. 2d 376, 390 (S.D.N.Y. 1999); *Great Am. Ins. Co. v. Fountain Eng'g, Inc.*, No. 15-CIV-10068-JLK, 2015 WL 6395283, at *2 n.2 (S.D. Fla. Oct 22, 2015). This Court certainly is familiar with the long-settled law that injunctive relief is never available unless the party lacks an adequate remedy at law—and injunctive relief is exactly what Steves would be seeking in a divestiture order.

The cases Steves cites in its Supplemental Response confirm the weakness of its position. *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 984 F.2d 223 (7th Cir. 1993) does not stand for the proposition that a party can seek equitable relief to remedy the same harm for which it has an adequate remedy at law. That case addressed whether seeking monetary damages for a breach of contract meant that a plaintiff could not also maintain a claim for specific performance of that contract, and the decision of the Seventh Circuit was that the two remedies did not necessarily address the same claim for harm. *Id.* at 229-30. Critically though, in Steves' recitation of that opinion, Steves inadvertently failed to inform the Court that the case arrived at the Seventh Circuit after the district court had thrown out the jury's verdict on monetary damages as not

supported by the evidence, and granted a new trial on that issue. *Id.* at 225. ***Thus, at the time the court affirmed the equitable relief and issued its ruling there was an impending new trial on monetary damages***. The Seventh Circuit stated that in that upcoming trial, ***the district court was free to preclude the plaintiff from seeking monetary damages that went to remedy the same harm for which it had obtained specific performance.*** *Id*. at 230 ("The district court will be conducting a third trial on damages and is free to exclude from consideration damages relief with regard to EPI."). This case supports JELD-WEN's position, not Steves' position.

Similarly, Steves finds no support in the unpublished decision *B. Braun Med., Inc. v. Rogers*, 163 F. App'x 500 (9th Cir. 2006). In that case, the Ninth Circuit determined that the district court's decision awarding equitable relief in the form of patent reassignment after a jury award of future lost profits *was reversible error*. *Id*. Steves is correct that the decision does not discuss adequacy of remedies or election of remedies, but that is because the particularly equitable remedy was not available under the substantive California law at issue. Steves does not suggest that there was ever any discussion at any point in time in that case either at the district or circuit level regarding the issue here and accordingly, it is unclear why this decision has any relevance. But the fact that this is the only case other than *Medcom* that Steves highlights in advocating for its position, and that Steves in fact devotes an entire page of its Supplemental Response to this unpublished decision, is quite telling of the lack of legal support that exists for Steves' view of the law.

Steves cites some cases involving very different situations in which the law does give a plaintiff a choice between two remedies. As this Circuit has noted, the doctrine of election of remedies "refers to situations where an individual pursues remedies that are legally or factually inconsistent." *Artis v. Norfolk & W. R.y. Co.,* 204 F.3d 141, 143 (4th Cir. 2000) (citations

omitted). It most often arises, as the cases cited by Steves show, when a party to a contract discovers an alleged fraud. At that point, the party has two choices from which to elect: affirm the contract and sue for damages, or disaffirm the contract and seek restitution and tort damages. *Winant v. Bostic*, 5 F.3d 767, 776 (4th Cir. 1993); *Sanders v. Meyerstein*, 124 F. Supp. 77, 83 (E.D. N.C 1954). But that election given in one particular circumstance to fraud victims does not, as Steves would have it, disprove the existence of the general rule that equitable relief (and in particular injunctive relief) is not available unless there is no adequate remedy at law. No case cited by Steves supports such a notion. *See* Supp. Resp. at 5 (*citing e.g. Enhance-It, LLC v. Am Access Techs, Inc.*, 413 F. Supp. 2d 626, 632 (D.S.C. 2006) (discussing whether a plaintiff could maintain breach of contract and tort claims simultaneously); *Guidance Endodonics, LLC v. Dentsply Int'l Inc.*, No Civ 08-1101 JB/RLP, 2010 WL 4054115 (D.N.M. Aug. 26, 2010) (discussing whether a plaintiff who sought a preliminary injunction and alleged that some of the future harm it might suffer *would be difficult to calculate with certainty* could later seek monetary damages for the portion of the future harm it could calculate)).

On the matter at issue, a case that is relevant is *MercExchange, LLC v. eBay, Inc.*, 500 F. Supp. 2d 556 (E.D. Va. 2007). In that case, the issue was whether a party could seek a permanent injunction after receiving monetary damages for patent infringement. After the Supreme Court reversed a finding by the Federal Circuit that such an award was appropriate and remanded, the district court analyzed whether that equitable remedy was available. Ultimately, the court determined that the damages at law constituted an adequate remedy for eBay's willful infringement—and that, therefore, equitable relief was unavailable. *Id.* at 582. In reaching that decision, the court relied on the fact that the plaintiff consistently sought monetary damages as a remedy for the infringement of its patent, and never claimed during litigation that an injunction

was necessary to protect other non-monetary damages such as brand name, reputation or goodwill. *Id.* at 569-70. The court noted that it was the plaintiff's burden to establish that money damages were an insufficient remedy—and plaintiff had failed to meet that burden. *Id.* at 570.

JELD-WEN respectfully submits that Steves certainly has not met its burden of establishing that monetary damages are inadequate. To the contrary, at no point during the litigation or trial did Steves ever claim that monetary damages were inadequate to remedy its future harms. In fact, it argued to the jury that future lost profits were "the damages it's going to suffer" for the violation of the Clayton Act, and never even presented at trial the notion that there were other non-monetary harms it might suffer. Trial Tr. at 2627:5-7. Under these circumstances, this Court should be quite skeptical of Steves' request and the motivation behind it, and determine that there simply is no basis to permit Steves to move forward with a hearing seeking divestiture.

II. STEVES HAS NOT DEMONSTRATED THAT A REMEDY AT LAW WOULD BE INADEQUATE

In addition, and in apparent contradiction, to its assertion that it must elect between lost profits and divestiture, Steves argues that this Court should find that "it is not particularly close" that its future lost profits award inadequately "compensate[s] Steves for the harm it suffered as a result of the anticompetitive merger." Supp. Resp. at 6. Steves bases its argument on assertions that (1) the lost profits award only constitutes eight years of lost profits and does not fully compensate Steves for the loss of its 150-year-old business; (2) an equitable remedy could permit Steves to stay in business; (3) an equitable remedy could address the overall harm to competition, and not merely the antitrust injury to Steves; and (4) equitable relief is necessary to prevent the harm that Steves might suffer if JELD-WEN engaged in anticompetitive conduct

between now and 2021. *Id.* In presenting these arguments, Steves evinces a fundamental misunderstanding of what it means for a remedy at law to be adequate. Steves *chose* to present a conservative estimation of its future monetary injuries to the jury, as a tactical decision in order to make its estimate seem more reasonable and less speculative. The fact that Steves chose not to ask for all the money it might have asked for does not mean that an adequate remedy at law was *unavailable.* And having requested monetary compensation, Steves no longer can seek equitable relief on behalf of other participants in the market.

A. Whether There Is An Adequate Remedy At Law Is Not Determined By The Size Of The Remedy Received

A theme running throughout Steves' papers is that the adequacy of its remedy of lost profits should be assessed by looking at the jury's verdict. As Steves noted before the verdict "[i]f the jury awards [lost profits], the Court may then determine whether that remedy is sufficient to make Steves whole. . . . On the other hand, if the jury denies an award of lost profits, ***but*** also finds the existence of an antitrust violation, that will establish that Steves does not have an adequate remedy at law." Opp. Br. at 10. In other words, Steves' position is that the adequacy of the remedy at law is based on whether Steves subjectively believes the monetary remedy it asked for and received is sufficiently significant to "make it whole."

That approach fundamentally misunderstands what it means for an adequate legal remedy to be *available.* Not surprisingly, once again Steves does not provide this Court with a single case that supports its position that the adequacy of a remedy at law depends on the amount a jury actually awards for an alleged harm (much less how the plaintiff feels about that amount). And with good reason—that is simply not the law. As this Circuit has explained, the fact that damages *might* be compensable through a monetary award means that equity is unavailable. *See Hughes*, 17 F.3d at 694 (stating that equitable remedy is improper "[w]here the harm suffered by

the moving party ***may*** be compensated by an award of money damages at judgment") (emphasis added). Were it otherwise, plaintiffs could automatically preserve the right to seek permanent injunctive relief by unilaterally proclaiming that whatever damages were awarded were less than it deserved. And by definition, preliminary injunctive relief would always be available, since no one could know in advance of trial how much a jury might ultimately award in damages. But as countless cases in this Circuit and others recognize, the determination of whether a preliminary injunction (which is indisputably a form of pre-verdict equitable relief) should be granted is based, in part, on whether an adequate remedy at law exists. *Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 499 (4th Cir. 1981); *Roland Mach.*, 749 F.2d at 386 ("In every case in which the plaintiff wants a preliminary injunction he must show that he has 'no adequate remedy at law.'") (citation omitted); *Eli Lilly & Co. v. Premo Pharm. Labs., Inc.*, 630 F.2d 120, 136 (3d Cir. 1980); *Grasso Enters., LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1040 (8th Cir. 2016). Adopting Steves' position thus would render meaningless a portion of the preliminary injunction test recognized and utilized by all courts throughout this country, including the Supreme Court. This Court should not follow Steves down that road of obvious error.

Steves simply misses the point when it argues that JELD-WEN's position is "ironic in light of . . . recent public pronouncements that it views the lost profits award as 'not recoverable' and subject to reversal on appeal," Supp. Resp. at 7 n.5. JELD-WEN has never claimed that no adequate remedy at law exists that would compensate Steves for going out of business. Rather, JELD-WEN's position has always been that Steves has not suffered that harm yet and, therefore, the award of lost profits *now* is improper.[1] There is nothing ironic or inconsistent with pointing

[1] At the Court's urging, JELD-WEN has represented that it would not challenge such a damages claim on limitations or laches grounds if it were brought by Steves once Steves actually suffered the injury that is the basis of that lost profits claim, *i.e.*, it actually goes out of business.

out that Steves would have an adequate remedy at law, but that Steves has not yet suffered the harm giving rise to that remedy. *See Sampson v. Murray*, 415 U.S. 61, 90, 94 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

B. The Fact That Steves' Lost Profits Award Supposedly Does Not Fully Capture The Value Of Steves' Loss Of Its Business Reflects A Strategic Decision Made By Steves Rather Than Any Inherent Inadequacy Of The Remedy

From the outset, Steves was cognizant that its claim that it was entitled to millions of dollars in lost profits for an event (Steves going out of business) that had not occurred and might never occur, was "novel." Indeed, at no point, despite repeated questioning from the Court, was Steves ever able to identify any case in which a court permitted such a claim to go to a jury. Tactically, Steves decided that in presenting its lost profits calculation to the jury it needed to be able to claim to have been conservative and not to have overreached. Tr. 2627:20-2628:9. For that reason Steves instructed its damages expert, Mr. Tucker, to only calculate lost profits for 10 years despite the fact that Steves believed it would suffer lost profits well beyond 2029. Specifically, Steves' counsel told the jury the following:

> "This is Mr. Tucker's calculations. He only took them out ten years. Do you think Steves is going out of business in [2029]? It's been in business for 152 years. And it makes doors. Do you think this country is not going to need doors after 2029? Of course, we need doors. And, of course, you knew that if there was competition in selling door skins, Steves was going to survive a lot longer than 2029. But we asked Mr. Tucker to be conservative. We didn't -- we didn't want to come in here and overreach. And so he limited it to ten years. It's not speculative that Steves would be in business in 2029. You know it. You remember the picture of Edward Steves from 1866 that I showed you in the opening. They're going to be around for a long time if they had door skins. So Mr. Tucker used reasonable estimates. He made sure that his assumptions and his estimates were conservative, were reasonable."

Tr. 2627:20-2628:11.

As Steves noted in its original opposition, whether it had an adequate remedy at law depends on whether monetary damages are difficult to ascertain or inadequate. Opp. Br. At 11 (*citing Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994)). But at no point in time did Steves or its expert ever assert that calculating lost profits for its entire business beyond 2029 was difficult, or that monetary damages for that harm were inadequate. Rather, Steves made the strategic decision that by estimating its lost profits conservatively, it was more likely to get that award.

The decision not to seek lost profits for the period beyond 2029, and to not seek to obtain damages reflecting the supposed full value of Steves' loss of its business, was one made by Steves at the outset of this case. In his initial report, Mr. Tucker noted precisely what Steves is arguing now, *i.e.*, that [redacted] A. Tucker Expert Report at ¶ 111 (Jan. 20, 2017), attached as Exhibit 1. However, in his deposition, Mr. Tucker admitted that he was [redacted] A. Tucker Dep. Tr. at 10:18-11:6 (Sept. 4, 2017), attached as Exhibit 2. In other words, there is nothing inherently inadequate about a lost profits remedy; Steves simply made the tactical judgment that its novel lost profits claim would be better received by the Court and the jury if it estimated those damages conservatively rather than aggressively. JELD-WEN submits that it would be a perversion of the process if Steves were

permitted to rely on a tactical decision to present a more conservative case on lost profits to establish that a lost profits remedy is inadequate.

C. Alleged Benefits Of Divestiture Do Not Make Steves' Remedy At Law Inadequate, As Steves No Longer Has Standing To Seek Divestiture

In its Supplemental Response, Steves also claims that lost profits are an inadequate remedy because divestiture "could" "permit Steves to remain in business," because "an equitable remedy could address the overall harm to competition, and not merely the antitrust injury to Steves," and "because equitable relief also is necessary to prevent harm that Steves may otherwise suffer between now and 2021 if JELD-WEN continues its improper conduct." Supp. Resp. at 6. These arguments are wholly unavailing and in fact raise more questions than they answer.

First, Steves necessarily abandoned any argument based on the notion that divestiture could permit Steves to remain in business when it submitted to the jury a future lost profits claim monetizing the value of not remaining in business. Even in its Supplemental Response, Steves asserts that the lost profits award remedies "the antitrust injury to Steves." Supp. Resp. at 6. Steves cannot base a claim that a remedy at law is inadequate based on a harm that it argued specifically could be remedied at law.

Even more concerning is the fact that Steves' argument suggests that it might be planning not to cease operations on September 11, 2021. It is indisputable that Steves represented before this Court to the jury that it is going out of business on September 11, 2021 when the contract expires. *See* Trial Tr. at 2626:19-2627:4. Steves asked for, and received from the jury, an award of $46,480,581 because of that representation. Steves cannot now "decide" that it might stay in business past 2021. If Steves is now suggesting that it may not be halting all operations as of

September 11, 2021, then at a minimum it is not entitled to lost profits and must immediately request a remittitur of that award.

As for the idea that lost profits are inadequate because they do not "address the overall harm to competition," Steves does not have standing to seek equitable relief on the basis of a harm to the market. The court in *Malaney v. UAL Corp.* specifically addressed this issue and held that in evaluating whether equitable relief is available under Section 7 of the Clayton Act, "the Court must only consider those injuries plaintiffs advance that are personal to them were defendants to merge, and cannot consider any injuries that plaintiffs allege would be suffered by the general . . . public as a whole." No. 3:10-CV-02858-RS, 2010 WL 3790296, at *13 (N.D. Cal. Sept. 27, 2010) (*citing U.S. v. Borden Co.*, 347 U.S. 514, 518 (1954)). Here, assuming as Steves acknowledges that its antitrust injury is remedied through a monetary award of lost profits, then Steves cannot obtain divestiture by virtue of the fact that the public as a whole might benefit from an equitable remedy. *See Cargill, Inc. v. Monofort of Colo, Inc.*, 479 U.S. 104, 113 (1986) (holding that in order to seek injunctive relief under Section 16 of the Clayton Act, a private plaintiff must allege threatened antitrust injury to itself); *Schlesinger v. Reservist Comm. To Stop the War*, 418 U.S. 208, 217 (1974) (holding that generalized injury that all members of the public share is insufficient to confer standing).

Finally, Steves has no standing to argue that divestiture is required to "prevent harm that Steves may otherwise suffer between now and 2021 if JELD-WEN continues its [alleged] improper conduct," if JELD-WEN continues to charge prices that Steves contends are too high. Supp. Resp. at 6. Once again, that claimed harm represents an aspect of future lost profits that plainly can be expressed in monetary terms. As Steves cannot deny, it calculated and presented those damages separately to the jury. Given that it was only two weeks ago that Steves obtained

a monetary award for such damages, it defies logic for Steves to now claim that a remedy at law is somehow inadequate for dealing with those harms and equitable relief is therefore required.

III. TIMING FOR ELECTIONS

Pursuant to the Court's Order, the parties were also required to address the time by which Steves must elect between legal and equitable remedies for JELD-WEN's liability under Count One; and the time by which Steves must elect between the damages awarded in connection with the same conduct underlying JELD-WEN's liability under Counts One and Two. *See* Order (Feb. 21, 2018 (Doc. No. 1041). With respect to the first question, because Steves cannot elect here between the legal remedy of lost profits and the equitable remedy of divestiture, JELD-WEN respectfully submits that there is no appropriate timing for such an election to occur. Steves already made any "election" when it calculated and presented to the jury its claim for future harm in the form of lost profits. To the extent the Court disagrees, and holds that Steves can still seek divestiture, then JELD-WEN, without waiving its arguments that such a decision would constitute error, agrees that an election must occur prior to entry of judgment.

JELD-WEN also agrees that the election between damages awarded in connection with same conduct underlying liability under Counts One and Two must occur before entry of judgment. JELD-WEN submits that there is no reason Steves should not make that entry promptly, given that it has all the necessary information for making that election and has indicated it "will almost certainly elect damages under Count One." However, JELD-WEN disagrees that Steves can, subsequent to electing its Count One damages, undo that election and have its contract damages reinstated if the Court, or the Court of Appeals, holds that the jury's award of antitrust damages was improper. JELD-WEN agrees that this is an issue for another day, but notes that Steves has not presented any Fourth Circuit authority to support its position that its election is not permanent.

CONCLUSION

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

Dated: February 28, 2018

Respectfully submitted,

JELD-WEN, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th 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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