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

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

PLAINTIFF STEVES AND SONS, INC.'S REPLY IN SUPPORT OF ITS RESPONSE TO THE COURT'S OCTOBER 5, 2018, ORDER REGARDING FORM OF THE JUDGMENT

I. THE COURT SHOULD ENTER JUDGMENT ON BOTH DIVESTITURE AND THE JURY'S AWARD OF FUTURE LOST PROFITS

JELD-WEN fails to offer any rule, statute, or case law that precludes Steves' proposal that the Court enter a judgment that permits JELD-WEN to take a single appeal from the jury's award of future lost profits and the Court's divestiture order. Nor do JELD-WEN's arguments regarding efficiency make sense given its concession that the court of appeals will likely consider "at least some aspects of the lost profits damages award regardless of whether it is part of this Court's judgment." JELD-WEN's Resp. to Steves' Resp. to the Court's October 5, 2018 Order at 4 ("JW Resp."), ECF No. 1797 (Oct. 30, 2018). If the court of appeals will have to consider "***some aspects***" of the lost profits damages award, it should have the opportunity to consider ***all aspects*** of that award. The jury's award of future lost profits and this Court's order of divesture are ripe for appeal, and JELD-WEN has not identified any reason for this Court to

encourage piecemeal appeals by entering judgment on one remedy and withholding judgment on the other.

A. The Court Has Already Rejected JELD-WEN's Argument that Equitable Relief Is Unavailable to Steves As a Matter of Law

JELD-WEN rehashes its argument that the jury's award of future lost profits precludes the Court from ordering divestiture; Steves will not repeat its responses to that argument here. The Court has already repeatedly considered and rejected JELD-WEN's position on this issue. *See, e.g.*, Mem. Op. at 82-84 & n.19, ECF No. 1783 (Oct. 5, 2018) ("Divestiture Opinion"); Order at 2, ECF No. 1127 (Mar. 6, 2018). As the Court recognized in its Divestiture Opinion, "a plaintiff is not prohibited from seeking alternate injunctive relief merely because it tries to quantify its future harm in front of the jury." Divestiture Opinion at 82. Indeed, "[t]he purpose of the Remedies Hearing was, in part, to allow Steves to present further evidence about the inadequacy of its future lost profits award." *Id.* If the rule were otherwise, a plaintiff facing irreparable harm would have to either (1) waive seeking injunctive relief in order to pursue partial recompense for its injuries or (2) waive the possibility of receiving even partial damages in the hope that it would ultimately receive injunctive relief.

B. Entering Judgment On Both Divestiture And Future Lost Profits Makes Practical Sense

Steves and JELD-WEN agree on two critical points. ***First***, the parties agree that Steves cannot receive ***both*** divestiture and the jury's award of future lost profits; Steves can receive only one of these remedies. JW Resp. at 2. ***Second***, the parties agree that "Steves will not 'forfeit the jury's future lost profits award' should the Fourth Circuit affirm liability but conclude that divestiture is not an available or appropriate remedy." JW Resp. at 5. As JELD-WEN admits, a party does not forego an alternative remedy "if the court of appeals rules that its preferred choice was unavailable." *Id.* Therefore, the question faced by the Court—and the question raised by the

Court's October 5, 2018 Order—is how to frame an appealable judgment that facilitates efficient appellate review while avoiding the prospect of double recovery.

Steves' proposal plainly avoids the prospect of double recovery, and JELD-WEN does not claim otherwise. Under Steves' proposal, the Court's judgment would order the divestiture of Towanda and also include an award of future lost profits, payable only if divestiture does not occur.

In addition, notwithstanding JELD-WEN's equivocal statements regarding the most efficient way to structure a judgment, *see* JW Resp. at 5-6, Steves' proposal will allow for efficient appellate review of this case. As JELD-WEN notes, "the unavailability of an adequate remedy at law is highly relevant to the availability of equitable relief." JW Resp. at 4. Thus, to evaluate JELD-WEN's arguments regarding the availability of divestiture, the court of appeals will most likely also need or want to consider JELD-WEN's arguments and its position on the availability of future lost profits as well as this Court's rulings on the availability and adequacy of that remedy. *Cf. Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir. 1985) ("When an order in a case is properly appealed, the court of appeals can consider a closely related order if considering them together is more economical than postponing consideration to a subsequent appeal.").

Indeed, JELD-WEN concedes that, ***regardless of how this Court frames its judgment***, the court of appeals will need to address the jury's verdict and will likely need to consider the jury's award of future lost profits. JW Resp. at 4. Given that everyone agrees that the court of appeals will likely need to consider at least some aspects of the jury's award of future lost profits, its ability to fully consider this issue should not be postponed.

JELD-WEN contends that the appeal of this case will be "challenging enough to brief and argue . . . without adding 'bonus' issues to be reached only in the alternative." JW Resp. at 6. But

JELD-WEN's concession that the availability of divestiture is intertwined with the adequacy and availability of future lost profits shows that the jury's award of future lost profits is not a "***bonus***" issue, but rather something that JELD-WEN will likely need to address in its opening appellate brief regardless of how this Court formulates its judgment.

Of course, JELD-WEN may prefer, on appeal, to avoid making the contradictory arguments it made before this Court: (1) that future lost profits are speculative and unavailable to Steves as a matter of law and (2) that divestiture is unavailable as a matter of law because future lost profits are available. *Compare* JELD-WEN's Mot. for Partial Summary J. at 21-27, ECF No. 376 (Sept. 22, 2017), *with* JELD-WEN's Opp. to Steves' Request for Equitable Relief at 21-25, ECF No. 1652 (June 14, 2018). But that is all the more reason to put JELD-WEN to the task of making all its appellate arguments about the proper remedy in the case, once and for all. There is nothing to recommend a course where JELD-WEN first attacks the Court's divestiture order on the grounds that an adequate remedy is available at law and then, in a potential successive appeal, turns around and attacks the jury's damages verdict on the grounds that future lost profits are speculative. Whatever JELD-WEN's actual intent, the Court should adopt Steves' proposal for the simple reason that it will promote an efficient appellate process.

Finally, JELD-WEN argues that this Court should not worry about the risk of piecemeal appeals identified by Steves in its opening brief, because it is not unusual for cases "to return to an appellate court more than once." JW Resp. at 6-7. Of course, the fact that, by necessity or inadvertence, ***other*** cases sometimes involve long, protracted, and potentially inefficient appeals, does not justify consigning ***this*** case to an inefficient appellate process. In this case, the jury's verdict and the Court's divestiture order are both ripe for appeal. *See* JW Resp. at 8-9 (acknowledging that the alternative remedy to divestiture is already "in the record, in black and

white"). In addition, in this case, Steves faces the prospect of going out of business before a protracted appellate process can be completed—a reality that, in light of the evidence presented at trial, could very well be motivating JELD-WEN's arguments.

C. JELD-WEN Fails to Identify Any Rule, Case, or Principle that Prevents the Court From Entering Judgment on Both Divestiture and Future Lost Profits

JELD-WEN muses that the "Fourth Circuit may have considerable doubts about the propriety or finality" of the type of judgment suggested by Steves, but, at the end of the day, it "takes no definitive position on these issues."[1] JW Resp. at 5-6. In fact, although JELD-WEN attempts to distinguish the cases cited by Steves in support of its proposal, JELD-WEN does not identify ***any*** source of law—no statute, no rule, no case—that would prevent this Court from entering judgment in the form requested by Steves.

Steves' proposal will result in an appealable judgment. As an initial matter, Steves' proposal does not affect the language or form of the portion of the Court's judgment addressing divestiture. In other words, whether or not the Court adopts Steves' proposal and enters a judgment for future lost profits (payable only if divestiture does not occur), the Court's judgment with respect to divestiture would not change. JELD-WEN does not explain why the mere

[1] *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 454 (4th Cir. 2017), and *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1338−39 (4th Cir. 1993), the two cases cited by JELD-WEN to suggest that the court of appeals may doubt the finality or propriety of the judgment proposed by Steves, have nothing to do with the decision faced by this Court. In *Fawzy*, the plaintiff appealed the district court's dismissal of its original complaint even though the plaintiff had filed its amended complaint, as of right, moments before the district court entered its dismissal. *Fawzy*, 873 F.3d at 452. *Fawzy* simply holds that an interlocutory order dismissing a superseded complaint is not appealable. *See id*. at 455. *Braswell Shipyards* held that the district court should not have entered judgment under Rule 54(b) on the plaintiff's state law claim while the plaintiff's CERCLA claims were still pending and were "inextricably intertwined" with the state law claims. *Braswell Shipyards*, 2 F.3d at 1337, 1338-39. The parties agree that, at least as things now stand, no Rule 54(b) judgment is necessary.

addition of an alternative remedy, contingent on the non-occurrence of divestiture, would affect the appealability of the divestiture order.

Nor is there any reason to believe that the alternative remedy—the award of future lost profits—would be an unreviewable interlocutory order. Simply as a practical matter, the court of appeals has and exercises the authority to look at the record of the case and enter a final disposition on alternative remedies, regardless of how the judgment is precisely phrased. *See* Steves' Resp. to the Court's October 5, 2018 Order at 7, ("Steves Resp."), ECF No. 1791 (Oct. 16, 2018) (discussing 28 U.S.C. § 2106 and *B. Braun Med., Inc. v. Rogers*, 163 F. App'x 500, 509 (9th Cir. 2006)). And as noted above, "[w]hen an order in a case is properly appealed, the court of appeals can consider a closely related order if considering them together is more economical than postponing consideration to a subsequent appeal." *Parks*, 753 F.2d at 1402. By awarding Steves its alternative remedy as part of the judgment, the Court can provide a clear and unambiguous order for the court of appeals to review in the event it determines that divestiture is not available.

Steves' Response identified a number of cases that demonstrate the above principle in action. Steves Resp. at 9-11. JELD-WEN's Response attempts to distinguish these cases on the grounds that they did not involve a Court granting an alternative remedy. But JELD-WEN misses the point of these cases. The cases cited by Steves involved district courts entering alternative orders that were inconsistent with the primary relief granted and appellate courts then reviewing those alternative orders.

For example, in *White v. Mar-Bel, Inc.*, 369 F. Supp. 1321, 1326 (M.D. Fla. 1973), the district court entered inconsistent alternative orders. ***First***, the court issued a judgment in favor of the defendant on the grounds that the plaintiff's patent was invalid. *Id.* at 1326. ***Second***, the

district court made further alternative rulings that would apply if the court of appeals determined that the patent ***was*** valid: it held that the infringement at issue was "not willful," it held that the case was not an "exceptional case" warranting attorneys' fees, and it held that the plaintiff would be entitled to an injunction against future infringement. *Id.* The court of appeals reversed the district court's ruling on validity and then reviewed the district court's alternative rulings. *White v. Mar-Bel, Inc.*, 509 F.2d 287, 292-93 (5th Cir. 1975).[2]

Similarly, JELD-WEN fails usefully to address the cases cited by Steves from the criminal sentencing context. JELD-WEN contends that the two-track sentencing procedures followed by the district courts in these cases "were not about facilitating ***appellate*** consideration of alternative remedies, but rather were about facilitating further ***district court*** proceedings on remand." JW Resp. at 8. But JELD-WEN does not cite anything for this statement, and the cases reveal that the district courts' procedures actually facilitated ***appellate*** review of the district courts' alternative rulings.

In *Warner*, for example, the district court's "two-track sentencing procedure" facilitated the court of appeals' review of the district court's alternative sentence. *United States v. Warner*, 894 F.2d 957, 961 (8th Cir. 1990). The district court had announced two inconsistent sentences—a non-Guidelines sentence and an alternative Guidelines sentence. *Id.* The court of appeals set aside the non-Guidelines sentence after confirming the constitutionality of the Sentencing Guidelines. *Id.* And the court of appeals then directed the issuance of a new

[2] JELD-WEN claims that this case is unhelpful because the district court simply followed Federal Rule of Civil Procedure 50(c) by issuing a conditional ruling on a motion for a new trial after granting a motion for judgment as a matter of law. While the district court did conditionally rule on the defendant's motion for a new trial pursuant to Rule 50(c), the district court ***also*** resolved a number of other issues, described above, that are not within the scope of Rule 50(c). Thus *White* did not simply involve an application of Rule 50(c), as JELD-WEN asserts.

commitment order without remanding for a new sentencing hearing because the defendant had already had the opportunity to appeal both sentences. *See id. Warner* illustrates that a district court can avoid the need for successive appeals by announcing an alternative remedy.

Similarly, in *United States v. Everhart*, 166 F. App'x 61, 62-63 (4th Cir. 2006), the court of appeals was able to evaluate the procedures followed by the district court in imposing an alternative non-Guidelines sentence after the court of appeals vacated the primary Guidelines sentence imposed by the district court. As it happened, those alternative procedures were inadequate. But if the district court had not announced its alternative sentence, the court of appeals' review of the district court's sentencing procedures would have had to await a remand and resentencing.

The cases cited by Steves, including *White*, *Warner*, and *Everhart*, demonstrate that appellate courts are willing and able to review the alternative remedies ordered by a district court and that district courts, by ordering such alternative relief, can avoid the need for successive and wasteful appeals. By contrast, JELD-WEN fails to cite any authority suggesting that a district court may not order alternative relief or that an appellate court may not review such alternative relief.

II. THE JUDGMENT SHOULD NOT INCLUDE A STAY PROVISION

JELD-WEN's Response does not address Steves' request that the Court strike the language regarding a stay of divestiture from the draft judgment of divestiture. Steves Resp. at 12. But JELD-WEN agrees with Steves that the conditions that attach to any stay should be addressed through separate briefing. JW Resp. at 11-12. The question whether JELD-WEN should receive a stay depends on the specific conditions that attach to such a stay and on whether those conditions are sufficient to protect Steves during the pendency of the appeal. *See* Fed. R. Civ. P. 62(c) ("[T]he court may suspend [or] modify . . . an injunction ***on . . . terms that secure***

the opposing party's rights." (emphasis added)); *see also* Steves Resp. at 13-14 (collecting cases). Accordingly, because JELD-WEN does not address this issue in its Response and because the parties agree that the contours of a stay order should be addressed in separate briefing, the Court should grant Steves' request to strike the language regarding a stay of divestiture from the draft judgment, and set a schedule for JELD-WEN to move for a stay of the Court's forthcoming final divestiture order.

III. MODIFICATIONS TO THE DRAFT JUDGMENT

A. JELD-WEN Does Not Contest The Modifications Requested By Steves

Steves requested certain other corrections and modifications to the draft judgment, including modifications designed to conform the judgment to the divestiture order. *See* Steves Resp. at 17-20. JELD-WEN does not contest any of these requested corrections and modifications, and Steves respectfully requests that the Court adopt Steves' proposals for the reasons described in Steves' Response.

B. The Court Should Not Adjust the Jury's Verdict Regarding Past Antitrust Damages

JELD-WEN claims that the Court should reduce Steves' past antitrust damages on the basis of JELD-WEN's "upcoming motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b)." JW Resp. at 10. Of course, the Court cannot and should not modify the jury's verdict on the basis of a hypothetical motion that JELD-WEN has not filed—and indeed need not file until "28 days ***after the entry of judgment***." Fed. R. Civ. P 50(b) (emphasis added). The Court should enter judgment consistent with the jury's verdict and the parties can brief JELD-WEN's Rule 50(b) motion—including the question whether JELD-WEN has waived the new issue it seeks to raise by failing to raise it by way of a motion under Rule 50(a)—once JELD-WEN actually files its motion.

C. Pre-Judgment & Post-Judgment Interest for JELD-WEN's Trade Secrets Damages

The parties agree that federal law governs post-judgment interest.

JELD-WEN asserts that Texas law applies to pre-judgment interest for its trade secrets claim and that the Texas Finance Code provides the applicable rate of pre-judgment interest. JW Resp. at 10-11. JELD-WEN has not addressed a number of threshold issues regarding its entitlement to pre-judgment interest.

First, JELD-WEN has not addressed the question whether state or federal law governs the award of pre-judgment interest in cases involving a single, combined damages award for overlapping state and federal claims, such as the jury's award in connection with JELD-WEN's federal trade secrets (DTSA) and state trade secrets (TUTSA) claims. *Compare Doty v. Seawall*, 908 F.2d 1053 (1st Cir. 1990) ("[W]here, as here, the claims under federal and state law, and the damages awarded therefore, are identical, a plaintiff is entitled to select the body of law under which the damages will be paid."), *with Press v. Concord Mortgage Corp.*, 2009 WL 6758998 (S.D.N.Y. Dec. 7, 2009) (applying federal law). To the extent federal law applies, the award of pre-judgment interest is discretionary. *See Maksymchuk v. Frank*, 987 F.2d 1072, 1077 (4th Cir. 1993).

Second, to the extent JELD-WEN is correct that Texas law applies, it has not explained why the Texas Finance Code provisions it cites are applicable. *See* Tex. Fin. Code Ann. § 304.103 (pre-judgment interest for ***wrongful death***, ***personal injury***, and ***property damage*** cases); *see also Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530 (Tex. 1998) (interpreting predecessor to current statute and noting that "property damage cases" are "claims for damage to tangible property" and not for "economic loss or loss of economic opportunity."). And although Texas law appears to provide for common law pre-judgment

interest, JELD-WEN has not addressed how the Court should exercise its discretion in awarding such interest.

Steves takes no position on the above issues, but, for purposes of the jury's award of $1.2 million in connection with JELD-WEN's trade secrets claim, Steves does not oppose the Court exercising its discretion by applying JELD-WEN's proposed formula for the application of pre-judgment interest, with an accrual date of May 22, 2017, the date that JELD-WEN's counterclaim was filed. *See* Tex. Fin. Code Ann. §304.104 (prejudgment interest accrues on the earlier of 180 days after notice of the claim or the date suit was filed); §304.104 (prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment); *see also Johnson & Higgins*, 962 S.W.2d at 531-32 (applying Texas statutory provisions governing prejudgment interest rates and accruals to assessing prejudgment interest under common law).

Dated: November 7, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 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.

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