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

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

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

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INTRODUCTION

Steves and Sons Inc. ("Steves") submits this response to the Court's October 5, 2018, Order, which directed the parties to address how to "formulate a judgment order that permits appeal of the jury's verdict and the divestiture order, but that assures that there will be no double recovery." Order, ECF No. 1786 (Oct. 5, 2018) ("Briefing Order"). In connection with the Briefing Order, the Court also issued two Draft Judgments—one addressing Steves' damages ("Draft Damages Judgment," ECF No. 1786-1) and the other addressing divestiture ("Draft Divestiture Judgment," ECF No. 1786-2)—and invited the parties to comment on these drafts. Hr'g Tr. at 6:7-19 (Oct. 4, 2018).

The Court can and should formulate a single final judgment that (1) permits JELD-WEN to appeal the jury's damages verdict ***and*** the Court's divestiture order in a single appeal, (2) ensures that Steves—having secured an award of future lost profits and the remedy of divestiture—does not face the risk of receiving ***no*** remedy at all, and (3) ensures that JELD-WEN does not face the risk of double recovery. Specifically, the Court should enter a single judgment addressing all claims and counterclaims, with the following components:

- ***Antitrust Past Damages***: An award in favor of Steves of $36,455,619, with post-judgment interest thereon. This award reflects the jury's award, before trebling, of $12,151,873 for Steves' past antitrust damages. *See* Verdict Form ¶¶ 3(a)(1)-(4), ECF No. 1022 (Feb. 15, 2018).
- ***Breach of Contract Damages*:** An alternate award in favor of Steves of $9,933,602, with pre-judgment interest from the date of the verdict to the date judgment is entered, and post-judgment interest from the date of judgment, payable only if JELD-WEN succeeds in obtaining a reversal of the jury's award of antitrust past damages. The principal

amount of this award reflects the jury's award of $12,151,873 for Steves' breach of contract claims, reduced by $2,218,271 as a result of the Court's granting of JELD-WEN's Motion for Judgment as a Matter of Law. *See* Verdict Form ¶¶ 5, 7, ECF No. 1022; Mem. Op., ECF No. 1773 (Sep. 28, 2018).

- ***The Court's Judgment of Divestiture***: Below, Steves has proposed certain modifications to the Court's Draft Divestiture Judgment.
- ***Antitrust Lost Profits Damages***: An award in favor of Steves for $139,441,743, with post-judgment interest thereon, payable if divestiture does not occur. This award reflects the jury's award, before trebling, of $46,480,581, for Steves' future lost profits in connection with its antitrust claim. *See* Verdict Form ¶¶ 3(b), ECF No. 1022.
- ***Declaratory Relief*:** A declaration of Steves' rights under the Long Term Supply Agreement. The Court has requested briefing on this issue. *See* Order, ECF No. 1790 (Oct. 9, 2018).
- ***Judgment in Favor of Individual Counterclaim Intervenors:*** An order finally adjudicating and disposing of all claims against the individual counterclaim intervenor defendants: Sam Steves, Edward Steves, and John Pierce. *See* Memo. Op. at 31, ECF No. 1779 (Oct. 4, 2018); Order at 2, ECF No. 1780 (Oct. 4, 2018).
- ***JELD-WEN's Relief***: The relief, if any, that the Court determines JELD-WEN is entitled to receive on its trade secret counterclaims. The Court previously ordered, with respect to JELD-WEN's trade secret counterclaims, "that judgment is hereby entered on the verdict (ECF No. 1609) in favor of JELD-WEN, Inc. against Steves and Sons, Inc." Order, ECF No. 1780 (Oct. 4, 2018). The Court has requested briefing on the equitable relief, if any, to award on these claims. *See* Order, ECF No. 1766 (Sep. 11, 2018).

A judgment structured in this manner does not permit Steves to receive both divestiture and an award of future lost profits, so there is no risk of double recovery against JELD-WEN. Moreover, structuring the judgment as described above will "secure the just, speedy, and inexpensive determination," Fed. R. Civ. P. 1, of this action by ensuring a single appeal of all issues adjudicated by the Court. Should the Court of Appeals determine that divestiture is not available to Steves for some reason—an outcome Steves does not anticipate given the record in this case—the Court of Appeals can still consider JELD-WEN's appeal of the jury's award of lost profits without the need for a successive appeal.

The judgment described above should be set out in a separate standalone document as contemplated by Federal Rules of Civil Procedure 58(a) and 58(b)(2). In addition, the judgment should address all claims pending in this litigation. A single final judgment with respect to all claims and parties will reduce the risk of confusion regarding the operative appealable judgment, make clear the time for appeal, and avoid the inefficiency and delay of piecemeal appeals.

Finally, as discussed in detail below, Steves respectfully requests that the Court make certain additional modifications to the Draft Judgments. In particular, Steves requests that the Court delete the language in the Draft Divestiture Judgment stating that divestiture "will be stayed pending appeal," Draft Divestiture Judgment at 6, and instead establish a schedule on which the parties may brief the proper conditions for staying components of the Court's judgment.

Steves recognizes the appropriateness of staying aspects of the Court's divestiture order pending JELD-WEN's appeal. But the entry of a stay is distinct from the judgment itself, the scope of such a stay must be carefully crafted, and—of greatest importance to Steves—any such stay must be on "terms that secure [Steves'] rights," Fed. R. Civ. P. 62(c). Without such terms,

Steves faces the very real risk that despite obtaining an order of divestiture from this Court, and despite successfully defending that order of divestiture on appeal, it will nonetheless go out of business before it can receive the benefit of the restored competition that will result from divestiture. *See, e.g.*, Mem. Op. at 37, ECF No. 1783 (Oct. 5, 2018) ("Divestiture Opinion") ("[I]f Steves cannot obtain a reliable doorskin supply, its business will soon fail."). To avoid that untoward result, if the Court preserves the status quo for JELD-WEN by staying divestiture during appeal, then it should likewise preserve the status quo for Steves by conditioning that stay of divestiture on an extension of the Long Term Supply Agreement during the appeal and divestiture process and until the divested Towanda is operational under new management.

But the Court need not and should not resolve JELD-WEN's entitlement to a stay—or the conditions that should apply to such stay—at this time. The grant of a stay is an "exercise of judicial discretion," and JELD-WEN "bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Here, JELD-WEN has neither moved for a stay nor addressed any of the relevant circumstances that bear on the propriety of a stay, including "whether issuance of the stay will substantially injure" Steves. *See id.* Nor has JELD-WEN specified what parts of the divestiture process would injure it if they were to proceed concurrently with its appeal.

Steves, for its part, has consistently emphasized its concern that a stay of divestiture pending appeal should be crafted to avoid prejudice to Steves. *See, e.g.*, Steves' Revised Sep. Mem. Re Mechanics of Divestiture at 7 & n.4, ECF No. 1672 (June 19, 2018); Steves' Post-Hearing Mem. Requesting Equitable Relief at 15 n.6, ECF No. 1606 (May 15, 2018). But Steves obviously cannot fully address this issue without briefing from JELD-WEN. Indeed, JELD-WEN itself has indicated that it intends to brief this issue. *See* JELD-WEN's Mem. Re

Mechanics of Divestiture at 15, ECF No. 1704 (July 3, 2018) ("JELD-WEN intends to appeal [the Court's] entire decision and seek a stay."). Accordingly, the Court should set a schedule on which the parties can address the conditions that should attach to a stay of the judgment the Court intends to enter.

ARGUMENT

I. THE COURT CAN AND SHOULD FORMULATE A SINGLE JUDGMENT THAT PERMITS APPEAL OF THE JURY'S DAMAGES VERDICT AND THE DIVESTITURE ORDER, YET ASSURES THAT THERE WILL BE NO DOUBLE RECOVERY

A. Judgment on All Claims Should Be Entered as a Single, Separate Document

Federal Rule of Civil Procedure 58(a) specifies that a "judgment . . . must be set out in a separate document." Although the Rules do permit judgments for different claims to be contained in different documents, *see* Fed. R. Civ. P. 54(b), Steves suggests that the better course under present circumstances is for the Court to issue a single document that addresses all claims as to all parties.

First, because this case involves multiple claims and counterclaims among multiple parties, judgment will not be final until the Court enters judgment on all claims as to all parties. *See* Fed. R. Civ. P. 54(b) (judgment on fewer than all claims not final unless "the court expressly determines that there is no just reason for delay"). By issuing a single document adjudicating all claims, the Court can ensure that there is no confusion regarding when judgment becomes final.

Second, some of the parties' claims involve requests for injunctive relief, and the time for appeal of an order granting or denying an injunction runs from the date the order is entered, even if the Court has not yet entered final judgment. *See* 28 U.S.C. § 1292(a); Fed. R. App. P. 4(a). By entering a single document granting or denying all relief sought by the parties, the Court can

avoid a scenario in which some orders inadvertently become appealable before others are capable of being appealed.

Third, at this time, it does not appear that any of the claims in this case are proceeding on materially different schedules. The two claims left for the Court to adjudicate are: (1) Steves' request for declaratory relief with respect to the Long Term Supply Agreement and (2) JELD-WEN's request for equitable relief with respect to its trade secrets counterclaims. Briefing on both will be completed by early November. *See* Order, ECF No. 1766 (briefing schedule for trade secrets relief); Order, ECF No. 1790 (briefing schedule for declaratory relief). Similarly, briefing in connection with the Court's Draft Judgments regarding Steves' damages and divestiture will be completed by early November. *See* Order, ECF No. 1786 (Oct. 5, 2018). Accordingly, at this time, there is no reason for the Court to issue a partial judgment on any claim and to certify such partial judgment for appeal. *See* Fed. R. Civ. P. 54(b).[1]

B. The Court Should Enter Judgment on Both Divestiture and Future Lost Profits

Steves agrees that it may not receive ***both*** the legal remedy of future lost profits ***and*** the equitable remedy of divestiture.[2] That result would constitute double recovery. But protecting JELD-WEN against the possibility of double recovery should not expose Steves to the risk that, should the Court of Appeals vacate this Court's divestiture order or should divestiture not be accomplished, Steves will also forfeit the jury's future lost profits award. To the contrary, as

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[1] If it later appears that the resolution of one or more claims could delay the appeal of other claims, Steves respectfully reserves the right to seek relief pursuant to Federal Rule of Civil Procedure 54(b).

[2] Of course, Steves should receive its ***past*** damages even if it receives divestiture. The restoration of competition in the future does not remedy the harm that Steves has already suffered in the form of higher prices and lower quality, for which those past damages are compensation.

described below, this Court and the Court of Appeals can limit Steves to a single recovery while avoiding any forfeiture of Steves' alternative remedy.[3]

1. Entering Judgment on Divestiture But Not Future Lost Profits Will Be Inefficient and Could Result in Piecemeal Appeals

As one approach, the Court could simply enter judgment on the divestiture order and, if (for example) the Court of Appeals were to vacate the divestiture order, this Court or the Court of Appeals could enter judgment on the lost profits award. Steves does not, however, believe that is the best approach in this case.

In *B. Braun Med., Inc. v. Rogers*, 163 F. App'x 500, 509 (9th Cir. 2006), for example, the plaintiff elected to accept an equitable remedy granting it ownership of a patent instead of an alternative legal remedy awarding damages. *Id.* at 503. On appeal, the Ninth Circuit vacated the equitable remedy and ordered entry of judgment on the legal remedy established by the jury's damages verdict. *Id.* at 509-10. The Ninth Circuit undoubtedly had the authority in *B. Braun* to examine the substance of the record and "remand the cause and direct the entry of such appropriate judgment . . . as [was] just under the circumstances." 28 U.S.C. § 2106. But had it not done so, the district court would likewise have had authority to conduct further proceedings and enter an appropriate judgment for monetary relief. *See, e.g.*, *United States v. United Techs. Corp.*, 190 F. Supp. 3d 752, 758 (S.D. Ohio 2016) (on remand from appellate vacatur of plaintiff's preferred remedy, holding that "[plaintiff's] prior election of [one] remedy did not

[3] Steves' goal is to achieve divestiture and thereby secure a competitive source of doorskins. But if divestiture is ultimately not accomplished, Steves reserves the right to recover the jury's award of future lost profits. In that eventuality, Steves will not receive a double recovery because it will not receive the remedy of divestiture. *United States v. United Techs. Corp.*, 190 F. Supp. 3d 752, 758 (S.D. Ohio 2016) ("A fruitless attempt to recover on an unavailing remedy does not constitute an election which will deprive a person of rights which are availing by a different and appropriate remedy." (quoting *Estate Counseling Services, Inc. v. Merrill Lynch Pierce Fenner & Smith*, 303 F.2d 527, 530-31 (10th Cir. 1962))).

waive the right to seek an alternative remedy . . . if the elected remedy failed," and awarding that alternative remedy).

These cases suggest that, if the Court were to enter judgment ordering divestiture (alongside a judgment for past damages and other remedies), but not address future lost profits in the judgment, it would create some risk of inefficient appellate review. If, for example, JELD-WEN were to prevail on its challenge to the Court's divestiture order, the Court of Appeals would vacate the divestiture order, but it is not certain whether the Court of Appeals would go on to review the jury's future lost profits verdict and direct the entry of judgment accordingly. If the Court of Appeals did not direct entry of judgment on the future lost profits award, then, on remand, this Court would appropriately enter judgment on the lost profits award—but that could lead to another appeal by JELD-WEN.

That protracted process has little to recommend it. The jury's future lost profits award and the Court's divestiture order raise common legal and factual issues, including with respect to the likelihood of entry by other firms, the availability of foreign doorskins, and the harms faced by Steves in the absence of relief. *See, e.g.*, Mem. Op. at 33, 35, 36-37, ECF No. 1783 (Oct. 5, 2018) ("Divestiture Opinion"). It would be most efficient for the Court of Appeals to have the opportunity to address these issues a single time. Indeed, because the Court's divestiture order relies, in part, on factual findings made by the jury, including with respect to future lost profits, *see* Divestiture Opinion at 60, 71-73, it is unclear how the Court of Appeals could review the Court's divestiture order without also reviewing the jury's verdict. Moreover, as the Court has noted, JELD-WEN "has represented that it intends to appeal the jury's verdict and the divestiture order." Briefing Order at 1. Given JELD-WEN's stated intentions, it would be wasteful to set in motion a process that could result in appellate review of only the divestiture order at this time.

2. The Court Can Enter Judgment on Divestiture and an Alternative Judgment on Future Lost Profits

To avoid risking the inefficiency of piecemeal appeals, the Court could structure its judgment in the way Steves has proposed. *See* pp. 1-2, *supra*. Specifically, the Court would enter judgment awarding both divestiture and lost profits, but the award of lost profits would be conditioned on the non-occurrence of divestiture. Due to the "rather unusual circumstances" of this case, Briefing Order at 1, Steves has not identified prior cases in this precise configuration, but precedent from both civil and criminal practice strongly supports the Court's authority to follow this approach.

In *White v. Mar-Bel, Inc.*, 509 F.2d 287, 288 (5th Cir. 1975), for example, the jury returned a damages verdict for the plaintiff in a patent infringement case. Subsequently, the district court issued a judgment in favor of the defendant on the ground that the patent was invalid. *Id.* at 289. Despite finding the patent invalid, the district court made further alternative rulings regarding the defendant's willfulness and the remedies available to plaintiff if the patent ***were*** valid. *Id.*; *see also White v. Mar-Bel, Inc.*, 369 F. Supp. 1321, 1326 (M.D. Fla. 1973) (district court's decision). The district court's decision contained the following statement:

> If the ruling announced in this Order is reversed on appeal, it would be the intention of the Court (subject to the direction of the Court of Appeals) to enter judgment for the Plaintiff in the amount of the compensatory damages assessed by the jury ($94,500.00) plus taxable costs and injunctive relief prohibiting future infringement.

White v. Mar-Bel, Inc., 369 F. Supp. 1321, 1326 (M.D. Fla. 1973). On appeal the appeals court reversed the district court's holding regarding validity, and affirmed the alternative rulings. *White*, 509 F.2d at 292-93. Absent the district court's alternative holdings, the court of appeals might have instead remanded the case for the district court to conduct further proceedings, prolonging the case.

Similarly, in *Nachman Corp. v. L.A. Young Spring & Wire Corp.*, 202 F.2d 279, 279 (6th Cir. 1953), the district court held that a patent was invalid, but also held, in the alternative, that if it were valid, it had been infringed. The court of appeals agreed that the patent was invalid, so it found the remaining part of the court's order moot. *Id.* *Nachman* and *White* illustrate that a district court can make alternative rulings that are contingent on the appellate courts' resolution of the district court's primary order.

The Fourth Circuit's approach to criminal sentencing likewise demonstrates that district courts can, and should, make alternative rulings in appropriate circumstances. In the wake of concerns expressed by Members of the Supreme Court and other judges regarding the constitutionality of the United States Sentencing Guidelines, *see, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 324-25 (2004) (O'Connor, J., dissenting), the Fourth Circuit recommended that district courts impose sentences in conformity with the Sentencing Guidelines and simultaneously announce alternate sentences that treated the Guidelines as advisory only. *United States v. Hammoud*, 381 F.3d 316, 353 (4th Cir. 2004) (en banc), *vacated*, 543 U.S. 1097 (2005). After the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that courts must treat the Sentencing Guidelines as advisory only, the Fourth Circuit confronted such alternative sentences in many cases. In *United States v. Everhart*, 166 F. App'x 61, 62 (4th Cir. 2006), for example, the Fourth Circuit rejected the Guidelines sentence imposed by the district court as forbidden by *Booker*, *id.* at 63, and then considered the alternative sentence, *id.* at 63-64.[4]

[4] In *Everhart* and other cases, the Fourth Circuit concluded that the rules followed by district courts in arriving at alternative sentences were incompatible with *Booker*, *see, e.g.*, *Everhart*, 166 F. App'x at 63-64, and thus it had to remand for new sentencing proceedings, which sometimes spawned a second appeal, *see, e.g.*, *United States v. Batts*, 251 F. App'x 197, 199 (4th Cir. 2007). But such situations arose because the rules of sentencing were in flux around the time of *Booker*. Here, by contrast, the rules for assessing future lost profits are well-

Similarly, in *United States v. Warner*, 894 F.2d 957, 960 (8th Cir. 1990), the district court—"[a]waiting a ruling on the constitutionality of the United States Sentencing Guidelines" in *Mistretta v. United States*, 488 U.S. 361 (1989)—imposed two alternate sentences on the defendant, a Guidelines sentence and a non-Guidelines sentence. *Id.* at 961. On appeal, the Eighth Circuit upheld the constitutionality of the Guidelines and vacated the non-Guidelines sentence. *Id.* at 961. But it recognized the economy of the procedure followed by the district court: "Because the District Court employed a two-track sentencing procedure—formally sentencing [the defendant] outside of the Guidelines, but also announcing the proper sentence under the Guidelines to be served in the event the Guidelines were to survive constitutional attack—a new sentencing hearing [was] unnecessary." *Id.*

These criminal cases support entering a judgment with an alternative remedy. Although criminal practice differs in certain respects from civil practice, those differences do not meaningfully undermine the relevance of these cases: In criminal practice, the sentence is a remedy, just as equitable or monetary relief is the remedy in civil cases. In criminal practice, the oral announcement of a sentence (or alternative sentence) is the definitive judgment, see *United States v. Morse*, 344 F.2d 27, 29 n.1 (4th Cir. 1965), just as the written judgment in a civil case controls. Most fundamentally, all these examples show that courts of appeals have welcomed—and the Fourth Circuit has even invited—district courts to enter judgments that take a pragmatic approach to facilitating appellate review of primary and alternative remedies.

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established; the Court of Appeals would have no similar difficulty in reviewing the alternative award of future lost profits.

II. THE FINAL JUDGMENT SHOULD NOT INCLUDE A STAY PROVISION, BUT STEVES DOES NOT OPPOSE AN ORDER STAYING THE JUDGMENT ON TERMS THAT ADEQUATELY SECURE STEVES' RIGHTS

The Court's Draft Divestiture Judgment states that "divestiture will be stayed pending appeal." Draft Divestiture Judgment at 6. Steves respectfully requests that the Court delete this language and order the parties to address the terms of any stay in subsequent briefing. No judgment has actually been entered, and JELD-WEN has not filed a motion to stay the judgment. The Court has not had a full opportunity to consider whether a stay is appropriate and, if so, what terms the Court should impose to protect Steves during the pendency of an appeal.

Steves does not oppose a stay in principle, and Steves acknowledges that, as the *Brown Shoe* court noted, potential buyers are not likely to provide firm expressions of interest in the Towanda plant until after the divestiture issue is settled on appeal. Divestiture Opinion at 51. But Steves also believes that an unconditional stay would gravely prejudice it—potentially depriving Steves of the benefits of any divestiture, to the point that equitable relief could become moot if JELD-WEN's appellate efforts succeed not on the merits, but in simply running out the clock on the Long Term Supply Agreement and Steves' ability to retain its customers.

A stay pending appeal "is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). Rather, a stay is an "exercise of judicial discretion," and the party seeking a stay "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. "The fact that the issuance of a stay is left to the court's discretion does not mean that no legal standard governs that discretion." *Id.* at 434. To the contrary, a court must consider four factors in determining whether a stay is appropriate under the circumstances: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public

interest lies." *Id.* "The purpose behind a court granting a stay pending appeal is generally preventative or protective because the stay seeks to maintain the status quo pending a final determination of the merits of the suit." *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 661 F. Supp. 2d 548, 559 (E.D. Va. 2009).

When a court does stay an injunction pending appeal, it may impose "terms that secure the opposing party's rights." Fed R. Civ. P. 62(c). The rule "codifies the inherent power of courts to make whatever order is deemed necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment." 11 Wright & Miller, *Federal Practice and Procedure* § 2904 (3d ed.).

The cases reflect that courts have imposed diverse terms on parties seeking a stay of an injunction pending appeal, but the common theme is that in each case, the terms imposed by the court are designed to fit the circumstances of the case and protect the interests of the prevailing party and the public during the appeal. *See, e.g.*, *Hofmann v. Sender*, No. 12CV-8104 KMK, 2012 WL 8466673, at *2 (S.D.N.Y. Dec. 20, 2012) (entering stay pending appeal of order requiring respondent to return children to Canada, conditioned on surrendering certain documents, allowing petitioner to visit children, and not removing children from the court's territorial jurisdiction); *In re Hayes Microcomputer Prod., Inc. Patent Litig.*, 766 F. Supp. 818, 822 (N.D. Cal. 1991) (staying order enjoining defendants from infringing the plaintiff's patent pending appeal, but requiring defendants to deposit royalties into an escrow account during appeal), *aff'd*, 982 F.2d 1527 (Fed. Cir. 1992); *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1074, 1085 (8th Cir. 1974) (staying injunction closing mining facility pending appeal, but conditioning stay on the defendant taking steps to abate discharges of pollutants during appeal); *McConnell v. Anderson*, No. 4-70 CIV. 297, 1970 WL 136, at *1 (D. Minn. Sept. 24, 1970)

(staying injunction, pending appeal, on the condition that "[t]he library position for which plaintiff is an applicant will not be filled or eliminated so that the same will remain available to plaintiff in the event this court's injunction . . . is finally affirmed."); *cf. HCB Contractors v. Rouse & Assocs.*, 168 F.R.D. 508, 511, 514 (E.D. Pa. 1995) (granting stay pending appeal under Fed. R. Civ. P. 62(d), "impos[ing] an appropriate plan of alternative security" on judgment creditors unable to post a supersedeas bond, "including (1) a restraint from transferring any interest in [certain] assets, (2) notification provisions regarding claims or enforcement attempts made by other creditors, and (3) operational reporting and limiting provisions"); *Teachers Ins. & Annuity Ass'n of Am. v. Ormesa Geothermal*, No. 87 CIV. 1259 (KMW), 1991 WL 254573, at *4 (S.D.N.Y. Nov. 21, 1991) (similar).

In this case, the Court has expressly found that, absent equitable relief, Steves "will be forced out of business when the Supply Agreement terminates in 2021." Divestiture Opinion at 74, ECF No. 1783. As the Court recognized, "if Steves cannot obtain a reliable doorskin supply, its business will soon fail." *Id.* at 37. Although divestiture will ultimately restore competition, an unconditional stay of divestiture makes it unlikely that the appeals process and the subsequent process of marketing and selling the Towanda plant can be completed before the termination of the Long Term Supply Agreement in September 2021, less than three years from now.

Steves' concern is compounded by the fact that JELD-WEN has multiple incentives to drag out the appellate process. Any delay benefits JELD-WEN ***both*** by weakening Steves ***and*** by delaying the entry of a new competitor. *See* Reply Mem. in Support of Plaintiff's Motion for Entry of Final Judgment, *U.S. v. Bazaarvoice, Inc.*, 2014 WL 12825582 (N.D. Cal. March 12, 2014) (argument by the Department of Justice that a defendant in a contested divestiture case "stands to benefit from any delay in divestiture sale because delay puts off the creation of a new

. . . competitor."). JELD-WEN benefits from any delay in the appellate process for an additional reason: during any period of delay, it continues to earn tens of millions of dollars in EBITDA from Towanda, the asset it illegally acquired and that it has been ordered to divest. Rem. Tr. 726:7-16 (Apr. 12, 2018).

Steves faces the untenable risk that despite securing divestiture in this Court, and despite having strong prospects of defending that relief on appeal, it will all be for nothing if Steves goes out of business simply due to the time JELD-WEN requires to appeal. In that eventuality, all the irreparable harms found by the Court will come to pass despite the Court's order of equitable relief.

Moreover, even if the appeal, the eventual divestiture of Towanda, and the resulting restoration of competition ***could*** be completed by 2021, Steves faces grave risks to its relationships with its customers ***before*** 2021. A significant percentage of Steves' door sales volume comes from sales to customers under long-term supply agreements. Rem. Tr. 43:9-16 (Apr. 10, 2018). And several of Steves' customers have raised concerns that Steves' inability to acquire doorskins will impact their own supply of products. Rem. Tr. 41:8-42:4 (Apr. 10, 2018).

For example, as a condition of renewing its long-term agreement with Steves, one of Steves' customers has required Steves to provide reasonable assurances by April 2020 that it will be able to secure a sufficient supply of doorskins for the duration of the customer's agreement. Rem. Tr. 46:9-48:15 (Apr. 10, 2018); Steves' Proposed Findings of Fact ¶¶ 20-23, ECF No. 1604 (May 15, 2018). If Steves cannot provide reasonable assurances of its supply of doorskins, the customer may terminate the agreement by as early as October 2020. Rem. Tr. 46:9-48:15 (Apr. 10, 2018); Steves' Proposed Findings of Fact ¶¶ 20-23, ECF No. 1604 (May 15, 2018).

Similarly, another significant customer, which has also raised concerns about Steves' access to doorskins, will be reviewing its ongoing business with Steves in 2019. Rem. Tr. 42:24-43:7; 43:17-22; 44:10-15 (Apr. 10, 2018); J. Tr. 501:23-502:11 (Feb. 2, 2018). Unless Steves can assure its customers that it will have a continued supply of doorskins, it will lose customers even before the termination of the Long Term Supply Agreement in 2021. Rem. Tr. 49:4-11 (Apr. 10, 2018).

Given these circumstances, Steves believes that any stay pending appeal must be conditioned in a way that preserves the status quo where Steves' supply of doorskins is concerned—in practical terms, extending the term of the current Long Term Supply Agreement between Steves and JELD-WEN during the pendency of the appeal and the divestiture process and until Towanda is operational under new management. Such an extension will allow Steves to obtain the doorskins it needs and assure its customers that it will have a source of doorskins—and thereby stay in business—before the divestiture order can take effect and restore competition to the market. Such an extension will ensure that Steves is not prejudiced by JELD-WEN's appeal. At the same time, this extension will not work any significant hardship on JELD-WEN given that Steves will continue to pay JELD-WEN the competitive prices reflected in the Long Term Supply Agreement during the pendency of the appeal and divestiture process.

But the Court need not resolve this question at this time. For now, the Court should simply remove the reference to a stay that is contained in the Draft Divestiture Judgment. JELD-WEN, if it so chooses, can file a motion for a stay of divestiture, and the parties can address the propriety of a stay, the contours of the stay, and the terms that should attach to that stay in the course of briefing JELD-WEN's motion. Indeed, JELD-WEN previously indicated that it intended to move for a stay of divestiture. *See* JELD-WEN's Mem. Re Mechanics of Divestiture

at 15 ("JELD-WEN intends to appeal [the Court's] entire decision and seek a stay."). Steves respectfully suggests that the Court establish a schedule for making and briefing such a motion.

III. THE COURT SHOULD MAKE CERTAIN CORRECTIONS AND MODIFICATIONS TO THE DRAFT JUDGMENTS

A. The Judgment Should Include Certain Provisions Identified In the Court's Divestiture Opinion

Section II.B of the Court's Divestiture Opinion addressed various divestiture-related remedies requested by Steves. Divestiture Opinion at 114-117. The Opinion notes that Steves' motion for equitable relief would be granted and that "to the extent set out in Section II.B," the Court would "grant the conduct remedies necessary to the success of the divested entity." Divestiture Opinion at 148. A handful of provisions set out in Section II.B appear to have been inadvertently omitted from the Draft Divestiture Judgment. These provisions should be added to the final judgment.

First, the Court held that Steves' request for "an order affording the new owner [of Towanda] a reasonable opportunity to retain the services of current Towanda employees" is "permissible and appropriate." Divestiture Opinion at 115. The Draft Divestiture Judgment issued by the Court does not include such a provision. Relatedly, the Court's conclusion in the Divestiture Opinion that it is permissible and appropriate "that Jeld-Wen be prohibited from rehiring those employees for two years," *id.*, does not appear in the draft judgment.

Second, the Court agreed with Steves that a provision allowing other independent door manufacturers to terminate their supply agreements with JELD-WEN "would help restore competition." Divestiture Opinion at 116. This provision does not appear in the Draft Divestiture Order.

Third, the Court declined to adopt Steves' proposal limiting JELD-WEN's ability to purchase from Towanda, but the Court did state that it would impose certain other limits on

JELD-WEN's purchases from Towanda. Divestiture Opinion at 116-17. Those limits do not appear in the Draft Divestiture Order.

B. The Judgment Should Not Cumulate the Jury's Award of Breach of Contract Damages and the Jury's Award of Past Antitrust Damages

The Court's Draft Damages Judgment cumulates the damages Steves was awarded for its antitrust claim and the damages it was awarded for its breach of contract claim. But Steves' past damages for its antitrust claim and breach of contract claims overlap; they should not be treated as cumulative. Instead, the Court should enter the following damages awards:

- ***Antitrust Past Damages***: An award in favor of Steves of $36,455,619, with post-judgment interest thereon. This award reflects the jury's award, before trebling, of $12,151,873 for Steves' past antitrust damages. *See* Verdict Form ¶¶ 3(a)(1)-(4), ECF No. 1022.
- ***Breach of Contract Damages***: An alternate award in favor of Steves of $9,933,602, with pre-judgment interest as discussed below, and post-judgment interest thereon, payable only if JELD-WEN succeeds in obtaining a reversal of the jury's award of antitrust past damages. This award reflects the jury's award of $12,151,873 for Steves' breach of contract claims, reduced by $2,218,271 as a result of the Court's granting of JELD-WEN's Motion for Judgment as a Matter of Law. *See* Verdict Form ¶¶ 5, 7, ECF No. 1022; Mem. Op., ECF No. 1773 (Sep. 28, 2018).
- ***Antitrust Lost Profits Damages***: An award in favor of Steves for $139,441,743, with post-judgment interest thereon, payable only if divestiture does not occur. This award reflects the jury's award, before trebling, of $46,480,581, for Steves' future lost profits in connection with its antitrust claim. *See* Verdict Form ¶¶ 3(b), ECF No. 1022.

C. The Court Should Make Certain Other Miscellaneous Corrections to the Draft Judgments

The Draft Divestiture Judgment states that JELD-WEN shall divest itself of assets "that were acquired by JELD-WEN when it acquired CMI on October 24, ***2018***." Draft Divestiture Judgment at 2, ECF No. 1786-2 (emphasis added). The reference to "2018" should be changed to "2012," to reflect the correct year of the CMI acquisition.

The Draft Divestiture Judgment states that JELD-WEN may not re-acquire the divestiture assets during "the term of this Order," but the term of the Order is not defined. As Steves has previously suggested, the term of the judgment should be fifteen years from the date of entry, unless the Court orders an extension. Steves' Second Revised Proposed Order at 14, ECF No. 1719-01 (July 13, 2018).

D. The Court Should Include Appropriate Awards of Pre-Judgment and Post-Judgment Interest in the Judgment

1. Pre-Judgment Interest

The Court should award pre-judgment interest on Steves' breach-of-contract claims. An award of pre-judgment interest is a matter of state substantive law. *See Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 633 (4th Cir. 1999); *Sec. Ins. Co. of Hartford v. Arcade Textiles, Inc.*, 40 F. App'x 767, 769 (4th Cir. 2002). In this case, Delaware law applies to Steves' contract claims. *See* Long Term Supply Agreement § 10, PTX-149; Mem. Op. at 9, ECF No. 1773 (Sep. 28, 2018) (applying Delaware law to Steves' contract claims).

Under Delaware law, in breach-of-contract cases "prejudgment interest is awarded as a matter of right." *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992); *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 487 (Del. 2011). "Such interest is to be computed from the date payment is due." *Citadel*, 603 A.2d at 826. This is true even though the

amount due under a breach of contract is in dispute prior to the verdict. *See Brandywine*, 34 A.3d at 487.

In this instance, for ease of computation, Steves requests pre-judgment interest on its breach of contract damages from February 15, 2018, the date the jury returned its verdict. Civil Jury Trial Minute Sheet, ECF No. 1021 (Feb 15, 2018).

Delaware law provides that the interest rate for pre-judgment interest shall be the "'legal rate of interest' found in 6 Del. C. § 2301." *Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1367 (Del. Super. Ct. 1980); *Miller v. Silverside*, No. CV N15A-03-009 AML, 2016 WL 4502012, at *9 (Del. Super. Ct. Aug. 26, 2016). Where there is no rate specified in the parties' contract, the legal rate of interest is "5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due." 6 Del. C. § 2301(a); *Miller*, 2016 WL 4502012, at *9 n.109.

As of February 15, 2018, the Federal Reserve discount rate (also called the primary credit rate) was 2.00%. *See* https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20180227a1.pdf. Accordingly, the pre-judgment interest rate on Steves' contract claims should be 7% per year, or .0191780822% per day.

Because the Court has determined that Steves is entitled to $9,933,602.00 in breach-of-contract damages, Steves is entitled to $1905.07 of pre-judgment interest for each day from February 15, 2018 to the date judgment is entered on its breach-of-contract claim.

2. Post-Judgment Interest

As the Court's Draft Damages Judgment recognizes, Steves is entitled to post-judgment interest on its damages, under both its antitrust claim and its contract claim. Draft Damages Judgment, ECF No. 1786-1 at 2; *cf.* Order, ECF No. 1780 (Oct. 4, 2018) (granting JELD-WEN post-judgment interest on its trade secrets damages award).

Federal law governs post-judgment interest on claims under federal and state law alike. *Hitachi Credit Am. Corp.*, 166 F.3d at 633 ("Federal law, rather than state law, governs the calculation of post-judgment interest in diversity cases."). In particular, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961. This rate is published daily at https://www.federalreserve.gov/releases/h15/.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 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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