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 SUPPLEMENTAL RESPONSE TO JELD-WEN'S MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO ELECTION OF REMEDIES

Pursuant to the Court's order of February 21, 2018 (Dkt. No. 1041), Plaintiff Steves and Sons, Inc. submits this supplemental response to Defendant JELD-WEN, Inc.'s Motion for Judgment as a Matter of Law. As discussed in greater detail below, Steves responds to the questions posed in the Court's order as follows: First, the jury's award of future lost profits damages does not foreclose Steves from seeking equitable relief in the form of divestiture or other equitable remedy, though the jury's award is one of many facts that may inform the Court's ultimate decision as to whether Steves has an adequate remedy at law. Second, the time at which Steves must elect between legal and equitable remedies is after the Court's ruling as to the availability of equitable relief, but prior to final judgment. Finally, Steves should be permitted to elect between duplicative antitrust damages under Count One and contract damages under Count Two prior to final judgment.

I. THE JURY'S AWARD OF FUTURE LOST PROFITS DAMAGES DOES NOT PRECLUDE STEVES FROM SEEKING EQUITABLE RELIEF

Before Steves' claim for future lost profits had even been submitted to the jury, JELD-WEN took the position that the mere submission of this claim for the jury's consideration would conclusively demonstrate that Steves has an adequate remedy at law such as to bar any claim for equitable relief. (Dkt. No. 969 at 8-10.) JELD-WEN now renews that contention in light of the verdict, asserting that the jury's grant of future lost profits damages proves that Steves has a fully adequate legal remedy.

JELD-WEN's position, both then and now, is incorrect. A plaintiff does not, by successfully submitting a damages claim to a jury, forfeit its right to seek an alternative equitable remedy from the court. To the contrary, multiple courts have awarded a plaintiff equitable relief notwithstanding a jury verdict awarding the plaintiff damages on the same, or overlapping, claims.[1] While these courts will not allow a plaintiff to ***recover*** both damages and an equitable remedy as recompense for the same injury, they nonetheless recognize a plaintiff's right to ***pursue*** both to the point of judgment.

Medcom Holding Co. v. Baxter Travenol Laboratories, Inc., 984 F.2d 223 (7th Cir. 1993), is a case in point. The plaintiff in *Medcom* sued for, among other things, breach of a stock purchase agreement and sought both damages for the breach of contract and specific performance. *Id.* at 225. Following a jury trial in which the jury awarded contract damages, and a separate proceeding concerning the requested equitable relief, the trial court ordered that the plaintiff was entitled to specific performance. *Id.* On appeal, the defendant argued both that

[1] In this case, the only damages that overlap with Steves' request for equitable relief are the future lost profits damages.

specific performance was not warranted because damages represented an adequate remedy at law, and that the plaintiff had elected damages over specific performance when it "argued its damages case to a jury." *Id.* at 227-28.

The Seventh Circuit rejected both arguments. As to the existence of an adequate remedy at law, the Seventh Circuit concluded that the nature of the claim—namely, breach of a contract to sell a business—was of a type that could not necessarily be fairly compensated through an award of damages, notwithstanding the fact that a jury had awarded damages for this breach. *Id.* at 227.

As to whether the plaintiff had elected damages over specific performance when it presented its damages case to the jury, the Seventh Circuit concluded that it had not. *Id.* at 228. While acknowledging that a "plaintiff cannot recover both damages and specific performance," the *Medcom* court found that the plaintiff was not required to choose between those remedies before the full resolution of its claims. *Id.* at 229-30. Indeed, given the requirement in cases involving mixed questions of law and equity that the jury "determine the legal questions before a judge will determine equitable issues," the court recognized that the legal issues surrounding the plaintiff's breach of contract claim ***had*** to have been decided before its request for specific performance. *Id.* at 229 (citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962)); *see also Glazier v. First Media Corp.*, 532 F. Supp. 63, 68 (D. Del. 1982) (in view of *Dairy Queen*, court in copyright infringement action provided for jury to determine actual damages and profits, followed by evidentiary bench hearing on equitable statutory damages, after which plaintiff would elect which award to accept prior to entry of judgment). This sequencing of the legal and equitable phases of the *Medcom* case—which was constitutionally required in order to preserve

the Seventh Amendment right to jury trial—did not disqualify the plaintiff from obtaining an equitable remedy.

B Braun Medical, Inc. v. Rogers, 163 F. App'x 500 (9th Cir. 2006), provides another instance in which a court awarded equitable relief following a jury verdict awarding damages for the same injury. The plaintiff in *B Braun* originally sued for a declaration of ownership as to a disputed patent. *Id.* at 503. The defendant counterclaimed, seeking damages for misappropriation of the trade secrets upon which the patent was based and for "equitable relief in the form of patent reassignment." *Id.* A jury awarded the defendant-counterclaimant both compensatory and future damages based on misappropriation of trade secrets, and, in a subsequent bench trial, the court determined that the defendant was entitled to the equitable remedy of patent reassignment. *Id.* Because the future damages award and the patent reassignment both aimed to compensate the defendant for future harm flowing from the trade secret violation, the trial court required the defendant to elect between the two remedies. *Id.* However, it did so only *after* adjudicating the defendant's request for equitable relief. There was no suggestion, either in the trial court or on appeal, that the jury's damage award provided any basis for denying equitable relief—either because it proved the existence of an adequate legal remedy or because the defendant was said to have somehow "elected" damages by presenting its legal case to a jury.[2]

[2] Although the Ninth Circuit reversed the award of patent reassignment on appeal, it did so because it concluded that that remedy was not available under the applicable substantive law, not because of any conflict between the damages award and the granting of equitable relief. 163 F. App'x at 509.

Other courts have similarly awarded a party equitable relief following a jury verdict awarding damages for the same injury, or recognized that such an award is possible. *See Viasphere Int'l, Inc. v. Vardanyan*, No. 12-cv-1536-HRL, 2015 WL 493833, at *1-2 (N.D. Cal. Feb. 4, 2015) (plaintiff permitted to elect equitable remedy of rescission after jury awarded damages for breach of contract); *see also Dopp v. HTP Corp*., 947 F.2d 506, 510 & 515-16 (1st Cir. 1991) (plaintiff did not forfeit right to seek remedy similar to specific performance by virtue of having submitted damages claim to jury). Moreover, and as pointed out in Steves' original opposition to JELD-WEN's Motion for Judgment as a Matter of Law (*see* Dkt. No. 980 at 12-13), courts agree on the general principle that a party need not make a conclusive election of remedies until "after the verdict is entered and prior to the entry of judgment." *Enhance-It, L.L.C. v. Am. Access Techs., Inc.*, 413 F. Supp. 2d 626, 632 (D.S.C. 2006); *see also Dopp*, 947 F.2d at 515 (same); *Wynfield Inns v. Edward LeRoux Grp., Inc.*, 896 F.2d 483, 488 (11th Cir. 1990) (same); 25 Am. Jur. 2d Election of Remedies § 13 (same); *cf. Guidance Endodontics, LLC v. Dentsply Int'l Inc.*, No. 08-cv-1101 JB/RLP, 2010 WL 4054115, at *26 (D.N.M. Aug. 26, 2010) (election of remedies doctrine did not bar plaintiff from seeking future damages where plaintiff "pursued both future damages and injunctive relief, in the alternative, until the jury had returned a verdict," and then "elected to pursue money damages to the exclusion of injunctive relief" before judgment was entered).[3]

[3] *Taleff v. Southwest Airlines, Co.*, 828 F. Supp. 2d 1118 (N.D. Cal. 2011), upon which JELD-WEN relied in its original motion for judgment as a matter of law, is wholly inapposite. Critically, the plaintiff there sought only injunctive relief. Thus, the case did not implicate election of remedies. Although, in rejecting the injunction claim, the court observed in dictum that the plaintiff ***would have had*** an adequate remedy at law, had it sought damages, the alleged damages there involved merely "higher … prices," not lost profits attributable to the elimination

The determination of whether the jury's future lost profits awarded in ***this*** case is adequate to compensate Steves for the harm suffered as a result of the anticompetitive merger is a factual question for this Court to consider in the course of determining whether Steves is entitled to equitable relief.[4] Steves submits that the question is not a particularly close one, in light of the following factors: (i) an equitable remedy intended to promote competition in the doorskin market could, unlike the lost profits award, permit Steves to remain in business; (ii) the lost profits award constitutes only eight years of lost profit damages and does not fully compensate Steves for the loss of a 150-year-old business; and (iii) an equitable remedy could address the overall harm to competition, and not merely the antitrust injury to Steves. Equitable relief also is necessary to prevent harm that Steves may otherwise suffer between now and 2021 if JELD-WEN continues its improper conduct, which harm cannot be remedied by a damages award covering a period that begins in 2021. For example, even today, based on the jury's finding regarding breaches of the supply agreement, JELD-WEN continues to overcharge Steves by about 9% for every doorskin Steves purchases from JELD-WEN.

In any case, whether or not future lost profits damages are an adequate remedy is a determination that properly should be made at the conclusion of the equitable phase. JELD-WEN's invitation to the Court to resolve this issue now, as a matter of law and without

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of a 150-year-old family business. *Id.* at 1123 n.7. The two situations are not remotely comparable when considering whether a damages award would provide an "adequate remedy."

[4] The Court has also indicated that it will consider Steves' outstanding request for declaratory relief at the same time it considers Steves' request for an equitable remedy. (*See* Dkt. No. 701.)

consideration of all the evidence relevant to Steves' right to an equitable remedy, is premature and improper.[5]

II. THE APPROPRIATE TIME FOR STEVES TO ELECT BETWEEN LEGAL AND EQUITABLE RELIEF UNDER COUNT ONE IS AFTER THE COURT'S DECISION ON STEVES' ENTITLEMENT TO AN EQUITABLE REMEDY AND PRIOR TO THE ENTRY OF JUDGMENT

As suggested by the discussion above, the appropriate time for Steves to elect between its lost profits damages and any equitable remedy the Court may award is before the entry of final judgment. *See, e.g.*, *Dopp*, 947 F.2d at 515-16 (noting that trial court can withhold judgment on jury verdict, rule on claims for equitable relief, and then require an election of remedies "thereby allowing the plaintiff to make an enlightened 'final choice' before being compelled to elect among mutually repugnant remedies"); *TVT Records v. Island Def Jam Music Grp.*, 250 F. Supp. 2d 341, 348 (S.D.N.Y. 2003) ("[T]o the extent necessary, an election between equitable and monetary relief can occur after a verdict is rendered.").

B Braun provides an example of how the election procedure can work in practice. Following the jury's verdict awarding damages and the district court's determination in a subsequent bench trial that the defendant-counterclaimant was entitled to equitable relief, the district court ordered the defendant to elect between the legal damages and equitable relief by filing a notice of election. *See* Order to Elect Remedies at 3, *B Braun Med., Inc. v. Rogers*, No.

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[5] JELD-WEN's assertion that future lost profits damages afford Steves an adequate remedy is particularly ironic in light of JELD-WEN's recent public pronouncement that it views the lost profits award as "not recoverable" and subject to reversal on appeal. *See* Transcript of February 21, 2018 JELD-WEN Earnings Call, *available at* https://seekingalpha.com/article/4148879-jeld-wen-holdings-jeld-ceo-mark-beck-q4-2017-results-earnings-call-transcript?part=single" https://seekingalpha.com/article/4148879-jeld-wen-holdings-jeld-ceo-mark-beck-q4-2017-results-earnings-call-transcript?part=single (last accessed Feb. 23, 2018).

98-CV-0250 (S.D. Cal. July 20, 2004), ECF No. 364.[6] Defendant did so, and the district court entered judgment accordingly. *See* Final Judgment at 5-7, *B Braun Med., Inc. v. Rogers*, No. 98-CV-0250 (S.D. Cal. Aug. 16, 2004), ECF No. 385.[7]

III. THE COURT MAY ADDRESS THE JURY'S OVERLAPPING ANTITRUST AND CONTRACT DAMAGES AWARDS BY ALLOWING STEVES TO FILE A NOTICE OF ELECTION OF REMEDIES PRIOR TO FINAL JUDGMENT

The procedure for addressing any overlapping damages awarded for conduct underlying Counts One and Two is the same as that which will apply should Steves need to elect between future lost profits damages and an equitable remedy that will restore competition to the market and allow Steves to continue in business. Prior to final judgment, Steves can file a notice of election choosing damages under only one of the two counts—because of the trebling of antitrust damages, Steves will almost certainly elect damages under Count One—and the court can enter judgment consistent with that election. Numerous courts have followed this procedure, including courts within the Fourth Circuit.[8] *See, e.g.*, *Southwood v. CCDN, LLC*, No. 7:09-cv-81-F, 2016 WL 1389596, at *6-7 (E.D.N.C. Apr. 7, 2016) (ordering plaintiffs to elect among multiple remedies for single course of wrongful conduct by filing a "Notice of Election of Remedy" immediately prior to entry of final judgment); *Maks Inc. v. EOD Tech., Inc.*, No. 3:10-cv-443, 2013 WL 12121951, at *6 (E.D. Tenn. Jan. 24, 2013) (same); *Uhlig, LLC v. Shirley*, No. 6:08-

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[6] Attached hereto as Exhibit A.

[7] Attached hereto as Exhibit B.

[8] As mentioned during the telephonic conference with Court on February 19, 2018, other courts within the Fourth Circuit have addressed duplicative damages awards through post-judgment motions for remittitur. *See, e.g.*, *Hair Club for Men, LLC v. Ehson*, No. 1:16-cv-236, 2016 WL 6780310, at *1 (E.D. Va. Nov. 14, 2016). The pre-judgment Notice of Election procedure described above, however, allows the Court and the parties to address this issue before judgment has been entered.

cv-1208-JMC, 2012 WL 2890178, at *3-4 (D.S.C. July 16, 2012) (same); *see also Trost v. Trost*, 525 F. App'x 335, 346 (6th Cir. 2013) (ordering that, on remand, plaintiff would be required to elect between duplicative damages awards).[9]

Dated: February 23, 2018

Respectfully submitted,

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[9] Although unnecessary to respond to the questions posed by the Court, Steves observes that this election procedure will not result in a waiver of Steves' right to seek to have the damages on Count Two restored should the Court of Appeals overturn the damages awarded on Count One. In *B Braun*, for example, the Ninth Circuit ordered that the future damages the defendant-counterclaimant had elected to forgo in favor of an equitable remedy be restored in light of the court's decision to vacate the equitable award. *See* 163 F. App'x at 509-10; *accord Barachkov v. Lucido*, 151 F. Supp. 3d 745, 758, 763 (E.D. Mich. 2015) (plaintiffs did not waive right to equitable remedy of reinstatement by pursuing damages and accepting jury verdict awarding damages; following order vacating damages award on appeal, plaintiffs could seek and receive reinstatement).

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 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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