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

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

JELD-WEN, Inc. ("JELD-WEN") submits this response to the Court's October 5, 2018 Order, and Steves and Sons, Inc.'s ("Steves") response to that same Order ("Steves Resp."). Steves strains, unsuccessfully, to identify a solution to a problem of its own making. It is no accident that Steves cannot identify any precedent for what it seeks—namely, a judgment awarding both equitable relief and damages, in the alternative, as remedies for the same future harms. Long-settled equitable principles preclude the possibility of such a two-in-one judgment by conditioning the availability of equitable relief on the unavailability of legal relief like damages. And even in (different) circumstances where the law does contemplate an election between alternative remedies, the election must be made before judgment, and the judgment should reflect only the remedy elected. Notwithstanding Steves' attempts to justify its proposed deviation from the normal order, any such deviation is far more likely to complicate the appellate process than to streamline it.

On the other issues, JELD-WEN agrees with Steves that this Court should issue a single consolidated final judgment resolving all issues (and triggering orderly appellate and post-trial briefing deadlines) simultaneously. JELD-WEN further responds below to Steves' proposed "modifications" to that judgment, and proposes a few additional changes as well. Finally, JELD-WEN agrees with the Court and Steves that a stay pending appeal is appropriate, and that any potential conditions on that stay should be resolved through separate briefing.

ARGUMENT

I. ENTERING JUDGMENT FOR DUPLICATIVE, ALTERNATE REMEDIES IS NOT PERMITTED

"Steves agrees that it may not receive ***both*** the legal remedy of future lost profits ***and*** the equitable remedy of divestiture" because such a result would constitute an impermissible "double recovery." Steves' Resp. at 6 (Doc. No. 1791) (emphasis in original). Steves also candidly admits that it has been unable to find any case in this "precise configuration"—namely, a single judgment ordering both injunctive relief and damages to remedy the same future injury and purporting to present both alternatives simultaneously to the court of appeals. *Id*. at 9. The absence of any such precedent is no accident, but rather follows ineluctably from bedrock rules of equity and the election of remedies. While JELD-WEN understands the Court's desire to facilitate an efficient appellate process, a novel judgment alternatively awarding two inherently contradictory remedies is far more likely to frustrate than to further that goal.

A. An Alternative Judgment Is Inappropriate Because Equitable Relief Is Unavailable When An Adequate Remedy At Law Exists

The reason that Steves has been unable to identify any case in this "precise configuration" is simple. Courts and litigants are never confronted with a *choice* between future damages and equitable relief addressed to the same future harm because the existence of the former precludes the possibility of the latter. Put differently, the law itself makes the choice, through the ancient

rule that equitable relief is unavailable when an adequate remedy at law exists. Steves effectively conceded the availability of an adequate remedy at law when it sought lost future profits as a remedy and presented expert testimony quantifying its own harm in monetary terms. This Court thus should enter judgment for the more-than-adequate monetary remedy that Steves sought and obtained. There is no on-point precedent for entering a two-for-one order instead because the law requires the damages remedy when it is available.

Of course, JELD-WEN understands that the Court has already considered this issue and will not burden the Court by reiterating its arguments that the damages remedy forecloses the divestiture order. But we respectfully submit that the complete absence of any precedent for the kind of "alternative" judgment Steves contemplated is a powerful signal that there is an antecedent problem with what they seek. If such alternative remedies were permissible, one would expect the law books to be full of examples of judgments preserving both issues for appellate review. The absence of such orders is explained only by the reality that one of Steves' contemplated remedies (damages for future lost profits) forecloses the possibility of the other (divestiture). A single judgment ordering both in the alternative would be an order highlighting its own reversible error, and thus examples are understandably not forthcoming. Indeed, it is quite striking that Steves is forced to resort to far-fetched analogies to criminal sentencing and other inapposite circumstances, rather than citing cases, treatises or form books squarely addressing what one would expect to be a fairly common situation were what Steves contemplates not foreclosed by an anterior problem. Steves is searching for a solution to a perceived dilemma that under long-settled equity practice cannot arise in the first place.

B. Even If There Were Two Alternative Remedies Available Here, Steves Would Still Need To Elect One Before The Court Enters Judgment

Because traditional equitable principles preclude an injunctive remedy when damages are available, JELD-WEN does not believe the law permits any choice between the supposedly alternative remedies in this case. But if there *were* such a choice to be made (as here, where there are duplicative legal remedies, such as breach-of-contract and antitrust damages for the same conduct), the law is clear that the election must be made before entry of judgment. We have been unable to identify any support for a judgment ordering duplicative remedies in the alternative. Instead, the appropriate procedure is to enter judgment on whatever relief the plaintiff elects or the Court deems available, followed by a remand if that relief is set aside on appeal. Neither inefficiency concerns nor anything else justifies deviation from that settled practice.

1. "Efficiency" In The Court Of Appeals Does Not Permit Or Justify An Unprecedented Alternative Judgment

While JELD-WEN appreciates the Court's desire to craft an order that would facilitate an efficient appellate process, a novel order purporting to enter judgment on two alternative remedies is far more likely to complicate the appellate process than to streamline it.

At the outset, Steves' concern that a traditional order entering judgment on Steves' elected remedy could confine the Fourth Circuit to reviewing "only the divestiture order" (Steves' Resp. at 8), is misplaced. JELD-WEN intends to challenge not just whichever remedy Steves elects, but the underlying liability findings pursuant to which it was ordered. The Fourth Circuit thus will be considering both liability and remedy no matter how this Court crafts its judgment. Moreover, because the unavailability of an adequate remedy at law is highly relevant to the availability of equitable relief, the Fourth Circuit likely will consider at least some aspects of the lost profits damages award regardless of whether it is part of this Court's judgment. An alternative

judgment thus is not necessary to ensure that the Fourth Circuit has before it the central issues in this case.

Nor is such a judgment necessary to ensure 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. Steves Resp. at 6–7. As Steves correctly notes, a party that elects one remedy in the district court does not lose the foregone alternative(s) if the court of appeals rules that its preferred choice was unavailable. *See Latman v. Burdette*, 366 F.3d 774, 782 (9th Cir. 2004) (explaining that in order for a party to be bound to an election of remedies "two or more remedies must have existed at the time of the election[]") (citations omitted); *Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 46, 51 (9th Cir. 1966); 25 Am. Jur. 2d *Election of Remedies* § 11 ("[A]n election made by one under a mistake of facts, or a misconception as to his or her rights, is not binding."). Instead, the case would simply be remanded for Steves to make a different election. In reality, putting aside the unavailability of an injunctive remedy when a damages remedy will do, the choice Steves faces when it comes to divestiture and damages is not materially different for appellate purposes than its choice between contract and antitrust damages. A reversal on the antitrust claims might necessitate a remand, but that is no reason to enter a judgment reflecting alternative or duplicative relief. The only apparent difference between the two is Steves' greater interest in hedging against the possibility of appellate reversal when it comes to the divestiture order.

Not only is a novel alternative judgment unnecessary to ensure an efficient appeal; it is far more likely to further complicate what will already be a complex appeal. For one thing, the Fourth Circuit may have considerable doubts about the propriety or finality of such a novel procedural mechanism. *Cf. Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1338–39 (4th Cir. 1993)

(holding that it lacked jurisdiction to review a 54(b) judgment when unresolved future proceedings could lead to duplicative recovery); *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 454 (4th Cir. 2017) (refusing to take appellate jurisdiction over non-final order even though both parties supported doing so). JELD-WEN takes no definitive position on these issues, but notes the danger that entering an unprecedented form of judgment could complicate, or even derail, the appellate process rather than streamline it. Moreover, entering judgment on two remedies instead of one could force entirely unnecessary additional briefing on the second remedy should the Fourth Circuit ultimately rule in JELD-WEN's favor on liability and conclude that it need not resolve the propriety of *any* relief at all.

Finally, while Steves protests that entry of judgment on the relief actually ordered, and not alternatives that would become relevant only if that relief is set aside, could lead to a "piecemeal" appellate process, that is far from a certainty. Both Steves and JELD-WEN will be advancing arguments in the Fourth Circuit that would obviate any need for a remand. If, however, the Fourth Circuit rejects the arguments for affirmance or reverses and remands instead, that will hardly be a novelty. *See, e.g.*, *Hickson Corp. v. Norfolk S. Ry. Co.*, 260 F.3d 559, 568 (6th Cir. 2001) (remanding for a new trial on damages where jury form permitted duplicative recovery for same damage at contract and tort); *Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293, 295 (8th Cir. 1989) (vacating portion of judgment that permitted plaintiff to recover for the same damages under tort and breach of fiduciary duty). And while the possibility of a remand may increase when there are more issues on appeal, so too would the complications of injecting yet additional alternative issues into the appeal. This case will be challenging enough to brief and argue within the normal appellate constraints without adding "bonus" issues to be reached only in the alternative. Nor is it unusual for large and complex cases, like this one, to return to an appellate

court more than once. Just this past year, the Fourth Circuit heard arguments in several cases for the second, or even third, time. *See e.g.*, *Equal Emp't Opportunity Comm'n v. Baltimore Cty.*, 904 F.3d 330, 332 (4th Cir. 2018); *In re: KBR, Inc.*, 893 F.3d 241, 253 (4th Cir. 2018); *Verisign, Inc. v. XYZ.COM LLC*, 891 F.3d 481, 482 (4th Cir. 2018). What Steves attacks as a "protracted process" with "inefficient appellate review" (Steves' Resp. at 8), is thus far more common than the entirely novel approach that Steves urges the Court to adopt here.

2. The Case Law Cited By Steves Is Inapposite

Although Steves declines to address *why* there is a dearth of case law on how to enter a judgment alternatively awarding two inherently inconsistent remedies, it does admit that it could not find any cases on point. Instead, Steves strains mightily for analogies to contexts that are obviously inapposite.

The patent cases discussed by Steves do not involve entry of judgment on alternative remedies. In both cases, the district court refused to grant *any* remedy to the plaintiffs because they found the patents at issue to be invalid, but ruled conditionally that if the patents were valid, there had been sufficient evidence of infringement. *See White v. Mar-Bel, Inc.*, 509 F.2d 287, 289 (5th Cir. 1975) (reversing JMOL decision and then relying on district court's conditional ruling on the new trial and damages issues); *Nachman Corp v. L.A. Young Spring & Wire Corp.*, 202 F.2d 279, 279 (6th Cir. 1953) (dismissing cross-appeal as moot after affirming judgment of invalidity). Federal Rule of Civil Procedure 50(c) explicitly permits (indeed, requires) a court granting judgment as a matter of law to rule in the alternative on any motion for a new trial, in case the court of appeals sets aside the JMOL ruling. The alternative rulings in these cases thus were expressly permitted by the Federal Rules and *did not* involve any entry of judgment on alternative relief.

The Fourth Circuit's guidance about criminal sentencing in the wake of the Supreme Court's seminal cases of *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 375 U.S. 508 (2004), is equally irrelevant. In *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004), the Fourth Circuit ordered district courts to sentence defendants in accordance with the U.S. Sentencing Guidelines, and also to announce (but not order) at the time of sentencing a sentence treating the guidelines as advisory only. *Id*. at 353. The Fourth Circuit thought that approach would "serve judicial economy" because, if the Supreme Court struck down the Sentencing Guidelines as unconstitutional, "the district court and the parties will have made at least substantial progress toward the determination of a non-guidelines sentence, at a time when the facts and circumstances were clearly in mind." *Id*.; *see also* Steves' Resp. at 11, citing *United States v. Warner*, 894 F.2d 957, 961 (8th Cir. 1990) (explaining the efficiency of providing alternate sentences and avoiding a second sentencing hearing). That procedure did not obviate the need for a remand after the Supreme Court's ruling, but simply put the district court in a better position to impose a non-Guidelines sentence than it would be if considering the issue only after memories had faded. Those sentencing cases thus were not about facilitating *appellate* consideration of alternative remedies, but rather were about facilitating further *district court* proceedings on remand.

That is not a concern in this case, as the parties and this Court have already completed the analogous task of considering what the remedial alternatives to divestiture would be. The jury awarded damages for future lost profits, and this Court has ruled that those damages are appropriate and available. If, as Steves fears, the Fourth Circuit sets aside the divestiture order on appeal and remands to this Court, there is no danger that memories will have faded or that it will be difficult to recapture what the original alternative to divestiture would have been. It is all in the record, in

black and white. The sentencing cases on which Steves relies are thus wholly inapposite, leaving this Court with no precedent whatsoever for following the novel course that Steves urges.

II. CORRECTIONS AND MODIFICATIONS TO THE DRAFT JUDGMENT

Steves' brief also addressed a number of other issues concerning the format of the judgment. JELD-WEN agrees with Steves that the Court should, at the appropriate time, formulate a single final judgment resolving all issues in the case and making clear that the time for appeal, and for post-trial motions, runs on all issues from a single date. *See* Steves' Resp. at 3. JELD-WEN further responds to Steves' specific recommendations below, and also provides additional requested corrections and modifications to the judgment.

Divestiture: Steves proposes that this Court make certain modifications to the draft divestiture judgment, including adding provisions to allow any new owner of Towanda a reasonable opportunity to retain the services of Towanda employees and to prohibit JELD-WEN from hiring them for two years, to allow JELD-WEN's other independent door manufacturer customers to terminate their long-term supply agreements with JELD-WEN, to "impose certain other limits on JELD-WEN's purchases from Towanda," and to set the term of the divestiture order at 15 years. Steves' Resp. at 17–19 (citation omitted). In general terms, JELD-WEN has briefed its objections to those proposals previously and preserves those objections but will not burden the Court by restating them. Any further objections that JELD-WEN may have to specific language implementing these concepts must await that language. JELD-WEN cannot, for example, usefully present any further specific arguments concerning unspecified "limits on JELD-WEN's purchases from Towanda" without knowing details of those as-yet-unspecified limits.

Antitrust Damages: In regards to the damages judgment, Steves rightly explains that the breach of contract and "past" antitrust damages should not be cumulative. These are duplicative,

alternative legal theories for recovery of the same underlying harm and Steves must make an election. Steves' Resp. at 18. Presumably Steves intends to elect the antitrust past damages instead of breach of contract. *Id*.

The formulations of "past" antitrust damages in the Court's proposed judgment and in Steves' Response are, however, incorrect and must be modified. As JELD-WEN will explain more fully in its upcoming motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), the jury's verdict of $2,218,271.00 for past antitrust damages related to quality issues cannot stand because Steves did not present any evidence to support a finding that the acquisition actually caused any diminution of doorskin quality in the doorskins Steves purchased. Indeed, the Court vacated the entire quality breach of contract damages award because Steves did not prove that any of the doorskins and doors included in Steves' damages calculations were actually defective. Mem. Op. at 13, 29–30 (Sept. 28, 2018) (Doc. No. 1773). The Court ruled that the "evidence creates serious doubt as to the probability, or the extent, of [] defects[]" in those doorskins and doors, and that, "[a]ccordingly, the mere possibility that JELD-WEN failed to reimburse Steves for defective doorskins is not enough to sustain the jury's inference in that regard." *Id*. at 13 (internal quotations and citations omitted). That basic failure of proof is just as fatal to recovery of those damages under an antitrust theory.

Accordingly, the actual amount of antitrust past damages for the final judgment should also be reduced; after trebling, the corrected amount is $29,800,806.

Trade Secrets: Steves proposes, and JELD-WEN agrees, that the judgment should also include recovery by JELD-WEN for Steves' theft of JELD-WEN's trade secrets. The judgment should reflect the jury's verdict of $1.2 million in damages to JELD-WEN (Verdict Form at 80 (May 11, 2018) (Doc. No. 1609)), as well as any equitable relief that the Court enters on those

claims. *See* Order (Sept. 11, 2018) (Doc. No. 1766). Additionally, Texas state law mandates the payment of pre-judgment interest on JELD-WEN's jury verdict. *Retractable Techs., Inc. v. Occupational & Med. Innovations, LTD.*, No. 6:08-CV 120, 2010 WL 3199624, at *4 (E.D. Tex. Aug. 11, 2010). Under Texas law, pre-judgment interest is assessed at the same rate as post-judgment interest on the day of judgment, and "accrues on the amount of a judgment during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered." Tex. Fin. Code Ann. §§ 304.103, 304.104; *see also Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 529 (Tex. 1998). In turn, the post-judgment interest rate is: "(1) the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation; (2) five percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is less than five percent; or (3) 15 percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is more than 15 percent." Tex. Fin. Code Ann. § 304.003;

As Steves notes (Steves Resp. at 21), federal law governs post-judgment interest on claims under federal and state law; accordingly, JELD-WEN is entitled to post-judgment interest "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 judgment." 28 U.S.C. § 1961.

III. SHOULD THIS COURT BE INCLINED TO IMPOSE ANY CONDITIONS ON A STAY, THE CONTOURS OF THOSE CONDITIONS SHOULD BE ADDRESSED THROUGH SEPARATE BRIEFING

JELD-WEN agrees with both this Court and Steves that a stay pending appeal is appropriate. Steves has made clear that it intends to ask the Court to impose conditions on JELD-

WEN in connection with that stay, including a condition extending the current Long Term Supply Agreement during the pendency of the appeal. Of course, the fact that Steves considers requiring JELD-WEN to comply with that agreement sufficient to keep Steves in business only underscores that this case should never have been anything more than a breach-of-contract case, and that the radical remedy of divestiture is nowhere near necessary to resolve the supposed antitrust issues Steves has raised. In any event, while JELD-WEN sees no need for any conditions on a stay, should the Court be inclined to consider Steves' request, JELD-WEN agrees that the Court should establish a schedule for separately briefing these issues.

CONCLUSION

For the foregoing reasons, JELD-WEN requests that the Court reject Steves' proposal for alternative judgments and instead enter the final judgment with terms proposed above.

DATED: October 30, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 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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