

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.)	
)	

**JELD-WEN, INC.’S PROPOSED MODIFICATIONS TO
STEVES’ PROPOSED VERDICT FORM**

JELD-WEN, Inc. (“JELD-WEN”) respectfully submits the following proposed modifications to Steves and Sons, Inc.’s (“Steves”) proposed verdict form (ECF No. 981-5). A redline reflecting JELD-WEN’s edits to Steves’ proposed verdict form is attached as Exhibit A. Exhibit B is a clean (i.e., not redline) version of JELD-WEN’s edits to Steves’ proposed verdict form. JELD-WEN submits the following explanations regarding its proposed modifications.

Addition of Question 2

As JELD-WEN explained during the February 12 charge conference, there is an incongruity in Steves’ proposed verdict form in that for Count II (breach of contract) the verdict form is specialized, while for Count I (antitrust), the verdict form is general. In order to remedy this issue, JELD-WEN proposes the inclusion of Question 2. Question 2 is taken verbatim from the Court’s Question 2 of “Draft 2” of its proposed verdict form. This question is necessary because it would be error for the jury to leap from the determination that there was a violation of Section 7 to the question of what Steves is entitled to recover for that violation. Including Question

2 will ensure that the jury properly considers whether Steves has established antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

Modifications to Question 3

There is no dispute that there is a complete overlap between Steves' breach of contract claims and Steves' antitrust claims for past damages. Accordingly, and as Steves has acknowledged, if the jury awards damages to Steves for both its breach of contract and backwards-looking antitrust claims, Steves will have to make an election of remedies. As JELD-WEN has argued in its Rule 50 motion, the contract damages cannot stand as antitrust damages. Without waiving that argument, JELD-WEN notes that the only way this Court will be able to determine whether an election of remedies is necessary is if the jury specifies the bases for its awards of backwards-looking antitrust damages. Accordingly, JELD-WEN inserted questions 3(a)(b)(c)(d) to capture the amount of antitrust damages the jury believes Steves is entitled to for the various breaches for which it is claiming damages in Count II. The specifications also are necessary because, as this Court is aware, JELD-WEN contends that the various categories of contract-based damages sought by Steves are unsupported by the contract and/or unsupported by the evidence, and also that Steves has failed to prove that those alleged damages reflect any harm to competition attributable to the acquisition. If this Court or the Fourth Circuit decide that any of those arguments are meritorious after the jury renders its verdict, as to any category of damages, it may be necessary to eliminate the corresponding antitrust damages from the jury's verdict.

Modification to Instruction After Paragraph 10

In reviewing Steves' proposed jury form after the conference, JELD-WEN recognized an incongruity between the instructions throughout the document after each liability question, and the instruction before the final liability question regarding reimbursement for the cost of doors that

incorporate defective doorskins (after Paragraph 10). JELD-WEN proposes modifying the language after Paragraph 10 to match the language throughout the rest of the document.

Quality Claims

During the February 12 conference, the Court noted that it is considering not submitting Steves' quality breach of contract claims to the jury. JELD-WEN respectfully submits that in the event the Court determines that there is not sufficient evidence to permit the breach of contract quality claims (Questions 8-11) from going to the jury, then the Court should also strike Questions 3(c) and 3(d), as there will be no basis for claiming that conduct as an antitrust violation, and Steves will have no quantification of damages on quality issues to present to the jury.

DATED: February 13, 2018

Respectfully submitted,

JELD-WEN, Inc.

By counsel

/s/Ryan T. Andrews

Ryan T. Andrews (VSB# 90519)
Margaret M. Zwisler (*pro hac vice*)
J. Scott Ballenger (*pro hac vice*)
Allyson M. Maltas (*pro hac vice*)
Latham & Watkins LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C., 20004
(202) 637-2200 – Tel.
(202) 637-2201 – Fax
margaret.zwisler@lw.com
scott.ballenger@lw.com
allyson.maltas@lw.com
ryan.andrews@lw.com

Alfred C. Pfeiffer (*pro hac vice*)
Sarah M. Ray (*pro hac vice*)
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111

(415) 391-0600 – Tel.
(415) 395-8095 – Fax
al.pfeiffer@lw.com
sarah.ray@lw.com

Lawrence E. Buterman (*pro hac vice*)
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022
(212) 906-1200 – Tel.
(212) 751-4864 – Fax
lawrence.buterman@lw.com

Michael W. Smith (VSB #01125)
Craig T. Merritt (VSB #20281)
Harrison M. Gates (VSB #80385)
R. Braxton Hill, IV (VSB # 41539)
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4100 – Tel.
(804) 697-4112 – Fax
msmith@cblaw.com
cmerritt@cblaw.com
hgates@cblaw.com
bhill@cblaw.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2018, the following counsel of record have been served by electronic mail with a true and correct copy of the foregoing, including:

Lewis F. Powell III
John S. Martin
Alexandra L. Klein
Maya M. Eckstein
Paul T. Nyffeler
Douglas M. Garron
R. Dennis Fairbanks, Jr.
William H. Wright, Jr.
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200 – Tel.
(804) 788-8218 – Fax
lpowell@hunton.com
martinj@hunton.com
aklein@hunton.com
meckstein@hunton.com
pnyffeler@hunton.com
dgarrou@hunton.com
dfairbanks@hunton.com
cwright@hunton.com

Ted Dane
Glenn Pomerantz
Gregory Sergi
Munger, Tolles & Olson LLP
350 South Grand Avenue, 50th Floor
Los Angeles, CA 90071
(213) 683-9288 – Tel.
(213) 683-4088 – Fax
ted.dane@mto.com
glenn.pomerantz@mto.com
gregory.sergi@mto.com

Kyle Mach
Joshua Patashnik
Emily C. Curran-Huberty
Munger, Tolles & Olson LLP

560 Mission Street, 27th Floor
San Francisco, CA 94105
(415) 512-4000 – Tel.
(415) 512-4077 – Fax
kyle.mach@mto.com
josh.patashnik@mto.com
emily.curran-huberty@mto.com

Attorneys for Plaintiff

Marvin G. Pipkin
Kortney Kloppe-Orton
Pipkin Law
10001 Reunion Place, Suite 6400
San Antonio, TX 78216
(210) 731-6495 – Tel.
(210) 293-2139 – Fax

Of Counsel

/s/Ryan T. Andrews
Ryan T. Andrews (VSB# 90519)
Margaret M. Zwisler (*pro hac vice*)
J. Scott Ballenger (*pro hac vice*)
Allyson M. Maltas (*pro hac vice*)
Latham & Watkins LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C., 20004
(202) 637-2200 – Tel.
(202) 637-2201 – Fax
margaret.zwisler@lw.com
scott.ballenger@lw.com
allyson.maltas@lw.com
ryan.andrews@lw.com

Alfred C. Pfeiffer (*pro hac vice*)
Sarah M. Ray (*pro hac vice*)
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
(415) 391-0600 – Tel.
(415) 395-8095 – Fax
al.pfeiffer@lw.com
sarah.ray@lw.com

Lawrence E. Buterman (*pro hac vice*)
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022
(212) 906-1200 – Tel.
(212) 751-4864 – Fax
lawrence.buterman@lw.com

Michael W. Smith (VSB #01125)
Craig T. Merritt (VSB #20281)
Harrison M. Gates (VSB #80385)
R. Braxton Hill, IV (VSB # 41539)
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4100 – Tel.
(804) 697-4112 – Fax
msmith@cblaw.com
cmerritt@cblaw.com
hgates@cblaw.com
bhill@cblaw.com

Attorneys for Defendant