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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MARLYN NUTRACEUTICALS, INC., an Arizona corporation,

Plaintiff,

vs.

WILLIAM WONG and JANE DOE WONG, husband and wife; PATRICK BUEHL and JANE DOE BUEHL, husband and wife; WORLD NUTRITION, INC., an Arizona corporation; ABC Corporations I-X; XYZ PARTNERSHIPS I-X; and JOHN DOES I-X and JANE DOES I-X, husbands and wives, respectively,

Defendants,

WORLD NUTRITION, INC., an Arizona corporation,

Third Party Plaintiff/Counterclaimant/ Defendant,

vs.

MARLYN NUTRACEUTICALS, INC., an Arizona Corporation; and CRAIG KNOBLOCH,

Counterdefendant/Plaintiff/Third Party Defendant.

No. CIV 02-1876 PHX-HRH

DEFENDANT WORLD NUTRITION, INC.'S RESPONSE TO MARLYN NUTRACEUTICALS, INC.'S MOTION/SUPPLEMENT TO MOTION FOR INTERLOCUTORY APPEAL

(Assigned to The Honorable H. Russell Holland)

Defendant, World Nutrition, Inc. (hereinafter "World Nutrition"), by and through counsel undersigned, and pursuant to the Court's April 25, 2008 Order (Clerk's Docket number 367), hereby submits its response to Marlyn Nutraceutical, Inc.'s ("Marlyn") renewed motion for interlocutory appeal and Marlyn's supplement to motion for interlocutory appeal.

Marlyn cannot meet the heavy burden required by the legal standard required to obtain an interlocutory appeal in this case. The general rule is against an interlocutory appeal of an order granting a new trial on damages and Marlyn does not meet any of the exceptions. *Wagner v. Burlington Industries, Inc.*, 423 F.2d 1319 (6th Cir. 1970); *Roy v. Volkswagonwerk Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir. 1995).

Further, it has already been determined that Marlyn waived its right to appeal on the issue for which it now seeks interlocutory appellate review. Additionally, Marlyn's renewed motion should be denied as the Court's order granting a new trial on damages does not involve a "controlling question of law as to which there is substantial ground for difference of opinion."

Finally, the order Marlyn seeks to have reviewed simply determined that the jury's verdict as to damages was not supported by the evidence. The Court, in issuing its order granting World Nutrition a new trial on damages, correctly determined that Marlyn was unable to establish which sales, if any, stemmed from the alleged infringing activity. This is a factual determination based upon the evidence presented at trial and is not a question of law. Certification pursuant to 28 U.S.C. §1292(b) is not appropriate where it is predicated at least in part on specific factual findings and the appeal would present mixed questions of law and fact rather than controlling issue of pure law. *SEC v. First Jersey Secur., Inc.*, 587 F.Supp 535 (1984 SD NY). (*See also, Clark-Dietz & Associates-Engineers, Inc. v. Basic Construction Co.*, 702 F.2d 67 (5th Circ. 1983). Fact review questions are inappropriate for §1292(b) review.)

This Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Legal Standard

The well settled general rule is that an order granting a new trial is interlocutory and therefore not appealable. *Wagner v. Burlington Industries, Inc.*, 423 F.2d 1319 (6th Cir. 1970); *Roy v. Volkswagonwerk Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir. 1995). New trial orders are interlocutory and not appealable whether or not they are accompanied by a provision for a remittitur. *Eaton v. National Steel Products Co.*, 624 F.2d 863, 864 (9th Cir. 1980); *See also*; *Herold v. Burlington Northern, Inc*., 761 F.2d 1241 (8th Cir. 1985) (a plaintiff may not appeal a new trial order that results from his or her refusal to accept a remittitur).

The exceptions to this general rule are that such orders are appealable: (1) where the District Court lacked the power to grant the new trial; and (2) when the conditional new trial order is conditioned upon vacatur or reversal of the order granting judgment as a matter of law, neither of which apply in this case, Fed.R.Civ.P. Rule 50(c); *Neely v. Martin K. Eby Construction Company*, 386 U.S. 317 (1967); *Charles Allen Wright and Arthur R. Miller*, Federal Practice and Procedure § 2818 (2nd Edition 2006).

Moreover, orders granting new trial are not appealable where the new trial is limited to damages issues. *Howell v. Terminal R.R. Ass'n.*, 155 F.2d 807 (8th Cir. 1946); *Wagner, supra*. As with the instant case, such an order is reviewable on appeal from a final judgment when entered. *Id.*

II. Marlyn Cannot Meet the Narrow Exceptions to the General Rule

There is no question that the motions for new trial and motions for remittitur were timely and properly filed, timely and properly ruled upon by the Court, and it was well within the Court's power to grant the motion for new trial on damages. Thus, the first exception to the general rule against interlocutory appeals of new trial orders is not available to Marlyn.

The second exception is likewise not applicable as there was no order conditioned upon vacatur or reversal of an order granting judgment as a matter of law. In fact, the

District Court's order regarding the conditional new trial on damages was issued pursuant to Rule 59(a) and is therefore not immediately appealable. *Schudel v. General Electric Company*, 120 F.3d 991, 994 (9th Cir. 1997) (Where a trial court did not order a conditional new trial pursuant to Rule 50(c)(1), Fed. R. Civ. P., and the order was therefore not conditioned on the reversal of the order granting judgment notwithstanding the verdict, the conditional new trial order was interlocutory and not immediately appealable.)

In *Eaton*, *supra.*, the District Court, on a timely motion for new trial by Defendant, ordered either a remittitur or a new trial on the grounds that the verdict was excessive. The District Court imposed the condition that if plaintiff accepted their remittitur, judgment for the plaintiff for remitted amount would be entered. The plaintiff rejected the remittitur and appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal, holding that new trial orders, whether or not accompanied by a remittitur provision, are not appealable. The court also concluded that the limited exception to the general rule of non-appealability did not apply because defendant's new trial motion was timely filed, meaning that the District Court had jurisdiction to grant the motion. *Id*.

A similar decision was reached in *Casey v. Long Island Railroad*, 406 F.3d 142 (Second Cir., 2005). In *Casey*, the plaintiff appealed from an interlocutory post-trial order of the District Court for the Southern District of New York, which order granted defendant's motion for a new trial on certain issues unless plaintiff agreed to a remittitur. The court held that the correctness of an order finding a monetary verdict to be unsupported by the evidence, and requiring a new trial unless the claimant accepts remittitur, involves evaluation of facts and is not a question of law such that an interlocutory appeal under 28 U.S.C. §1292(b) is not available. *Casey*, *Id.* at 147.

III. This Case Does not Involve a Controlling Question of Law Over Which There is Substantial ground for Difference of Opinion

A. *Marlyn Waived its Right to Seek Appellate Review of These Issues*

Prior to trial, Marlyn agreed that, consistent with *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400 (9th Cir. 1993), one of the issues for trial was whether or not there

was any causal connection between the damages it claimed and any alleged wrongdoing on the part of Defendants.[1] Marlyn now seeks to distance itself from that acknowledgment and argue that no such causal connection is necessary. Marlyn further argues that the Court should not have instructed the jury that it could only award a divestiture of profits on those profits "attributable to" World Nutrition's conduct.

However, the divestiture of profits/burden of proof issue Marlyn raises in its renewed motion for interlocutory appeal was only first raised by Marlyn in its Motion for Reconsideration filed on December 14, 2006.[2] However, as the Court correctly ruled in its January 26, 2007 Order denying Marlyn's Motion for Reconsideration[3], Marlyn did not object to the language "attributable to the false advertising" which was contained within jury instructions 29, 31 and 37. (See, Clerk's Docket #286, page 4.) The Court correctly determined that Marlyn therefore did not preserve the objections it now seeks to take up in an interlocutory appeal. (See, Clerk's Docket #286, page 5.) This includes including those issues related to causation, the burden of proof for the divestiture of profits and Marlyn's argument for more favorable jury instructions on its disgorgement of profits claim.

B. *The "Issue" Does Not Meet the Required Standard for Review*

1. <u>The Question of Law is Not Controlling</u>

Marlyn attempts to characterize the issue as one of controlling law because Marlyn disputes the legal standard applied by this Court with regard to the burden of proof regarding damages.[4] However, it is well settled that a question of law is not controlling merely because it is determinative of the case at hand. A question of law is "controlling" only if it may contribute to determination, at an early stage, of a wide spectrum of cases. *Federal Deposit Ins. Corp. v. First Nat'l. Bank*, 604 F.Supp. 616 (1985, ED Wis); *Kohn v.*

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[1] See, Joint Statement of the Issues for Trial, Issue #23. (Clerk's Docket #178)

[2] Clerk's Docket #285.

[3] Clerk's Docket #286.

[4] See, Marlyn's Supplement to Motion for Interlocutory Appeal (Clerk's Docket # 364), page 3, lines 21-25;

Royall, Koegel & Wells, 59 FRD 515 (1973, SD NY).

In fact, certifications for interlocutory appeals are to be used sparingly to avoid piece-meal appeals, and movants bear "the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted." *White v. Nix*, 43 F.3d 374, 376 (8th Cir. 1994). Even a dearth of cases interpreting a particular statute does not create substantial grounds for difference of opinion. *Id.* at 378. (See also, *Clark-Dietz, supra.* at 69. "The basic rule of appellate jurisdiction restricts review to final judgment, avoiding the delay and extra effort of piece-meal appeals.")

In the instant case, there is nothing about the issue Marlyn raises which raises it to the level of "controlling" as defined in the cases interpreting 28 U.S.C. §1292(b). The issue only pertains to the case at hand and it will not serve to materially advance the resolution of anything other than possibly the instant case. This is no more true in the instant case than in any other case in which a new trial has been granted, yet the general rule remains that an order granting a new trial is interlocutory and therefore not appealable. *Wagner, supra; Roy, supra.*

Additionally, an interlocutory appeal will only serve to delay this case for length of time it would take the Ninth Circuit to decide the issue as it pertains to this case, and likely will not resolve this case. As Marlyn correctly acknowledges, it can only be said that a retrial "may" not be necessary if the Ninth Circuit grants review *and* rules in Marlyn's favor. Further, as set forth below, it is highly doubtful that the Ninth Circuit would reverse this Court's ruling, as the Ninth Circuit has already settled this issue consistent with the manner in which the Court previously ruled.

2. The Question of Law is Not Close

Contrary to Marlyn's naked assertions, this case is not decided by a close, controlling issue of law over which there is substantial ground for difference of opinion. The Ninth Circuit to which Marlyn wishes to appeal has already determined the issue in a manner contrary to that which Marlyn currently asserts. The fact that Marlyn now disagrees with this position does not create a ground for difference of opinion as Marlyn

suggests.

In *Lindy Pen, supra*, the Ninth Circuit Court of Appeals determined that a plaintiff in an infringement action must prove both the fact and amount of damage. The accounting is intended to award profits only on sales that are attributable to the infringing conduct. There must be an evidentiary basis on which to rest and award and Plaintiff has the burden of establishing defendant's gross profits ***from the infringing activity with reasonable certainty.***" (*Lindy Pen*, 982 F.2d at 1408.) It is only after plaintiff has established with reasonable certainty those sales stemming from the infringing activity that the obligation shifts to defendant to demonstrate that the sale were not attributable to the infringing activity and to prove any available deductions. *Id.* Thus, the issue of law has been settled and is not close as Marlyn claims.

3. The "Question of Law" is Really a Question of Fact

Determining that a monetary verdict is not supported by the evidence, but rather is so high that a new trial on damages was warranted unless the plaintiff accepts remittitur, is not a question of law to which an immediate interlocutory appeal is appropriate under 28 U.S.C. § 1292(b). *Casey, supra.* Rather, such a ruling necessarily involves questions of fact. Even where there may be legal question involved, those questions may be foreclosed by the fact findings by the District Court, and an interlocutory appeal is not available. *Clark-Dietz, supra* at 69. Similarly, an order granting a new trial on damages is interlocutory and not appealable whether or not the new trial orders are accompanied by a provision for remittitur. *Eaton, supra.*

In its November 13, 2006 Order on World Nutrition's post-trial motions[5], the Court correctly determined that there was no evidence upon which a reasonable jury could conclude that all of World Nutrition's sales were as a result of false advertising, unfair competition and/or trade libel and that Marlyn presented no evidence that tied the $16.3 million of World Nutrition's sales of Vitalzym to any false statements. Because

[5] Clerk's Docket #280.

insufficient evidence was presented, any award of disgorgement of profits would be speculation and guesswork and no award of disgorgement of profits is sustainable on the record in this case. (See, Clerk's Docket #280 at pp. 42-44.)

This was again confirmed in the Court's January 26, 2007 Order denying Marlyn's Motion for Reconsideration[6], at pages 5 and 6, wherein the Court repeated its finding that no reasonable jury could have possibly found "on the basis of the evidence before it that, consistent with the Court's instructions, all of World's profits should be attributable to World's bad acts."

IV. Conclusion

Marlyn does not meet any of the exceptions to the general rule that the Court's order for a new trial on damages is not appealable. There is no controlling issue of law for the appellate court to decide, only one waived issue in the case at bar which can be argued through the normal appellate process after a final judgment, should it become necessary. This is precisely the type of piece-meal interlocutory appeal that the courts have strongly discouraged through long-established law, and which would result in extended delay and the resultant prejudice from that delay.

For these reasons, it is clear that an interlocutory appeal is not appropriate and Marlyn's renewed motion should be denied.

DATED this 8th day of May, 2008.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

By: /s Stephen D. Hoffman
Stephen D. Hoffman
Attorneys for Wong and World Nutrition

[6] Clerk's Docket #286.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2008, a copy of the foregoing **WORLD NUTRITION'S RESPONSE TO MARLYN'S RENEWED MOTION FOR INTERLOCUTORY APPEAL AND SUPPLEMENT TO MOTION FOR INTERLOCUTORY APPEAL** was filed electronically. A Notice of Electronic Filing (NEF) will be sent by operation of the Court's Electronic Case Filing (ECF) system to the filing party, the assigned Judge and any registered user in the case as indicated on the NEF. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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