



not there was any causal connection between damages claimed by plaintiff and any alleged wrongdoing on the part of the defendants. That being an issue for trial, the jury was instructed as to plaintiff's Lanham Act claim (as well as plaintiff's unfair competition and trade libel claims) that there must be a causal connection or nexus between false advertising established and damages in the form of profits sought by plaintiff. In each of Instructions No. 29 and No. 31, the jury was instructed that there must be a showing that profits to be divested were "attributable to" either a Lanham Act violation or unfair competition. Plaintiff agreed to the statement of issues to be tried and never took exception to the court's above-mentioned instructions. This is not a case where there is a squabble over who has the burden of proof regarding elements of cost and deductions claimed. Rather, the latter issue simply dropped out of the case, for it appears entirely clear that the jury attempted to award plaintiff only profits. However, the fault in the verdict was that the evidence simply would not support a conclusion that the totality of World Nutrition's sales were the product of World Nutrition's wrongful conduct.

It is this problem that gave rise to the court's grant of a new trial; and, contrary to plaintiff's contentions, the foregoing circumstances do not present a case of a controlling question of law as to which there is substantial grounds for difference of opinion such that early appellate resolution of that issue would materially advance the conclusion of the litigation. It is the

latter type of situation which can justify an interlocutory appeal.  
28 U.S.C. § 1292(b).

For the reasons and upon the authorities set forth by World Nutrition, the court concludes that an interlocutory appeal is not appropriate in this case. The renewed motion for interlocutory appeal is denied.

DATED at Anchorage, Alaska, this 11th day of June, 2008.

/s/H. Russel Holland  
United States District Judge