

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALISE MALIKYAR and ROBERT JACOBSEN,

Plaintiffs,

No. C 07-03533 WHA

v.

JOHN SRAMEK, BERNADETTE SRAMEK,  
HAROLD M. JAFFE, JOHN S. SRAMEK  
AND BERNADETTE SRAMEK REMOVABLE  
LIVING TRUST AND DOES 1 TO 100, inclusive,

Defendants.

---

**COURT’S PROPOSED CHARGE TO THE JURY  
[AND SPECIAL VERDICT FORM]**

Appended hereto are copies of the draft charge to the jury and special verdict form given to both sides on **June 18, 2009**, for discussion with the Court at the charging conference on **June 19, 2009 at 7:30 a.m.** The proposed charge is based on the way the trial has actually developed, taking into account issues that have emerged and receded and concessions by counsel. Subject to the upcoming charging conference, the Court believes the proposed charge adequately and fairly covers all issues actually still in play. Therefore, in order to give the district judge a fair opportunity to correct any error as matters now stand, counsel must, at the charging conference, bring to the judge’s attention any addition, subtraction or modification or

1 other objections or proposal for the jury instructions. Otherwise, all such points shall be deemed  
2 waived and it will not be sufficient merely to argue after the verdict that a proposed instruction  
3 filed earlier in the proceedings somehow was not adopted. Rather, any such proposal that  
4 counsel still cares about must be raised anew at the charging conference. The charging  
5 conference shall be conducted so as to give full and fair opportunity for counsel to raise any and  
6 all objections and proposals.

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALISE MALIKYAR and ROBERT JACOBSEN,

Plaintiffs,

No. C 07-03533 WHA

v.

JOHN SRAMEK, BERNADETTE SRAMEK,  
HAROLD M. JAFFE, JOHN S. SRAMEK  
AND BERNADETTE SRAMEK REMOVABLE  
LIVING TRUST AND DOES 1 TO 100, inclusive,

Defendants.

---

**[DRAFT]**  
**FINAL CHARGE TO THE JURY**  
**AND SPECIAL VERDICT FORM**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1.

Members of the jury, now that you have heard all the evidence and arguments by counsel, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult as necessary.

It is your duty to find the facts from all the evidence in the case. To those facts, you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case. In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the Court may have said or done as suggesting what verdict you should return — that is a matter entirely up to you.

2.

The evidence from which you are to decide what the facts are consists of:

1. The sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2. The exhibits which have been received into evidence;
3. The sworn testimony of witnesses in depositions, read into evidence; and
4. Any facts to which the lawyers have stipulated. You must treat any stipulated facts as having been conclusively proved.

3.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose,

1 may explain the presence of water on the sidewalk. Therefore, before you decide that a fact has  
2 been proved by circumstantial evidence, you must consider all the evidence in the light of  
3 reason, experience and common sense. You should consider both kinds of evidence. The law  
4 makes no distinction between the weight to be given to either direct or circumstantial evidence.  
5 It is for you to decide how much weight to give to any evidence. You should base your decision  
6 on all of the evidence regardless of which party presented it.

7 4.

8 In reaching your verdict, you may consider only the types of evidence I have described.  
9 Certain things are not evidence, and you may not consider them in deciding what the facts are.  
10 I will list them for you:

11 1. Arguments and statements by lawyers are not evidence.

12 The lawyers are not witnesses. What they have said in their opening statements,  
13 closing arguments and at other times is intended to help you interpret the  
14 evidence, but it is not evidence. If the facts as you remember them differ from the  
15 way the lawyers have stated them, your memory of them controls.

16 2. A suggestion in a question by counsel or the Court is not evidence  
17 unless it is adopted by the answer. A question by itself is not evidence.

18 Consider it only to the extent it is adopted by the answer.

19 3. Objections by lawyers are not evidence. Lawyers have a duty to  
20 their clients to consider objecting when they believe a question is improper under  
21 the rules of evidence. You should not be influenced by any question, objection or  
22 the Court's ruling on it.

23 4. Testimony or exhibits that have been excluded or stricken, or that  
24 you have been instructed to disregard, are not evidence and must not be  
25 considered. In addition, some testimony and exhibits have been received only for  
26 a limited purpose; where I have given a limiting instruction, you must follow it.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

5. Anything you may have seen or heard when the Court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

5.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it or none of it. In considering the testimony of any witness, you may take into account:

1. The opportunity and ability of the witness to see or hear or know the things testified to;
2. The witness' memory;
3. The witness' manner while testifying;
4. The witness' interest in the outcome of the case and any bias or prejudice;
5. Whether other evidence contradicted the witness' testimony;
6. The reasonableness of the witness' testimony in light of all the evidence; and
7. Any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. Nor does it depend on which side called witnesses or produced evidence. You should base your decision on all of the evidence regardless of which party presented it.

6.

You are not required to decide any issue according to the testimony of a number of witnesses, which does not convince you, as against the testimony of a smaller number or other evidence, which is more convincing to you. The testimony of one witness worthy of belief is sufficient to prove any fact. This does not mean that you are free to disregard the testimony of any witness merely from caprice or prejudice, or from a desire to favor either side. It does mean that you must not decide anything by simply counting the number of witnesses who have

1 testified on the opposing sides. The test is not the number of witnesses but the convincing force  
2 of the evidence.

3 7.

4 A witness may be discredited or impeached by contradictory evidence or by evidence  
5 that, at some other time, the witness has said or done something or has failed to say or do  
6 something that is inconsistent with the witness' present testimony. If you believe any witness  
7 has been impeached and thus discredited, you may give the testimony of that witness such  
8 credibility, if any, you think it deserves.

9 8.

10 Discrepancies in a witness' testimony or between a witness' testimony and that of other  
11 witnesses do not necessarily mean that such witness should be discredited. Inability to recall  
12 and innocent misrecollection are common. Two persons witnessing an incident or a transaction  
13 sometimes will see or hear it differently. Whether a discrepancy pertains to an important matter  
14 or only to something trivial should be considered by you.

15 However, a witness willfully false in one part of his or her testimony is to be distrusted  
16 in others. You may reject the entire testimony of a witness who willfully has testified falsely on  
17 a material point, unless, from all the evidence, you believe that the probability of truth favors  
18 his or her testimony in other particulars.

19 9.

20 In determining what inferences to draw from evidence you may consider, among other  
21 things, a party's failure to explain or deny such evidence.

22 10.

23 You should decide the case as to each defendant separately and as to each plaintiff  
24 separately. Unless otherwise stated, the instructions apply to all parties.

25 11.

26 In these instructions, I will often refer to a party's "burden of proof." Let me explain  
27 what that means. When a party has the burden of proof on any claim by a preponderance of the  
28 evidence, it means you must be persuaded by the evidence that the claim is more probably true

1 than not true. To put it differently, if you were to put the evidence favoring a plaintiff and the  
2 evidence favoring a defendant on opposite sides of a scale, the party with the burden of proof on  
3 the issue would have to make the scale tip somewhat toward its side. If the party fails to meet  
4 this burden, then the party with the burden of proof loses on that issue. Preponderance of the  
5 evidence basically means “more likely than not.”

6 When a party has the burden of proving any claim by clear and convincing evidence, it  
7 means you must be persuaded by the evidence that the claim is highly probable. This is a  
8 higher standard of proof than proof by a preponderance of the evidence.

9 12.

10 On any claim, if you find that plaintiffs carried their burden of proof as to each element  
11 of a particular claim, your verdict should be for plaintiffs on that claim. If you find that  
12 plaintiffs did not carry their burden of proof as to any element, you must find against plaintiffs  
13 on that claim.

14 13.

15 Before explaining the details of the law, it is worthwhile to state that all claims in this  
16 case depend on plaintiffs’ proving that one or more defendants placed any alleged wiretap on  
17 their telephone line. If this has not been proven, then no claim has been proven.

18 There is no direct evidence that any defendant was responsible for the alleged wiretap.  
19 Plaintiffs rely instead on alleged flaws in Harold Jaffe’s testimony concerning how he learned  
20 certain information, contending that he could have only learned of the information by tapping  
21 their telephone. Mr. Jaffe says that he learned of the pending escrow and sale, its expected date  
22 of close of escrow, and the involvement of Coldwell Banker from the fax (Exh. 8) from  
23 Attorney McGraw on April 24, 2007. He states that he went to Coldwell Banker and learned  
24 that the escrow was pending at North American Title and that, in turn, North American Title  
25 gave his assistant Gail Smith the escrow number or at least the last six digits of the escrow  
26 number at North American Title. Plaintiffs contend that the involvement of North American  
27 Title and the escrow number was not obtained in this way and thus Mr. Jaffe lied to cover up  
28

1 the alleged wiretapping. It is for you to decide how much weight to give this evidence in  
2 determining whether plaintiffs have carried their burden of proof.

3 I now turn to the law that applies to this case. *First*, I will give you a brief summary of  
4 the three specific claims at issue in this case.

5 14.

6 Plaintiffs' first claim is brought under the federal anti-wiretapping statute. To establish  
7 a violation of this statute, plaintiffs must prove that a defendant intentionally intercepted  
8 plaintiff's oral communication by means of an electronic, mechanical, or other device or by  
9 using information known to have been obtained by illegal wiretapping.

10 15.

11 The next claim is based on a violation of California state law that allows plaintiffs to sue  
12 for eavesdropping or recording. To establish this claim, plaintiffs must prove, as to any  
13 defendant charged, all of the following by a preponderance of evidence:

14 1. That said defendant intentionally recorded plaintiffs' conversation  
15 by using an electronic device;

16 2. That plaintiffs had a reasonable expectation that the conversation  
17 was not being overheard or recorded;

18 3. That said defendant did not have the consent of all parties to the  
19 conversation to record it;

20 4. That plaintiffs were harmed; and

21 5. That said defendant's conduct was a substantial factor in causing  
22 plaintiffs' harm.

23 16.

24 Plaintiffs' last claim is for invasion of privacy. To establish this claim, plaintiffs must  
25 prove, as to any defendant charged, all of the following by a preponderance of evidence:

26 1. That plaintiffs had a reasonable expectation of privacy in the use of  
27 their telephone;

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

2. That said defendant intentionally intruded in the telephone conversation of plaintiffs;

3. That the intrusion would be highly offensive to a reasonable person;

4. That plaintiffs were harmed; and

5. That the charged conduct was a substantial factor in causing plaintiffs' harm.

17.

As you know, plaintiffs have sued not only Harold Jaffe but also the Srameks on the theory that the Srameks are responsible for any wiretapping done by their attorney, Mr. Jaffe. It is for you, of course, to determine whether plaintiffs have proven any wiretapping by Mr. Jaffe in the first place. If you find a failure of proof in this regard, the claim against the Srameks will be moot. If you find otherwise, you will need to decide whether the Srameks are liable for any such wiretapping by Mr. Jaffe.

In evaluating the agency relationship between the Srameks and Mr. Jaffe, I instruct you that an agent is a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal. The agency agreement may be oral or written. An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

A principal is not responsible, however, for unauthorized acts of the agent. An act is unauthorized if it is outside the scope of engagement. When a client obtains a lawyer to represent them in court, it is presumed that the lawyer will act lawfully. The client is not responsible for illegal acts of the lawyer unless the acts were authorized or ratified by the client. It would not be enough to show that a lawyer performed an illegal act in furtherance of a client's case. The client must have authorized or affirmatively ratified the illegal conduct.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

18.

Now, I will turn to damages. It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered. There are different measures of damages for the different claims. The party seeking damages has the burden of proving damages by a preponderance of the evidence, unless otherwise indicated.

19.

I will first address the possibility of an award to compensate for *actual* injury. The only evidence before you of *actual* injury is the claim of Ms. Malikyar for emotional distress due to alleged interception of alleged attorney-client calls. No claim for any other type of emotional distress or any other category of other injury, such as the filing of the *lis pendens*, was preserved for trial in this case. Therefore, as to actual damages, you need only concern yourself with alleged interception by attorney-client calls and any emotional distress from learning that they had allegedly been intercepted. I will now instruct you as to emotional distress damages.

In order for Alise Malikyar to recover actual damages, she has the burden of demonstrating by a preponderance of the evidence that she suffered actual damages as a result of the alleged failure of defendants to comply with a requirement of the federal wiretapping law. In determining the measure of damages, you should consider any mental and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

You are not permitted to include speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain. Your award must be based upon evidence and not upon speculation, guesswork or conjecture. However, if you determine that a party is entitled to recover, you should compensate a party for the loss or harm caused by the injury in question which the evidence shows is reasonably certain to be suffered in the future.

20.

The amount of any damages award should include an award for all harm that was caused, even if the particular harm could not have been anticipated. Alise Malikyar must prove the

1 amount of her damages. However, she does not have to prove the exact amount of damages  
2 that will provide reasonable compensation for the harm. You must not speculate or guess in  
3 awarding damages.

4 21.

5 Mr. Jacobsen has not presented any evidence of actual damages, so he is not entitled to  
6 seek any actual damages for any of the claims.

7 22.

8 Now I will turn to a separate category of damages called “statutory damages.”  
9 Whether or not a plaintiff proves actual injury, a plaintiff may recover under the federal  
10 statute what are called “statutory damages,” meaning an amount for each day of a violation.  
11 Specifically, the statute allows a plaintiff who proves a claim to recover the greater of actual  
12 damages proven or statutory damages of \$100 per day up to a maximum of \$10,000. If a  
13 violation is found by the jury, the judge, not the jury, decides the amount of statutory damages,  
14 but the special verdict form will ask you to state the number of days of wiretapping, if any, that  
15 have been proven.

16 The state eavesdropping statute also allows for statutory damages but it is not keyed to  
17 the number of days. Rather, it is keyed to actual damages proven, so you will not need to  
18 determine anything more than actual damages, which in this is limited to alleged emotional  
19 distress flowing from interception of attorney-client calls. This applies, of course, only if you  
20 find a violation in the first place.

21 23.

22 The next category is punitive damages. This issue can only be reached if you find an  
23 intentional violation. The purposes of punitive damages are to punish an intentional wrongdoer  
24 and to deter them and others from committing similar acts in the future.

25 To recover punitive damages, plaintiffs have the burden of proving by clear and  
26 convincing evidence that defendants were guilty of oppression, fraud or malice in engaging in  
27 the conduct on which they base their claim that defendants violated their rights.

28



1 must decide the case for yourself, but you should do so only after you have considered all of the  
2 evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

3 Do not be afraid to change your opinion if the discussion persuades you that you should.  
4 Do not come to a decision simply because other jurors think it is right. It is important that you  
5 attempt to reach a unanimous verdict but, of course, only if each of you can do so after having  
6 made your own conscientious decision. Do not change an honest belief about the weight and  
7 effect of the evidence simply to reach a verdict.

8 I will give you a special verdict form to guide your deliberations. However, you do not  
9 need to address the questions in the precise order listed.

10 25.

11 Some of you have taken notes during the trial. Whether or not you took notes, you  
12 should rely on your own memory of what was said. Notes are only to assist your memory.  
13 You should not be overly influenced by the notes. When you go into the jury room, the Clerk  
14 will bring in to you the trial exhibits received into evidence to be available for your  
15 deliberations. The Clerk will also provide you with an index to them.

16 26.

17 As I noted before the trial began, when you retire to the jury room to deliberate, you will  
18 have with you the following things:

- 19 1. All of the exhibits received into evidence;
- 20 2. An index of the exhibits if the lawyers are able to stipulate as to  
21 its form;
- 22 3. A work copy of these jury instructions for each of you;
- 23 4. A work copy of the verdict form for each of you; and
- 24 5. An official verdict form.

25 When you recess at the end of a day, please place your work materials in the brown  
26 envelope provided and cover up any easels with your work notes so that if my staff needs to go  
27 into the jury room, they will not even inadvertently see any of your work in progress.

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

27.

A United States Marshal will be outside the jury-room door during your deliberations. If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone — including me — how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the Court.

28.

You have been required to be here each day from 7:45 A.M. to 1:00 P.M. Now that you are going to begin your deliberations, however, you are free to modify this schedule within reason. For example, if you wish to continue deliberating in the afternoons after a reasonable lunch break, that is fine. The Court does, however, recommend that you continue to start your deliberations by 8:00 A.M. If you do not reach a verdict by the end of today, then you will resume your deliberations tomorrow and thereafter.

It is very important that you let the Clerk know in advance what hours you will be deliberating so that the lawyers may be present in the courthouse at any time the jury is deliberating.

29.

You may only deliberate when all of you are together. This means, for instance, that in the mornings before everyone has arrived or when someone steps out of the jury room to go to the restroom, you may not discuss the case. As well, the admonition that you are not to speak to anyone outside the jury room about this case still applies during your deliberation.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

30.

After you have reached a unanimous agreement on a verdict, your foreperson will fill in, date and sign the verdict form and advise the Court that you have reached a verdict. The foreperson should hold onto the filled-in verdict form and bring it into the courtroom when the jury returns the verdict. Thank you for your careful attention. The case is now in your hands. You may now retire to the jury room and begin your deliberations.

Dated: June \_\_\_\_, 2009.

\_\_\_\_\_  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE