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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

GARDENSENSOR, INC., a Delaware Corporation, formerly known as PLANTSENSE, INC., a Delaware Corporation,

Plaintiff,

v.

BLACK & DECKER (U.S.), INC., a Maryland Corporation,

Defendant.

Case No. 12-cv-03922 NC

**PRELIMINARY JURY INSTRUCTIONS**

**I. Introduction**

Ladies and gentlemen: You are now the jury in this case. It is my duty to instruct you on the law.

These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set throughout the trial to which to refer. This set of instructions is not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, I will give you a final set of instructions. It is the final set of instructions which will govern your deliberations.

Case No. 12-cv-03922 NC  
PRELIMINARY JURY INSTRUCTIONS

1 You must not infer from these instructions or from anything I may say or do as  
2 indicating that I have an opinion regarding the evidence or what your verdict should be.

3 It is your duty to find the facts from all the evidence in the case. To those facts you  
4 will apply the law as I give it to you. You must follow the law as I give it to you whether  
5 you agree with it or not. And you must not be influenced by any personal likes or dislikes,  
6 opinions, prejudices, or sympathy. That means that you must decide the case solely on the  
7 evidence before you. You will recall that you took an oath to do so.

8 In following my instructions, you must follow all of them and not single out some and  
9 ignore others; they are all important.

10 **II. Summary of the Claims and Defenses in this Case**

11 To help you follow the evidence, I will give you a brief summary of the positions of  
12 the parties:

13 This case involves an alleged breach of contract. The plaintiff in this case is a  
14 company called GARDENSENSOR, Inc. and is also known as “PLANTSENSE.” The  
15 defendant is BLACK & DECKER (U.S.), Inc. also called, for short, “BLACK &  
16 DECKER.” The parties entered into a written contract concerning a product called  
17 “PLANTSMART.” The PlantSmart product is a gardening tool that takes soil, water and  
18 light readings and provides users with information about their home plants and garden  
19 plants through the Internet. Pursuant to the parties’ contract, the PlantSmart product was  
20 sold by Black & Decker under the Black & Decker brand name. In this lawsuit, PlantSense  
21 claims that Black & Decker breached the parties’ contract causing monetary damages to  
22 PlantSense. PlantSense has the burden of proving its breach of contract claim by a  
23 preponderance of the evidence, and I will instruct what that means.

24 Black & Decker denies that it breached the contract and denies that PlantSense  
25 incurred any monetary loss. In addition, Black & Decker asserts various affirmative  
26 defenses. Black & Decker has the burden of proof on these affirmative defenses.  
27 PlantSense denies Black & Decker’s affirmative defenses.

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1 **III. Burden of Proof**

2 When a party has the burden of proof on any claim or affirmative defense by a  
3 preponderance of the evidence, it means you must be persuaded by the evidence that the  
4 claim or affirmative defense is more probably true than not true.

5 You should base your decision on all of the evidence, regardless of which party  
6 presented it.

7 **IV. Evidence**

8 1. Evidence You May Consider

9 The evidence you are to consider in deciding what the facts are consists of:

- 10 (1) the sworn testimony of any witness;  
11 (2) the exhibits which are received into evidence; and  
12 (3) any facts to which the lawyers have agreed.

13 2. Things You May Not Consider

14 In reaching your verdict, you may consider only the testimony and exhibits received  
15 into evidence. Certain things are not evidence, and you may not consider them in deciding  
16 what the facts are. I will list them for you:

17 (1) Arguments and statements by lawyers are not evidence. The lawyers are not  
18 witnesses. What they have said in their opening statements, closing arguments, and at other  
19 times is intended to help you interpret the evidence, but it is not evidence. If the facts as  
20 you remember them differ from the way the lawyers have stated them, your memory of  
21 them controls.

22 (2) Questions and objections by lawyers are not evidence. Attorneys have a duty to  
23 their clients to object when they believe a question is improper under the rules of evidence.  
24 You should not be influenced by the objection or by the court's ruling on it.

25 (3) Testimony that has been excluded or stricken, or that you have been instructed to  
26 disregard, is not evidence and must not be considered. In addition sometimes testimony and  
27 exhibits are received only for a limited purpose; when I give a limiting instruction, you  
28 must follow it.

1 (4) Anything you may have seen or heard when the court was not in session is not  
2 evidence. You are to decide the case solely on the evidence received at the trial.

3 3. Types of Evidence

4 Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact,  
5 such as testimony by a witness about what that witness personally saw or heard or did.  
6 Circumstantial evidence is proof of one or more facts from which you could find another  
7 fact. You should consider both kinds of evidence. The law makes no distinction between  
8 the weight to be given to either direct or circumstantial evidence. It is for you to decide  
9 how much weight to give to any evidence.

10 By way of example, if you wake up in the morning and see that the sidewalk is wet,  
11 you may find from that fact that it rained during the night. However, other evidence, such  
12 as a turned on garden hose, may provide a different explanation for the presence of water on  
13 the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial  
14 evidence, you must consider all the evidence in the light of reason, experience, and common  
15 sense.

16 4. Evidence for a Limited Purpose

17 Some evidence may be admitted for a limited purpose only.

18 When I instruct you that an item of evidence has been admitted for a limited purpose,  
19 you must consider it only for that limited purpose and for no other.

20 5. The Court's Ruling on Objections

21 There are rules of evidence that control what can be received into evidence. When a  
22 lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side  
23 thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule  
24 the objection, the question may be answered or the exhibit received. If I sustain the  
25 objection, the question cannot be answered, and the exhibit cannot be received. Whenever I  
26 sustain an objection to a question, you must ignore the question and must not guess what the  
27 answer might have been.

28 Sometimes I may order that evidence be stricken from the record and that you

1 disregard or ignore the evidence. That means that when you are deciding the case, you  
2 must not consider the evidence that I told you to disregard.

3 **V. Witnesses**

4 1. Evaluation of Witness Testimony

5 In deciding the facts in this case, you may have to decide which testimony to believe  
6 and which testimony not to believe. You may believe everything a witness says, or part of  
7 it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses  
8 who testify about it.

9 In considering the testimony of any witness, you may take into account:

10 (1) the opportunity and ability of the witness to see or hear or know the things  
11 testified to;

12 (2) the witness's memory;

13 (3) the witness's manner while testifying;

14 (4) the witness's interest in the outcome of the case and any bias or prejudice;

15 (5) whether other evidence contradicted the witness's testimony;

16 (6) the reasonableness of the witness's testimony in light of all the evidence; and

17 (7) any other factors that bear on believability.

18 The weight of the evidence as to a fact does not necessarily depend on the number of  
19 witnesses who testify about it.

20 2. Expert Witnesses

21 Some witnesses, because of education or experience, are permitted to state opinions  
22 and the reasons for those opinions.

23 Opinion testimony should be judged just like any other testimony. You may accept it  
24 or reject it, and give it as much weight as you think it deserves, considering the witness's  
25 education and experience, the reasons given for the opinion, and all the other evidence in  
26 the case.

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1 **VI. Conduct of the Jury**

2 1. Prohibitions on Your Activities

3 I will now say a few words about your conduct as jurors.

4 First, keep an open mind throughout the trial, and do not decide what the verdict  
5 should be until you and your fellow jurors have completed your deliberations at the end of  
6 the case.

7 Second, because you must decide this case based only on the evidence received in the  
8 case and on my instructions as to the law that applies, you must not be exposed to any other  
9 information about the case or to the issues it involves during the course of your jury duty.

10 Thus, until the end of the case or unless I tell you otherwise:

11 Do not communicate with anyone in any way and do not let anyone else communicate  
12 with you in any way about the merits of the case or anything to do with it. This  
13 includes discussing the case in person, in writing, by phone or electronic means, via  
14 e-mail, text messaging, or any Internet chat room, blog, Web site or other feature.

15 This applies to communicating with your fellow jurors until I give you the case for  
16 deliberation, and it applies to communicating with everyone else including your  
17 family members, your employer, the media or press, and the people involved in the  
18 trial, although you may notify your family and your employer that you have been  
19 seated as a juror in the case. But, if you are asked or approached in any way about  
20 your jury service or anything about this case, you must respond that you have been  
21 ordered not to discuss the matter and to report the contact to the court.

22 Because you will receive all the evidence and legal instruction you properly may  
23 consider to return a verdict: do not read, watch, or listen to any news or media  
24 accounts or commentary about the case or anything to do with it; do not do any  
25 research, such as consulting dictionaries, searching the Internet or using other  
26 reference materials; and do not make any investigation or in any other way try to  
27 learn about the case on your own.

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1 The law requires these restrictions to ensure the parties have a fair trial based on the  
2 same evidence that each party has had an opportunity to address. A juror who violates these  
3 restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that  
4 would require the entire trial process to start over. If any juror is exposed to any outside  
5 information, please notify the court immediately.

6 2. Taking Notes

7 During deliberations, you will have to make your decision based on what you recall  
8 of the evidence. You will not have a transcript of the trial. I urge you to pay close attention  
9 to the testimony as it is given.

10 If at any time you cannot hear or see the testimony, evidence, questions or arguments,  
11 let me know so that I can correct the problem.

12 If you wish, you may take notes to help you remember the evidence. If you do take  
13 notes, please keep them to yourself until you and your fellow jurors go to the jury room to  
14 decide the case. Do not let note-taking distract you. When you leave, your notes should be  
15 left in the jury room. No one will read your notes. They will be destroyed at the  
16 conclusion of the case.

17 Whether or not you take notes, you should rely on your own memory of the evidence.  
18 Notes are only to assist your memory. You should not be overly influenced by your notes  
19 or those of your fellow jurors.

20 3. Questions to Witnesses

21 You will be allowed to propose written questions to witnesses after the lawyers have  
22 completed their questioning of each witness. You may propose questions in order to clarify  
23 the testimony, but you are not to express any opinion about the testimony or argue with a  
24 witness. If you propose any questions, remember that your role is that of a neutral fact  
25 finder, not an advocate.

26 Before I excuse each witness, I will offer you the opportunity to write out a question  
27 on a form provided by the court. Do not sign the question. I will review the question with  
28 the attorneys to determine if it is legally proper.

1 There are some proposed questions that I will not permit, or will not ask in the  
2 wording submitted by the juror. This might happen either due to the rules of evidence or  
3 other legal reasons, or because the question is expected to be answered later in the case. If I  
4 do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do not  
5 give undue weight to questions you or other jurors propose. You should evaluate the  
6 answers to those questions in the same manner you evaluate all of the other evidence.

7 By giving you the opportunity to propose questions, I am not requesting or suggesting  
8 that you do so. It will often be the case that a lawyer has not asked a question because it is  
9 legally objectionable or because a later witness may be addressing that subject.

#### 10 4. Bench Conferences and Recesses

11 From time to time during the trial, it may become necessary for me to talk with the  
12 attorneys out of the hearing of the jury, either by having a conference at the bench when the  
13 jury is present in the courtroom, or by calling a recess. Please understand that while you are  
14 waiting, we are working. The purpose of these conferences is not to keep relevant  
15 information from you, but to decide how certain evidence is to be treated under the rules of  
16 evidence and to avoid confusion and error.

17 Of course, we will do what we can to keep the number and length of these  
18 conferences to a minimum. I may not always grant an attorney's request for a conference.  
19 Do not consider my granting or denying a request for a conference as any indication of my  
20 opinion of the case or of what your verdict should be.

### 21 **VII. Trial**

22 Trials proceed in the following way: First, each side may make an opening statement.  
23 An opening statement is not evidence. It is simply an outline to help you understand what  
24 that party expects the evidence will show. A party is not required to make an opening  
25 statement.

26 PlantSense will then present evidence, and counsel for Black & Decker may cross-  
27 examine. Then Black & Decker may present evidence, and counsel for PlantSense may  
28 cross-examine.



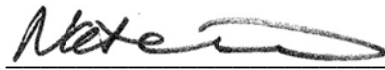
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After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

IT IS SO ORDERED.

Date: October 24, 2014

  
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Nathanael M. Cousins  
United States Magistrate Judge