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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

PROPOSED FINAL JURY INSTRUCTIONS

I. Introduction

Members of the Jury: Now that you have heard all of the evidence, it is my duty to instruct you as to the law of the case.

Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.

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

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

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PROPOSED FINAL JURY INSTRUCTIONS

1 you agree with it or not. And you must not be influenced by any personal likes or dislikes,
2 opinions, prejudices, or sympathy. That means that you must decide the case solely on the
3 evidence before you. You will recall that you took an oath to do so.

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

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

7 I will give you a brief review of the positions of the parties:

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

19 Black & Decker denies that it breached the contract and denies that PlantSense
20 incurred any monetary loss. In addition, Black & Decker asserts various affirmative
21 defenses. Black & Decker has the burden of proof on these affirmative defenses.
22 PlantSense denies Black & Decker’s affirmative defenses.

23 **III. Burden of Proof**

24 1. Preponderance of the Evidence

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

28 You should base your decision on all of the evidence, regardless of which party

1 presented it.

2 2. Clear and Convincing Evidence

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

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

9 **IV. Evidence**

10 1. Evidence You May Consider

11 The evidence you are to consider in deciding what the facts are consists of: (1) the
12 sworn testimony of any witness; (2) the exhibits received into evidence; and (3) any facts to
13 which the lawyers have agreed.

14 a. Evaluation of Witness Testimony

15 In deciding the facts in this case, you may have to decide which testimony to believe
16 and which testimony not to believe. You may believe everything a witness says, or part of
17 it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses
18 who testify about it. In considering the testimony of any witness, you may take into
19 account:

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

22 (2) the witness's memory;

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

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

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

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

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

28 The weight of the evidence as to a fact does not necessarily depend on the number of

1 witnesses who testify about it.

2 b. Impeachment Evidence—Witness

3 The evidence that a witness [e.g., has been convicted of a crime, lied under oath on a
4 prior occasion, etc.] may be considered, along with all other evidence, in deciding whether
5 or not to believe the witness and how much weight to give to the testimony of the witness
6 and for no other purpose.

7 c. Expert Witnesses

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

10 Opinion testimony should be judged just like any other testimony. You may accept it
11 or reject it, and give it as much weight as you think it deserves, considering the witness’s
12 education and experience, the reasons given for the opinion, and all the other evidence in
13 the case. The expert witnesses who testified in this case are [INSERT NAMES].

14 An expert witness may be asked to assume that certain facts are true and to give an
15 opinion based upon that assumption. This is a hypothetical question. If you determine that
16 any fact assumed in such a question has not been established by the evidence, you should
17 determine the effect of the failure to establish that fact upon the value of an opinion based
18 on that fact.

19 d. Stipulated Facts

20 The parties have agreed to certain facts that have been provided to you. You should
21 therefore treat these facts as having been proved.

22 e. Stipulated Testimony

23 The parties have agreed what [witness]’s testimony would be if called as a witness.
24 You should consider that testimony in the same way as if it had been given here in court.

25 f. Judicial Notice

26 The court has decided to accept as proved the fact that [state fact], even though no
27 evidence has been introduced on the subject. You must accept this fact as true.

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1 g. Deposition in Lieu of Live Testimony

2 A deposition is the sworn testimony of a witness taken before trial. The witness is
3 placed under oath to tell the truth and lawyers for each party may ask questions. The
4 questions and answers are recorded. When a person is unavailable to testify at trial, the
5 deposition of that person may be used at the trial.

6 The deposition of [witness] was taken on [date]. You should consider deposition
7 testimony, presented to you in court in lieu of live testimony, insofar as possible, in the
8 same way as if the witness had been present to testify.

9 [Do not place any significance on the behavior or tone of voice of any person reading
10 the questions or answers.]

11 h. Use of Interrogatories of a Party

12 Evidence [will now be] [was] presented to you in the form of answers of one of the
13 parties to written interrogatories submitted by the other side. These answers [have been]
14 [were] given in writing and under oath, before the actual trial, in response to questions that
15 were submitted in writing under established court procedures. You should consider the
16 answers, insofar as possible, in the same way as if they were made from the witness stand.

17 i. Charts and Summaries

18 (1) Not Received in Evidence

19 Certain charts and summaries not received in evidence have been shown to you in
20 order to help explain the contents of books, records, documents, or other evidence in the
21 case. They are not themselves evidence or proof of any facts. If they do not correctly
22 reflect the facts or figures shown by the evidence in the case, you should disregard these
23 charts and summaries and determine the facts from the underlying evidence.

24 (2) Received in Evidence

25 Certain charts and summaries have been received into evidence to illustrate
26 information brought out in the trial. Charts and summaries are only as good as the
27 underlying evidence that supports them. You should, therefore, give them only such weight
28 as you think the underlying evidence deserves.

1 2. Things You May Not Consider

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

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

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

13 (3) Testimony that has been excluded or stricken, or that you have been instructed to
14 disregard, is not evidence and must not be considered.

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

17 3. Types of Evidence

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

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

1 sense.

2 4. Evidence for a Limited Purpose

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

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

6 5. Evidence in Electronic Format

7 Those exhibits capable of being displayed electronically will be provided to you in
8 that form, and you will be able to view them in the jury room. A computer, projector,
9 printer and accessory equipment will be available to you in the jury room.

10 A court technician will show you how to operate the computer and other equipment;
11 how to locate and view the exhibits on the computer; and how to print the exhibits. You
12 will also be provided with a paper list of all exhibits received in evidence. If you need
13 additional equipment or supplies, you may make a request by sending a note.

14 In the event of any technical problem, or if you have questions about how to operate
15 the computer or other equipment, you may send a note to the clerk, signed by your
16 foreperson or by one or more members of the jury. Be as brief as possible in describing the
17 problem and do not refer to or discuss any exhibit you were attempting to view.

18 If a technical problem or question requires hands-on maintenance or instruction, a
19 court technician may enter the jury room with the clerk present for the sole purpose of
20 assuring that the only matter that is discussed is the technical problem. When the court
21 technician or any non-juror is in the jury room, the jury shall not deliberate. No juror may
22 say anything to the court technician or any non-juror other than to describe the technical
23 problem or to seek information about operation of equipment. Do not discuss any exhibit or
24 any aspect of the case.

25 The sole purpose of providing the computer in the jury room is to enable jurors to
26 view the exhibits received in evidence in this case. You may not use the computer for any
27 other purpose. At my direction, technicians have taken steps to make sure that the computer
28 does not permit access to the Internet or to any “outside” website, database, directory,

1 game, or other material. Do not attempt to alter the computer to obtain access to such
2 materials. If you discover that the computer provides or allows access to such materials,
3 you must inform me immediately and refrain from viewing such materials. Do not remove
4 the computer or any electronic data from the jury room, and do not copy any such data.

5 **V. PlantSense’s Breach of Contract Claim Against Black & Decker**

6 1. Breach of Contract—Elements

7 To recover damages from Black & Decker for breach of contract, PlantSense must
8 prove all of the following by a preponderance of the evidence:

9 (1) that PlantSense and Black & Decker entered into a contract;

10 (2) that PlantSense did all, or substantially all, of the significant or material things
11 that the contract required it to do;

12 (3) that Black & Decker failed to do something that the contract required it to do; and

13 (4) that PlantSense was harmed by that failure.

14 I will now give you more details about the first three of these elements:

15 As to the first element of the breach of contract claim, the parties have stipulated that
16 they entered into a contract.

17 As to the second element of the breach of contract claim, the first party to a contract
18 who fails to do one of the significant or material things that the contract required it to do
19 may not later proceed against the other party for breach of contract. However, a slight
20 breach by one party will not necessarily terminate the obligations of the other party to
21 perform under the contract. The question whether the breach is of sufficient importance to
22 justify non-performance by the non-breaching party is one of degree and is determined by
23 weighing the consequences in the light of the actual custom of persons in the performance
24 of contracts similar to the one that is involved in this case.

25 In determining whether a failure to render or to offer performance is material, the
26 following circumstances are significant:

27 (a) the extent to which the injured party will be deprived of the benefit which it
28 reasonably expected;

1 (b) the extent to which the injured party can be adequately compensated for the part
2 of that benefit of which it will be deprived;

3 (c) the extent to which the party failing to perform or to offer to perform will suffer
4 forfeiture;

5 (d) the likelihood that the party failing to perform or to offer to perform will cure its
6 failure, taking account of all the circumstances including any reasonable assurances;

7 (e) the extent to which the behavior of the party failing to perform or to offer to
8 perform comports with standards of good faith and fair dealing.

9 As to the third element of the breach of contract claim, PlantSense claims that Black
10 & Decker failed to do the following in breach of the contract between PlantSense and Black
11 & Decker:

12 (a) Provide PlantSense every month during the term of the agreement with an updated
13 12-month delivery and forecast schedule for the PlantSmart product;

14 (b) Make reasonable commercial efforts to sell the PlantSmart product with efforts
15 normal for its business;

16 (c) Commit marketing funds that Black & Decker reasonably determined were
17 necessary to support the launch and sale of the PlantSmart product;

18 (d) Meet the \$350,000 minimum marketing placement spend by December 4, 2010;
19 and

20 (e) Make reasonable efforts to support the PlantSmart product with marketing spends
21 normal for their business.

22 2. Performance Explained

23 Performance is the successful completion of a contractual duty. Full performance
24 consistent with the terms of the agreement discharges the contractual duty. Full
25 performance means not only performance of the character, quality and amount required, but
26 also performance within the agreed time.

27 //

1 **VI. Black & Decker’s Affirmative Defenses**

2 1. Performance Prevented by a Party to the Contract

3 A party to a contract may not prevent another party from performing its contractual
4 duties and then claim that the other party has breached the contract or failed to complete its
5 terms. For example, a farmer who contracts with a builder to put up a barn on the farmer’s
6 land must make the land available to the builder so that the work may be done. Likewise,
7 the farmer must not interfere with the progress of the work.

8 In this case, you must determine whether PlantSense prevented or otherwise
9 interfered with Black & Decker’s duty to perform [__describe terms of the contract__].

10 2. Estoppel

11 When the conduct of a party to a contract intentionally or unintentionally leads
12 another party to the contract, in reasonable reliance on that conduct, to change its position to
13 its detriment, then the original party cannot enforce a contractual right contrary to the
14 second party’s changed position. This is known in the law as estoppel. Reasonable reliance
15 means that the party that changed its position must have lacked the means of knowing the
16 truth about the facts in question.

17 In this case, Black & Decker must prove:

18 (1) that there was a contractual relationship between Black & Decker and PlantSense;

19 (2) that Black & Decker changed its position to its detriment because of PlantSense’s
20 conduct; and

21 (3) that Black & Decker reasonably relied on the conduct of PlantSense.

22 You must determine whether Black & Decker has proved all of the above elements by
23 clear and convincing evidence.

24 **VII. Damages**

25 It is the duty of the Court to instruct you about the measure of damages. The fact that
26 I have instructed you about the proper measure of damages should not be considered as my
27 suggesting which party is entitled to your verdict in this case. Instructions about the
28 measure of damages are given for your guidance only if you find that a damages award is in

1 order. It is for you to determine what damages, if any, have been proved.

2 1. Damages—Breach of Contract—General

3 If you find that Black & Decker committed a breach of contract, PlantSense is entitled
4 to compensation in an amount that will place it in the same position it would have been in if
5 the contract had been properly performed. In assessing damages, you must consider how
6 PlanSense’s position would have been different “but-for” Black & Decker’s breach of the
7 contract. The measure of damages is the loss actually sustained as a result of the breach of
8 the contract. PlantSense has the burden of proving damages by a preponderance of the
9 evidence.

10 2. Damages—Breach of Contract—Burden of Proof

11 PlantSense bears the burden of showing that its lost profit damages were the
12 immediate, direct, and proximate result of the alleged breach of contract by Black &
13 Decker. PlantSense’s lost profit damages would be considered the direct result of the
14 breach if they are precisely what PlantSense bargained for, and only an award of damages
15 equal to lost profits will put PlantSense in the same position it would have occupied had the
16 contract been performed.

17 To recover the damages it seeks, PlantSense bears the burden of proving with
18 reasonable certainty that a breach of the contract by Black & Decker caused PlantSense an
19 injury. Reasonable certainty is not the same as absolute certainty. Rather, reasonable
20 certainty merely means that the fact of damages must not be speculative. Once the *fact* of
21 damage is established, PlantSense does not need to prove the *amount* of damages with
22 mathematical accuracy. However, PlantSense must provide evidence offering some
23 reasonable basis upon which you may estimate with a fair degree of certainty the probable
24 loss which PlanSense will sustain in order to enable you to make an intelligent
25 determination of the extent of the loss. The fact that there might be some uncertainty as to
26 PlantSense’s damage or the fact that the damage might be very difficult to measure will not
27 preclude you from determining its value.

28 If you find that Black & Decker’s conduct created any of uncertainties that may make

1 estimating PlantSense's damages less than a mathematically precise exercise, it will be
2 enough if the evidence show the extent of the damages as a matter of just and reasonable
3 inference, although the result be only approximate. However, the damages may not be
4 determined by mere speculation or guess. If you find that the fact of such lost profits is
5 speculative or that the amount of any lost profits is unproven, then you may not award
6 damages for lost profits.

7 Also, in calculating such damages, you must calculate net profit: the amount by which
8 PlanSense's gross revenue would have exceeded all of the costs and expenses that would
9 have been necessary to produce those revenues.

10 Lost profits on a new business may be too speculative to allow recovery if there is no
11 evidence that the business would be profitable, but recovery for lost profits is not denied
12 merely because a business is newly established. A new business, like an existing business,
13 must prove lost profits with reasonable certainty.

14 Recovery for lost profits is limited to those profits which might have been made
15 pursuant to the performance of the particular contract sued on, during the period for which
16 the contract was to run. PlantSense may not recover future profits as damages for a period
17 beyond the termination date of the contract sued upon since termination automatically
18 extinguishes the relationship between the parties.

19 3. Damages—Breach of Contract—General/Nominal

20 A party that is harmed by a breach of contract is entitled to damages in an amount
21 calculated to compensate it for the harm caused by the breach. The compensation should
22 place the injured party in the same position it would have been in if the contract had been
23 performed.

24 If you find that PlantSense is entitled to a verdict in accordance with these
25 instructions, but do not find that PlantSense has sustained actual damages, then you may
26 return a verdict for PlantSense in some nominal sum such as one dollar. Nominal damages
27 are not given as an equivalent for the wrong but rather merely in recognition of a technical
28 injury and by way of declaring the rights of PlantSense.

1 4. Duty to Mitigate Damages

2 Generally, the measure of damages for one who is harmed by a breach of contract is
3 tempered by a rule requiring that the injured party make a reasonable effort, whether
4 successful or not, to minimize the losses suffered. To mitigate a loss means to take steps to
5 reduce the loss. If an injured party fails to make a reasonable effort to mitigate its losses, its
6 damage award must be reduced by the amount a reasonable effort would have produced
7 under the same circumstances. This reduction, however, must be measured with reasonable
8 probability.

9 **VIII. Conduct of the Jury**

10 Because you must base your verdict only on the evidence received in the case and on
11 these instructions, I remind you that you must not be exposed to any other information
12 about the case or to the issues it involves. Except for discussing the case with your fellow
13 jurors during your deliberations:

14 Do not communicate with anyone in any way and do not let anyone else communicate
15 with you in any way about the merits of the case or anything to do with it. This
16 includes discussing the case in person, in writing, by phone or electronic means, via
17 email, text messaging, or any Internet chat room, blog, website or other feature. This
18 applies to communicating with your family members, your employer, the media or
19 press, and the people involved in the trial. If you are asked or approached in any way
20 about your jury service or anything about this case, you must respond that you have
21 been ordered not to discuss the matter and to report the contact to the court.

22 Do not read, watch, or listen to any news or media accounts or commentary about the
23 case or anything to do with it; do not do any research, such as consulting dictionaries,
24 searching the Internet or using other reference materials; and do not make any
25 investigation or in any other way try to learn about the case on your own.

26 The law requires these restrictions to ensure the parties have a fair trial based on the
27 same evidence that each party has had an opportunity to address. A juror who violates these
28 restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that

1 would require the entire trial process to start over. If any juror is exposed to any outside
2 information, please notify the court immediately.

3 **IX. The Jury's Duty to Deliberate**

4 When you begin your deliberations, you should elect one member of the jury as your
5 presiding juror. That person will preside over the deliberations and speak for you here in
6 court.

7 You will then discuss the case with your fellow jurors to reach agreement if you can
8 do so. Your verdict must be unanimous.

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

12 Do not hesitate to change your opinion if the discussion persuades you that you
13 should. Do not come to a decision simply because other jurors think it is right.

14 It is important that you attempt to reach a unanimous verdict but, of course, only if
15 each of you can do so after having made your own conscientious decision. Do not change
16 an honest belief about the weight and effect of the evidence simply to reach a verdict.

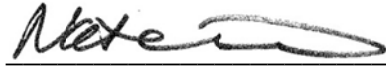
17 If it becomes necessary during your deliberations to communicate with me, you may
18 send a note through the courtroom deputy, signed by your presiding juror or by one or more
19 members of the jury. No member of the jury should ever attempt to communicate with me
20 except by a signed writing; I will communicate with any member of the jury on anything
21 concerning the case only in writing, or here in open court. If you send out a question, I will
22 consult with the parties before answering it, which may take some time. You may continue
23 your deliberations while waiting for the answer to any question. Remember that you are not
24 to tell anyone—including me—how the jury stands, numerically or otherwise, until after
25 you have reached a unanimous verdict or have been discharged. Do not disclose any vote
26 count in any note to the court.

27 A verdict form has been prepared for you. After you have reached unanimous
28 agreement on a verdict, your presiding juror will fill in the form that has been given to you,

1 sign and date it, and will advise the Court that you are ready to return to the courtroom.

2 IT IS SO ORDERED.

3 Date: October 28, 2014



4 Nathanael M. Cousins
United States Magistrate Judge

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