

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

No. C 06-7497 CW

UNITED STATES OF AMERICA, by RICHARD
WILSON and CHRIS MARANTO,

Plaintiffs,

[DRAFT] PRELIMINARY
JURY INSTRUCTIONS

v.

MAXXAM, INC. and CHARLES E. HURWITZ,

Defendants.

DUTY OF THE JURY

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 and refer to it. 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.

You must not infer from these instructions or from anything I may say or do 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

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

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

9 **CLAIMS AND DEFENSES**

10 To help you follow the evidence, I will first give you some
11 general background information about the case. This is a civil
12 case brought under the federal False Claims Act by two private
13 individuals, Richard Wilson and Chris Maranto, acting in the name
14 of the United States. Mr. Wilson and Mr. Maranto are called the
15 "Plaintiffs." They are suing a company called Maxxam Inc. and its
16 Chairman of the Board and Chief Executive Officer, Charles E.
17 Hurwitz. Maxxam and Mr. Hurwitz are called the "Defendants."

18 The False Claims Act is a federal law that authorizes private
19 citizens to bring actions on behalf of the United States to recover
20 damages caused by false or fraudulent claims submitted to the
21 United States in order to receive federal funds. A False Claims
22 Act case brought by a private citizen is sometimes called a "qui
23 tam" case. Before pursuing a False Claims Act case, the private
24 citizen must give notice to the United States government. The
25 United States government may then choose to intervene and play an
26 active role in the case, or not. In this case, the United States
27 government chose not to intervene. This decision, however, does
28 not prevent Plaintiffs from pursuing their claims. Although the

1 United States is not a party in the case, it would receive a
2 portion of any damages awarded.

3 Plaintiffs allege that Defendants defrauded the United States
4 when a Maxxam subsidiary by the name of the Pacific Lumber Company
5 sold a redwood forest called the Headwaters Forest to the
6 government. Maxxam acquired Pacific Lumber, which was based in
7 Northern California, in 1985. At the time of the purchase, Pacific
8 Lumber's timber land included the Headwaters Forest, the largest
9 privately-held old-growth forest in the United States. Plaintiffs
10 allege that, in order to pay off the large amount of debt that
11 Defendants assumed in purchasing Pacific Lumber, Defendants decided
12 to increase the logging of Pacific Lumber's old-growth timber,
13 including timber in the Headwaters Forest. This created a great
14 deal of public controversy.

15 In 1996, the United States government and the State of
16 California entered into an agreement with Pacific Lumber and its
17 parent company, Maxxam, to purchase the Headwaters Forest and
18 certain other property. The United States paid \$250 million toward
19 the purchase. Under the agreement, the Headwaters Forest would be
20 permanently set aside for its protection. However, the Headwaters
21 Agreement provided that the purchase would not go through unless
22 several conditions were first satisfied. One of these conditions
23 was approval by the State of California of a Sustained Yield Plan
24 for the 200,000 acres of timber land that would remain under
25 Pacific Lumber's ownership. A Sustained Yield Plan is a long-term
26 plan addressing future logging. It is designed to make sure that
27 timber harvests are conducted in accordance with sound principles
28 of sustainable forestry.

1 Plaintiffs allege that Defendants violated the False Claims
2 Act by submitting a false Sustained Yield Plan. Plaintiffs allege
3 that, in creating the Sustained Yield Plan, Defendants used a
4 fraudulent computer model in order to convince the State of
5 California to grant approval of more logging than would have been
6 permitted if the computer model were not fraudulent. Plaintiffs
7 allege that, if the United States had known that the Sustained
8 Yield Plan was false, it would not have paid \$250 million to
9 purchase the Headwaters Forest.

10 Defendants deny Plaintiffs' allegations. They say that the
11 United States government's real interest in the Headwaters
12 Agreement was to acquire the Headwaters Forest so that the forest
13 could be permanently set aside as a nature preserve, and that the
14 United States paid \$250 million for this purpose alone. Defendants
15 say that the SYP was not important to the United States and had
16 nothing to do with the Headwaters Forest because it applied only to
17 land that was not sold to the government. Defendants also say
18 there was nothing fraudulent about the computer modeling in the
19 SYP. They say that Pacific Lumber discussed with the California
20 Department of Forestry the issues that Plaintiffs are now
21 complaining about, and that the California Department of Forestry
22 agreed that Pacific Lumber's modeling was appropriate under the
23 circumstances. Finally, Defendants argue that they are not legally
24 responsible for the actions of Pacific Lumber, and that Plaintiffs'
25 claims are barred by the statute of limitations because they
26 brought their claims too late.

27 **WHAT IS EVIDENCE**

28 The evidence from which you are to decide what the facts are

1 consists of:

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

5 **WHAT IS NOT EVIDENCE**

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

10 (1) Arguments and statements by lawyers are not evidence. The
11 lawyers are not witnesses. What they will say in their opening
12 statements, closing arguments, and at other times is intended to
13 help you interpret the evidence, but it is not evidence. If the
14 facts as you remember them differ from the way the lawyers state
15 them, your memory of them controls.

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

20 (3) Testimony that is excluded or stricken, or that you are
21 instructed to disregard, is not evidence and must not be
22 considered. In addition, some testimony and exhibits are received
23 only for a limited purpose; when I give a limiting instruction, you
24 must follow it.

25 (4) Anything you see or hear when the Court is not in session
26 is not evidence. You are to decide the case solely on the evidence
27 received at the trial.

28

DIRECT AND CIRCUMSTANTIAL EVIDENCE

1
2 Evidence may be direct or circumstantial. Direct evidence is
3 direct proof of a fact, such as testimony by a witness about what
4 that witness personally saw or heard or did. Circumstantial
5 evidence is proof of one or more facts from which you could find
6 another fact. You should consider both kinds of evidence. The law
7 makes no distinction between the weight to be given to either
8 direct or circumstantial evidence. It is for you to decide how
9 much weight to give to any evidence.

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

RULING ON OBJECTIONS

17
18 There are rules of evidence that control what can be received
19 into evidence. When a lawyer asks a question or offers an exhibit
20 into evidence and a lawyer on the other side thinks that it is not
21 permitted by the rules of evidence, that lawyer may object. If I
22 overrule the objection, the question may be answered or the exhibit
23 received. If I sustain the objection, the question cannot be
24 answered, and the exhibit cannot be received. Whenever I sustain
25 an objection to a question, you must ignore the question and must
26 not guess what the answer might have been.

27 Sometimes I may order that evidence be stricken from the
28 record and that you disregard or ignore the evidence. That

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

3 **CREDIBILITY OF WITNESSES**

4 In deciding the facts in this case, you may have to decide
5 which testimony to believe and which testimony not to believe. You
6 may believe everything a witness says, or part of it, or none of
7 it.

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

- 10 (1) the opportunity and ability of the witness to see or hear
11 or know the things testified to;
- 12 (2) the witness' memory;
- 13 (3) the witness' manner while testifying;
- 14 (4) the witness' interest in the outcome of the case and any
15 bias or prejudice;
- 16 (5) whether other evidence contradicts the witness'
17 testimony;
- 18 (6) the reasonableness of the witness' testimony in light of
19 all the evidence; and
- 20 (7) any other factors that bear on believability.

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

23 **OVERVIEW OF APPLICABLE LAW**

24 I will now give you a brief description of the law that
25 governs Plaintiffs' claims. I will provide you with more detail
26 about the law in the final version of these instructions. I may
27 also instruct you during the course of the trial about certain
28 determinations you will need to make that are not described in

1 these instructions.

2 The False Claims Act defines three ways in which a defendant
3 may be found liable for submitting or contributing to the
4 submission of a false claim.

5 First, a defendant may be found liable for knowingly
6 presenting or causing to be presented a false claim to the United
7 States.

8 Second, a defendant may be found liable for knowingly making,
9 using, or causing to be made or used, a false statement in order to
10 get the United States to pay a false claim.

11 Third, a defendant may be found liable for conspiring with one
12 or more other persons to get a false claim paid by the United
13 States.

14 Plaintiffs have alleged that each of the Defendants has
15 violated the False Claims Act in all three of these ways. I will
16 describe each one for you in turn.

17 **I. Submitting a False or Fraudulent Claim to the United States
18 for Payment or Approval**

19 The first section of the False Claims Act makes it unlawful to
20 knowingly present to an officer or employee of the United States
21 government a false or fraudulent claim for payment or approval. To
22 prove a violation of this section of the False Claims Act against
23 each Defendant, Plaintiffs must prove:

- 24 1. That the Defendant presented or caused to be presented to
25 the United States a claim for payment or approval; and
- 26 2. That the claim was false or fraudulent; and
- 27 3. That the Defendant made the false or fraudulent claim
28 knowingly; and

1 4. That the misrepresentation was material to the United
2 States government's decision to the pay the false or
3 fraudulent claim.

4 A "claim" is a request or demand for money or property,
5 whether under a contract or otherwise, if the United States
6 government provides any portion of the money or property that is
7 requested or demanded. A claim is "false" if it is untrue when
8 made or when used. A claim is "fraudulent" if the speaker knows it
9 to be untrue at the time it is made or used. Satisfaction of the
10 "false or fraudulent" requirement requires proof of an objective
11 falsehood. A false or fraudulent statement is "material" if there
12 is a direct link between the statement and the United States
13 government's decision to pay or approve a false claim.

14 **II. Using a False Record or Statement to Get a False or Fraudulent**
15 **Claim Paid or Approved by the United States**

16 The second section of the False Claims Act makes it unlawful
17 to knowingly make, use, or cause to be made or used, a false record
18 or statement to get a false or fraudulent claim paid or approved by
19 the United States. To prove a violation of this section of the
20 False Claims Act against each Defendant, Plaintiffs must prove:

- 21 1. That the Defendant made, used, or caused someone else to
22 make or use, a record or statement for the purpose of
23 getting a false or fraudulent claim paid or approved by
24 the United States; and
- 25 2. That the record or statement was false or fraudulent; and
- 26 3. That the Defendant knew the record or statement was false
27 or fraudulent when made; and
- 28 4. That the false or fraudulent record or statement was

1 material to the United States' decision to pay the false
2 or fraudulent claim.

3 Again, a "claim" is a request or demand for money or property,
4 whether under a contract or otherwise, if the United States
5 government provides any portion of the money or property that is
6 requested or demanded. A claim, record or statement is "false" if
7 it is untrue when made or when used. A claim, record or statement
8 is "fraudulent" if the speaker knows it to be untrue at the time it
9 is made or used. Satisfaction of the "false or fraudulent"
10 requirement requires proof of an objective falsehood. A false or
11 fraudulent record or statement is "material" if there is a direct
12 link between the statement and the United States government's
13 decision to pay or approve a false claim.

14 **III. Conspiring to Defraud the United States by Getting a False or
15 Fraudulent Claim Allowed or Paid**

16 The third section of the False Claims Act makes it unlawful to
17 conspire to defraud the United States by getting a false or
18 fraudulent claim allowed or paid. To prove a violation of this
19 section of the False Claims Act against each Defendant, Plaintiffs
20 must prove:

- 21 1. That the Defendant conspired with one or more persons to
22 have a false or fraudulent claim paid by the United
23 States; and
- 24 2. That the Defendant acted with the intent to defraud the
25 United States; and
- 26 3. That one or more of the conspirators performed an act to
27 get such a claim paid or approved by the United States.

28 Under this section also, a "claim" is a request or demand for

1 money or property, whether under a contract or otherwise, if the
2 United States government provides any portion of the money or
3 property that is requested or demanded. A claim is "false" if it
4 is untrue when made or when used. A claim is "fraudulent" if the
5 speaker knows it to be untrue at the time it is made or used.
6 Satisfaction of the "false or fraudulent" requirement requires
7 proof of an objective falsehood. An "overt act" is any act
8 knowingly committed by one of the conspirators in an effort to
9 accomplish some object or purpose of the conspiracy.

10 **STATUTE OF LIMITATIONS**

11 The statute of limitations is a law governing when lawsuits
12 must be brought in order to be timely. In this case, Plaintiffs'
13 lawsuit is timely if it was filed within three years from the date
14 when the facts material to the lawsuit were known, or reasonably
15 should have been known, to Plaintiffs. If either Plaintiff knew,
16 or should have known, before December 7, 2003 of the facts material
17 to their lawsuit, then the statute of limitations bars this case.
18 Plaintiffs have the burden of proving that the statute of
19 limitations does not bar this lawsuit.

20 **INDIVIDUALS AND CORPORATIONS**

21 Individuals are responsible for their own actions. Under the
22 law, a corporation is considered to be a person. A corporation is
23 entitled to the same fair and conscientious consideration by you as
24 any party. A corporation can only act through its employees,
25 agents, directors, or officers. Therefore, a corporation is
26 responsible for the acts of its employees, agents, directors, and
27 officers performed within the scope of their authority. A
28 subsidiary corporation is a corporation that is owned and

1 controlled by another corporation, sometimes called the parent
2 corporation. In this case, the Pacific Lumber Company was a
3 subsidiary of Maxxam Corporation. The Plaintiffs claim that
4 Defendants Charles Hurwitz and Maxxam Inc. are liable for the acts
5 of the Pacific Lumber Company. One purpose of a corporate entity
6 is to shield its shareholders from liability. As a result, except
7 under certain circumstances, a corporate officer or director is not
8 liable for the acts of a corporation, and a parent corporation is
9 not liable for the acts of its subsidiary. In order to be liable
10 under the False Claims Act for the acts of a corporation or
11 subsidiary, the officer must participate in the wrongful acts. I
12 will instruct you further on this later.

13 **CONDUCT OF THE JURY**

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

15 First, you are not to discuss this case with anyone, including
16 members of your family, people involved in the trial, or anyone
17 else; this includes discussing the case on the internet. Nor are
18 you allowed to permit others to discuss the case with you. If
19 anyone approaches you and tries to talk to you about the case,
20 please let me know about it immediately;

21 Second, do not read or listen to any news stories, articles,
22 radio, television, or online reports about the case or about anyone
23 who has anything to do with it;

24 Third, do not do any research, such as consulting
25 dictionaries, searching the internet or using other reference
26 materials, and do not make any investigation about the case on your
27 own;

28 Fourth, if you need to communicate with me simply give a

1 signed note to the courtroom deputy clerk to give to me; and

2 Fifth, do not make up your mind about what the verdict should
3 be until after you have gone to the jury room to decide the case
4 and you and your fellow jurors have discussed the evidence. Keep
5 an open mind until then.

6 Finally, until this case is given to you for your deliberation
7 and verdict, you are not to discuss the case with your fellow
8 jurors.

9 **NO TRANSCRIPT AVAILABLE TO JURY**

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

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

17 **TAKING NOTES**

18 If you wish, you may take notes to help you remember the
19 evidence. You will be provided with paper and pencils to take
20 notes when the testimony begins. If you do take notes, please keep
21 them to yourself until you and your fellow jurors go to the jury
22 room to decide the case. Do not let note-taking distract you. When
23 you leave, your notes should be left in the jury room. No one will
24 read your notes. They will be destroyed at the conclusion of the
25 case.

26 Whether or not you take notes, you should rely on your own
27 memory of the evidence. Notes are only to assist your memory. You
28 should not be overly influenced by your notes or those of your

1 fellow jurors.

2 **QUESTIONS TO WITNESSES BY JURORS**

3 You may propose written questions to witnesses. You may
4 propose questions in order to clarify the testimony, but you are
5 not to express any opinion about the testimony or argue with a
6 witness. If you propose any questions, remember that your role is
7 that of a neutral fact finder, not an advocate.

8 If you wish, you may write out your question on a form
9 provided by the court. Do not sign the question. Give it to the
10 courtroom deputy clerk during one of your breaks. I will review
11 the question with the attorneys to determine if it is legally
12 proper.

13 There are some proposed questions that I will not permit, or
14 will not ask in the wording you submit. This might happen either
15 due to the rules of evidence or other legal reasons, or because the
16 question is expected to be answered later in the case. If I do not
17 ask a proposed question, or if I rephrase it, do not speculate as
18 to the reasons. Do not give undue weight to questions you or other
19 jurors propose. You should evaluate the answers to those questions
20 in the same manner you evaluate all of the other evidence.

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

26 **OUTLINE OF TRIAL**

27 The trial will now begin. First, each side may make an
28 opening statement. An opening statement is not evidence. It is

1 simply an outline to help you understand what that party expects
2 the evidence will show.

3 After opening statements, Plaintiffs will present evidence.
4 After Plaintiffs' counsel conducts a direct examination of a
5 witness, Defendants' counsel may cross-examine the witness. During
6 Plaintiffs' presentation of evidence, I may, for efficiency
7 reasons, require Defendants' counsel to conduct their own
8 examination of a particular witness following Plaintiffs'
9 examination. When Plaintiffs have concluded their presentation of
10 evidence, Defendants may present additional evidence, and
11 Plaintiffs' counsel may cross-examine.

12 After the evidence has been presented, I will instruct you on
13 the law that applies to the case and the attorneys will make
14 closing arguments. After that, you will go to the jury room to
15 deliberate on your verdict. After you have reached your verdict,
16 you will be excused.

17
18
19
20
21
22
23
24
25
26
27
28