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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PEPPER, N.A.,
Plaintiff,

v.

EXPANDI, INC., and
NETPARTNERING LIMITED,
Defendants.

Case No. 15-cv-04066 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.

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

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
5 and ignore others; they are all important.

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

7 This case is a business dispute between companies that worked on a marketing pitch
8 for Hewlett Packard. The plaintiff is Pepper NA, Inc. The defendants are Expandi Inc.
9 and NetPartnering Limited. The plaintiff alleges the arrangement was a joint venture and
10 that defendants breached the agreement. Plaintiff additionally seeks remedies for breach
11 of fiduciary duties, promissory estoppel, common count, and unfair competition.

12 Defendants deny that the arrangement was a joint venture, deny that they are liable to
13 plaintiff, and dispute the damages alleged by Plaintiff.

14 **III. Burden of Proof**

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

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

20 **IV. Multiple Defendants**

21 You should decide the case and come with a verdict as to each defendant separately.
22 Unless otherwise stated, the instructions apply to all parties.

23 **V. Evidence**

24 **A. Evidence You May Consider**

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

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

1 **B. 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 for you things that are not evidence:

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
7 other times is intended to help you interpret the evidence, but it is not evidence. If the
8 facts as you remember them differ from the way the lawyers have stated them, your
9 memory of 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
14 to disregard, is not evidence and must not be considered. In addition sometimes testimony
15 and exhibits are received only for a limited purpose; when I give a limiting instruction, you
16 must follow it.

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

19 **C. Types of Evidence**

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

26 **D. Use of Interrogatories of a Party**

27 Evidence may be presented to you in the form of answers of one of the parties to
28 written interrogatories submitted by the other side. These answers were given in writing

1 and under oath, before the actual trial, in response to questions that were submitted in
2 writing under established court procedures. You should consider the answers, insofar as
3 possible, in the same way as if they were made from the witness stand.

4 **E. Use of Requests for Admission**

5 Evidence may be presented to you in the form of admissions to the truth of certain
6 facts. These admissions were given in writing before the trial, in response to requests that
7 were submitted under established court procedures. You must treat these facts as having
8 been proved.

9 **F. Evidence for a Limited Purpose**

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

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

13 **G. Charts and Summaries Not Received in Evidence**

14 Certain charts and summaries not received in evidence may be shown to you in
15 order to help explain the contents of books, records, documents, or other evidence in the
16 case. They are not themselves evidence or proof of any facts. If they do not correctly
17 reflect the facts or figures shown by the evidence in the case, you should disregard these
18 charts and summaries and determine the facts from the underlying evidence. Charts and
19 summaries are only as good as the underlying evidence that supports them. You should,
20 therefore, give them only such weight as you think the underlying evidence deserves.

21 **H. The Court's Ruling on Objections**

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

1 Sometimes I may order that evidence be stricken from the record and that you
2 disregard or ignore the evidence. That means that when you are deciding the case, you
3 must not consider the evidence that I told you to disregard.

4 **VI. Witnesses**

5 **A. Evaluation of Witness Testimony**

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

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

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

13 (2) the witness's memory;

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

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

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

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

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

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

21 **B. Impeachment Evidence**

22 The evidence that a witness lied under oath or gave different testimony on a prior
23 occasion may be considered, along with all other evidence, in deciding whether or not to
24 believe the witness and how much weight to give the testimony of the witness and for no
25 other purpose.

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1 **VII. Conduct of the Jury**

2 **A. 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
8 the case and on my instructions as to the law that applies, you must not be exposed to any
9 other information about the case or to the issues it involves during the course of your jury
10 duty. 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
12 communicate with you in any way about the merits of the case or anything to do with it.
13 This 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. This
15 applies to communicating with your fellow jurors until I give you the case for deliberation,
16 and it applies to communicating with everyone else including your family members, your
17 employer, the media or press, and the people involved in the trial, although you may notify
18 your family and your employer that you have been seated as a juror in the case. But, if you
19 are asked or approached in any way about your jury service or anything about this case,
20 you must respond that you have been ordered not to discuss the matter and to report the
21 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 accounts or
24 commentary about the case or anything to do with it; do not do any research, such as
25 consulting dictionaries, searching the Internet or using other reference materials; and do
26 not make any investigation or in any other way try to learn about the case on your own.

27 The law requires these restrictions to ensure the parties have a fair trial based on the
28 same evidence that each party has had an opportunity to address. A juror who violates

1 these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result
2 that would require the entire trial process to start over. If any juror is exposed to any
3 outside information, please notify the court immediately.

4 **B. Taking Notes**

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

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

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

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

18 **C. Questions to Witnesses**

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

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

27 There are some proposed questions that I will not permit, or will not ask in the
28 wording submitted by the juror. This might happen either due to the rules of evidence or

1 other legal reasons, or because the question is expected to be answered later in the case. If
2 I do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do
3 not give undue weight to questions you or other jurors propose. You should evaluate the
4 answers to those questions in the same manner you evaluate all of the other evidence.

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

9 **D. Bench Conferences and Recesses**

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

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

20 **VIII. Trial**

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

25 Plaintiff will then present evidence, and counsel for the defendants may cross-
26 examine. Then the defendants may present evidence, and counsel for plaintiff may cross-
27 examine. Finally, plaintiff may present rebuttal evidence.

28 After the evidence has been presented, I will instruct you on the law that applies to

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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.

Dated: May 16, 2016



NATHANAEL M. COUSINS
United States Magistrate Judge