Agreed Upon Jury Instructions

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

vs.

Case No. 2:09-CV-10756
Hon. Marianne O. Battani

NAVIGATION CATALYST SYSTEMS, INC.,
a Delaware corporation; CONNEXUS CORP.,
a Delaware corporation; FIRSTLOOK, INC.,
a Delaware corporation; and EPIC MEDIA
GROUP, INC., a Delaware corporation,

Defendants.

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JOINT JURY INSTRUCTION LIST

The parties identify the following jury instructions and their agreement and disagreement as to particular instructions as follows:

Instruction No.	**Title**	**Agreed Upon?**	**Status**
1	Preliminary Instructions Before Trial	Yes.	
2	Court's Instruction to the Jury	Yes	
3	Consideration of the Evidence Duty to Follow Instructions Corporate Party Involved	Yes.	
4	Limited Purpose of Evidence	Yes.	
5	Credibility of Witnesses	Yes.	
6	Impeachment of Witnesses Inconsistent Statement	Yes.	
7.	Burden of Proof When There Are Multiple Claims or When Both Plaintiff and Defendant Have Burden of Proof	Yes.	
8.	Election of Foreperson Explanation of Verdict Form	No.	Plaintiff and Defendants each offer different proposals for this instruction.
9.	Vicarious Liability for Corporate Employer	No.	Plaintiff and Defendants each offer different proposals for this instruction.
10.	Spoliation/Destruction of Evidence	No.	Plaintiff and Defendants each offer different proposals for this instruction.
11.	The Parties and Claims	No.	Plaintiff and Defendants each offer different proposals for this instruction.
12.	Trademarks in General	No.	Plaintiff and Defendants each offer different proposals for this instruction.
13.	Registered Trademarks	No.	Plaintiff and Defendants each offer different proposals for this instruction.
14.	Incontestable Trademarks	Yes.	
15.	Common Law Trademarks	Yes.	

Instruction No.	Title	Agreed Upon?	Status
16.	Anti-Cybersquatting Consumer Protection Act Introductory Instruction and Definitions	No.	Plaintiff and Defendants each offer different proposals for this instruction.
17.	Distinctive or Famous	No.	Plaintiff and Defendants each offer different proposals for this instruction.
18.	"Registers," "Traffics in" or "Uses"	No.	Plaintiff and Defendants each offer different proposals for this instruction.
19.	"Confusingly Similar"	No.	Plaintiff and Defendants each offer different proposals for this instruction.
20.	Typosquatting	No.	Plaintiff and Defendants each offer different proposals for this instruction.
21.	Bad Faith Intent to Profit	No.	Plaintiff and Defendants each offer different proposals for this instruction.
22.	Anticybersquatting Consumer Protection Act Damages	No.	Plaintiff and Defendant each offer different proposals for this instruction.

RESPECTFULLY SUBMITTED this 28th day of February 2012.

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JOINT JURY INSTRUCTIONS AGREED UPON BY THE PARTIES

INSTRUCTION NO. 1
PRELIMINARY INSTRUCTIONS BEFORE TRIAL

Ladies and Gentlemen:

You have now been sworn as the Jury to try this case. By your verdict you will decide the disputed issues of fact.

I will decide all questions of law and procedure that arise during the trial, and, before you retire to the jury room at the end of the trial to deliberate upon your verdict and decide the case, I will explain to you the rules of law that you must follow and apply in making your decision.

The evidence presented to you during the trial will primarily consist of the testimony of the witnesses and tangible items including papers or documents called "exhibits."

You should pay close attention to the testimony because it will be necessary for you to rely upon your memories concerning what the testimony was. Although, as you can see, the Court Reporter is making a stenographic record of everything that is said, typewritten transcripts will not be prepared in sufficient time or appropriate form for your use during your deliberations and you should not expect to receive them.

On the other hand, any exhibits admitted in evidence during the trial will be available to you for detailed study, if you wish, during your deliberations. So, if an exhibit is received in evidence but is not fully read or shown to you at the time, don't be concerned because you will get to see and study it later during your deliberations.

If you would like to take notes during the trial, then you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you, individually.

Also, your notes should be used only as aids to your memory, and, if your memory should later differ from your notes, you should rely upon your memory rather than your notes.

If you do not take notes, then you should rely upon your own independent recollection or memory of what the testimony was, and you should not be unduly influenced by the notes of other Jurors. Notes are not entitled to any greater weight than the recollection or impression of each Juror concerning what the testimony was.

During the trial you should keep an open mind and should avoid reaching any hasty impressions or conclusions. Reserve your judgment until you have heard all of the testimony and evidence, the closing arguments or summations of the lawyers, and my instructions or explanations to you concerning the applicable law.

Because of your obligation to keep an open mind during the trial, coupled with your obligation to decide the case at its conclusion only on the basis of the testimony and evidence presented, you must not discuss the case during the trial in any manner among yourselves or with anyone else, nor should you permit anyone to discuss it in your presence; you should also avoid reading any newspaper articles that might be published about the case, and you should avoid seeing or hearing any television or radio comments about the trial.

From time to time during the trial I may be called upon to make rulings of law on objections or motions made by the lawyers. You should not infer or conclude from any ruling or other comment I may make that I have any opinions on the merits of the case favoring one side or the other. And if I should sustain an objection to a question that goes unanswered by a witness, you should not guess or speculate what the answer might have been nor should you draw any inferences or conclusions from the question itself.

During the trial it may be necessary for me to confer with the lawyers from time to time out of your hearing with regard to questions of law or procedure that require consideration by the court or judge alone. On some occasions you may be excused from the courtroom for the same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

The order of the trial's proceedings will be as follows: In just a moment the lawyers for each of the parties will be permitted to address you in turn and make what we call their "opening statements." The Plaintiff will then go forward with the calling of witnesses and presentation of evidence during what we call the Plaintiff's "case in chief." When the Plaintiff finishes (by announcing "rest"), the Defendants will proceed with witnesses and evidence, after which, within certain limitations, the Plaintiff may be permitted to again call witnesses or present evidence during what we call the "rebuttal" phase of the trial. The Plaintiff proceeds first, and may rebut at the end, because the law places the burden of proof or burden of persuasion upon the Plaintiff (as I will further explain to you as a part of my final instructions).

When the evidence portion of the trial is completed, I will instruct you on the applicable law. Afterwards, the lawyers will then be given another opportunity to address you and to make their summations or final arguments in the case, and you will then retire to deliberate upon your verdict.

Now, we will begin by affording the lawyers for each side an opportunity to make their opening statements in which they may explain the issues in the case and summarize the facts they expect the evidence will show.

I caution you that the statements that the lawyers make now (as well as the closing arguments they present at the end of the trial) are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for purposes of opening statements.

INSTRUCTION NO. 2
COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case.

When I have finished, you will go to the jury room and begin your discussions - - what we call your deliberations.

INSTRUCTION NO. 3
CONSIDERATION OF THE EVIDENCE
DUTY TO FOLLOW INSTRUCTIONS
CORPORATE PARTY INVOLVED

In deciding the case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone.

The fact that a corporation is involved as a party must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of the company.

In your deliberations you should consider only the evidence - - that is, the testimony of the witnesses and the exhibits I have admitted in the record - - but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make.

Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. Circumstantial evidence is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. As an example, direct evidence that it is raining is testimony from a witness who says, "I was outside a minute ago and I saw it raining." Circumstantial evidence that it is raining outside is the observation of someone entering a room

carrying a wet umbrella. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Remember that anything the lawyers say is not evidence in the case. And, except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your decision concerning the facts. It is your own memory and interpretation of the evidence that counts.

INSTRUCTION NO. 4
LIMITED PURPOSE OF EVIDENCE

You will recall that during the course of this trial I instructed you that I admitted certain evidence for a limited purpose. You must consider this evidence only for the limited purpose for which it was admitted.

INSTRUCTION NO. 5
CREDIBILITY OF WITNESSES

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness' testimony differ from other testimony or other evidence?

INSTRUCTION NO. 6
IMPEACHMENT OF WITNESSES
INCONSISTENT STATEMENT

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things and remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

INSTRUCTION NO. 7
BURDEN OF PROOF
WHEN THERE ARE MULTIPLE CLAIMS OR
WHEN BOTH PLAINTIFF AND DEFENDANT HAVE BURDEN OF PROOF

In this case each party asserting a claim or a defense has the responsibility to prove every essential part of the claim or defense by a preponderance of the evidence. This is sometimes called the burden of proof.

A preponderance of the evidence simply means an amount of evidence that is enough to persuade you that a claim or contention is more likely true than not true.

When more than one claim is involved, and when more than one defense is asserted, you should consider each claim and each defense separately; but in deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence you should find against the party making that claim or contention.

INSTRUCTION NO. 8
INCONTESTABLE TRADEMARKS

The right of the a trademark registrant to use a registered mark in commerce for the goods or services on or in connection with which such registered mark shall be incontestable. The following trademarks owned by Plaintiff have been registered as incontestable trademarks on the dates indicated, pursuant to 15 U.S.C.§ 1065:

THE WEATHER UNDERGROUND - December 20, 2008

WUNDERGROUND.COM - June 6, 2009

WUNDERSEARCH - March 7, 2011

INSTRUCTION NO. 9
COMMON LAW TRADEMARKS

Registration of a trademark is not needed to establish cybersquatting, trademark infringement or unfair competition. However, because some of Plaintiff's marks are not federally registered, Plaintiff must prove these marks are protectable. Plaintiff's rights in these marks are governed by common-law principles. Under common law, a party acquires rights in a trademark by using it as a trademark. In order to obtain trademark protection, a designation must identify one source and distinguish it from other sources.

The owner of a common-law mark acquires both the right to use the particular mark and the right to prevent others from using the same or a confusingly similar mark. Plaintiff claims common law trademark rights over all of its registered marks, as well as the word "WUNDER" which has not been registered by the United States Patent and Trademark Office as of the date of this trial:

Authority:

Source: Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 767-68 (1992); See Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 209 (2000).

RESPECTFULLY SUBMITTED this 28th day of February 2012.

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