

FILED
U.S. DISTRICT COURT
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DISTRICT OF UTAH
BY: [Signature]

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

THE PROCTER & GAMBLE COMPANY
and THE PROCTER & GAMBLE
DISTRIBUTING CO.,

Plaintiffs,

vs.

RANDY L. HAUGEN, dba FREEDOM
ASSOCIATES, INC.; STEVEN E.
BRADY; STEPHEN L. BYBEE; TED
RANDALL WALKER/WALKER
INTERNATIONAL,

Defendants.

JURY INSTRUCTIONS

Case No. 1:95-CV-94 TS

INSTRUCTION NO. 1

It will be your duty to find from the evidence what the facts are. You, and you alone, are the judges of the facts. You will then have to apply to those facts the law as the Court will give it to you. You must follow that law whether you agree with it or not.

Nothing the Court may say or do during the course of the trial is intended to indicate nor should be taken by you as indicating what your verdict should be.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

INSTRUCTION NO. 2

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts the lawyers agree or stipulate to, or that the Court may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments and questions by lawyers are not evidence.
2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the Court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.
3. Testimony that the Court has excluded or told you to disregard is not evidence and must not be considered.
4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

INSTRUCTION NO. 3

This is a civil case. The plaintiff has the burden of proving its case by what is called the preponderance of the evidence. That means the plaintiff has to produce evidence which, considered in the light of all the facts, leads you to believe that what plaintiff claims is more likely true than not. To put it differently, if you were to put plaintiff's and defendants' evidence on opposite sides of the scales, plaintiff would have to make the scales tip somewhat on its side. If the plaintiff fails to meet this burden, the verdict must be for the defendants.

Those of you who have sat on criminal cases will have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case and you should therefore put it out of your mind.

INSTRUCTION NO. 4

The Jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their demeanor upon the witness stand, their apparent intelligence or lack of intelligence, their means of knowledge of the facts testified to, the interest, if any, which any witness may have in the outcome of this trial, the prejudice or motives, or feelings or revenge, if any, which have been shown by the evidence. In so doing, you may take into consideration all of the facts and circumstances in the case and give such weight as you think the same are entitled to, in light of your experience and knowledge of human affairs.

INSTRUCTION NO. 5

During the trial it may be necessary for me to talk with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

INSTRUCTION NO. 6

Next, a few words about your conduct as jurors.

First, I instruct you that during the trial you are not to discuss the case with anyone, including fellow jurors, or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case.

Second, do not read or listen to anything touching on this case in any way. Do not watch or listen to any news reports concerning this trial on television or on radio, and do not read any news accounts of this trial in a newspaper or on the internet. If anyone should try to talk to you about it, bring it to the Court's attention promptly.

Third, do not try to do any research or make any investigation about the case on your own.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

INSTRUCTION NO. 7

Although there is more than one defendant in this action, it does not follow from that fact alone that if one is liable, all are liable. Each defendant is entitled to a fair consideration of the evidence. A defendant is not to be prejudiced by the fact, if it should become a fact, that you find against another defendant. Unless otherwise stated, all instructions given you govern the case as to each defendant.

INSTRUCTION NO. 8

If you would like to take notes during the trial, you may. On the other hand, you are not required to take notes.

If you do decide to take notes, be careful not to get so involved in note taking that you become distracted, and remember that your notes will not necessarily reflect exactly what was said, so your notes should be used only as memory aids. Therefore, you should not give your notes precedence over your independent recollection of the evidence. You should also not be unduly influenced by the notes of other jurors. If you do take notes, leave them in the jury room at night and do not discuss the contents of your notes until you begin deliberations.

INSTRUCTION NO. 9

At the end of trial, you must make your decision based on what you recall of the evidence. You will not have a transcript of the trial. I urge you to pay close attention to the testimony as it is given.

INSTRUCTION NO. 10

The trial will now begin. First, each side may make an opening statement. An opening statement is neither evidence nor argument; it is an outline of what that party intends to prove, offered to help you follow the evidence.

Next, plaintiff will present its witnesses and Defendants may cross-examine them. Then Defendants will present their witnesses and plaintiff may cross-examine them.

At the close of the evidence, the Court will give you instructions on the law, after which the attorneys will make their closing arguments to summarize and interpret the evidence for you.

You will then retire to deliberate on your verdict.

INSTRUCTION NO. 11

MEMBERS OF THE JURY:

Now that you have heard the evidence, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence of the case.

You are to disregard any evidence offered at trial and rejected by the Court. You are not to consider questions of counsel as evidence. You are not to consider the opening statements and the arguments of counsel as evidence. Their purpose is merely to assist you in analyzing and considering the evidence presented at trial.

The Court did not by any words uttered during the trial or in these instructions give or intimate, or wish to be understood by you as giving or intimating, any opinions as to what has or has not been proven in this case or as to what are or are not the facts of the case.

INSTRUCTION NO. 12

Plaintiff Procter & Gamble has the burden of proving its claim by a preponderance of the evidence. To prove by a preponderance of the evidence means to prove something is more likely so than not so. It does not mean the greater number of witnesses or exhibits. It means the evidence that has the more convincing force when taken on the whole compared to the evidence opposed to it. It means the evidence that leads you the jury to find that the existence of the disputed fact is more likely true than not true. To put it differently, if you were to put Plaintiff's and Defendants' evidence on opposite sides of the scales, Plaintiff would have to make the scales tip somewhat on its side. If Plaintiff fails to meet this burden, the verdict must be for Defendants.

Any finding of fact you make must be based on probabilities, not possibilities. A finding of fact must not be based on speculation or conjecture. When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find" or "if you determine," I mean that you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

In determining whether any disputed fact has been proven by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits.

If a party fails to meet its burden of proof, or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof on that issue and in favor of the opposing party.

INSTRUCTION NO. 12A

As I instructed you at the beginning of this case, although there is more than one defendant in this action, it does not follow from that fact alone, if established, that if one is liable, all are liable. Each defendant is entitled to a fair consideration of the evidence. A defendant is not to be prejudiced by the fact, if it should become a fact, that you find against another defendant. Unless otherwise stated, all instructions given you govern the case as to each defendant.

INSTRUCTION NO. 12B

The Plaintiff, Procter & Gamble, asserts a claim under a federal law known as the Lanham Act and seeks damages against Defendants Haugen, Walker, Brady, Bybee, and the Defendants' companies, for unfair competition by making false statements concerning Procter & Gamble's commercial activities. The Defendants deny that they violated the Lanham Act. To help you understand the evidence that was presented in the case, I will explain the nature of this kind of claim.

INSTRUCTION NO. 13

Under the Lanham Act, any person who makes a false or misleading statement about the nature, characteristics or qualities of someone else's commercial activities in order to promote the sale of their own products may be liable for unfair competition if the other person's business or reputation is damaged by the false representation.

INSTRUCTION NO. 14

On Plaintiff Procter & Gamble's claim for violation of the Lanham Act by unfair competition, it has the burden of proving each of the following by a preponderance of the evidence.

1. That a Defendant made a material false or misleading statement of fact in connection with the commercial promotion of their goods;
2. That the statement misrepresented the nature, characteristics or qualities of Procter & Gamble's commercial activities; and
3. That Procter & Gamble is entitled to damages due to the misrepresentation.

If you find that Plaintiff has proven each of the elements on which it has the burden of proof as to a Defendant, your verdict should be for the Plaintiff and against that Defendant. If, on the other hand, you find that Plaintiff has failed to prove any of these elements as to any Defendant, your verdict should be for that Defendant.

INSTRUCTION 14A

The term "material" in this instruction means that the statement is likely to influence the purchasing decision.

INSTRUCTION NO. 15

To be a "commercial promotion," a representation must be

- (1) commercial speech;
- (2) by a Defendant who is in commercial competition with Plaintiff;
- (3) for the purpose of influencing consumers to buy that Defendant's goods or services; and
- (4) disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

INSTRUCTION NO. 16

It has been previously determined in this case that the false rumor contained in the Amvox message is commercial speech. You must consider that fact as proven.

INSTRUCTION NO.17

The term "commercial activities" may include such things as how a company uses its profits from the sale of its goods.

INSTRUCTION NO. 18

While the representations need not be made in a classic advertising campaign, but may consist instead of more informal types of promotion, the representations must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry. The extent of distribution necessary to constitute commercial advertising or promotion in a particular case may be an elastic factor, so that a relatively modest amount of activity may be sufficient in the context of a particular case. Nevertheless, these terms by their plain, everyday meaning connote some level of public dissemination of information. However, dissemination need not have been made to the general public. The touchstone of the inquiry is whether the representations are part of an organized effort to penetrate the relevant market.

INSTRUCTION NO. 19

Procter & Gamble is not required to show that the Defendants acted intentionally to establish that they violated the Lanham Act.

INSTRUCTION NO. 20

If you find that Procter & Gamble has met its burden of proving the elements of its Lanham Act claim, you must determine the amount of Procter & Gamble's actual damages.

Procter & Gamble has the burden of proving its actual damages caused by Defendants' false statements by a preponderance of the evidence.

Damages means the amount of money which will reasonably and fairly compensate Procter & Gamble for any losses you find were caused by the Defendants' false message.

You should consider the following:

1. The loss of Procter & Gamble's goodwill, including injury to its general business reputation;
2. The lost profits that Procter & Gamble would have earned if the Defendants had not sent the false message. Lost profits are determined by estimating the amount of product sales that were lost and subtracting the amount of money that would have been spent making and selling the product;
3. The expenses of attempting to prevent customers from being deceived;
4. The cost of advertising or communications to consumers to correct confusion caused by the false representations;
5. The amount of its out-of-pocket expenses incurred to correct the Defendants' false statements; and
6. Any other factors that bear on Procter & Gamble's actual damages.

INSTRUCTION NO. 21A

In order to prove it is entitled to actual damages, Plaintiff must prove by a preponderance of the evidence that the Defendants' conduct was a proximate cause of Plaintiff's injury.

An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act played a substantial part in bringing about or actually causing the damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

The law does not recognize only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

INSTRUCTION NO. 21 B

Even if you find that the Plaintiff is entitled to recover damages against more than one Defendant, you must return a verdict in a single sum against all of the Defendants you find to be liable. That is, there is only one loss to the Plaintiff and correspondingly only one damage award. Therefore, even if you find more than one Defendant liable, you are not to divide the damages among the Defendants. Rather, you must return one damage award, if any, against all of those you find liable.

INSTRUCTION NO. 22

The fact that I have instructed you on damages does not mean that I am indicating that you should, or should not, award damages—that is entirely for you, the jury, to decide.

Any damages you award must have a reasonable basis in the evidence. In determining damages, the difficulty or uncertainty in ascertaining or measuring the precise amount of any damages does not preclude recovery, and the jury should use its best judgment in determining the amount of such damages, if any, based upon the evidence. You may not, however, determine damages by speculation or conjecture.

The burden is upon Plaintiff to prove the existence and amount of its damages and that its damages were caused by the acts of one or more of the Defendants.

INSTRUCTION NO. 23

A corporation may act only through natural persons as its agents or employees. In general, agents or employees of a corporation may bind the corporation by their acts and declarations made while acting within the scope of their authority delegated to them by the corporation, or within the scope of their duties as employees of the corporation.

INSTRUCTION NO. 24

The events giving rise to this occurred in 1995 and the lawsuit initiated in that year. You should not speculate as to why the case is still pending. Nor should you draw any inferences in favor of or averse to any party based upon the length of time that the lawsuit has lasted.

INSTRUCTION NO. 25

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of Plaintiff, and the answer thereto of Defendants. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

All parties are equal before the law, and each should be given the same fair and equal treatment by you. You are to decide the case solely and exclusively on the evidence alone, except that you shall be guided at all times in your deliberation by the law as I instruct you.

INSTRUCTION NO. 26

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from the facts you find have been proved, such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

INSTRUCTION NO. 27

Unless you are otherwise instructed, the evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence regardless of who may have produced them; and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

INSTRUCTION NO. 28

As I instructed you during trial, some of the evidence in this case is limited under the rules of evidence to one of the parties and cannot be considered against the others. The evidence of the testimony of David Roberts you heard can be considered only in the case against Randy Haugen, Freedom Associates, Inc., Ted Walker/Walker International. The evidence of the testimony of David Roberts is not to be considered by you in the case against Steven Brady and Stephen Bybee.

INSTRUCTION NO. 29

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all evidence in the case, both direct and circumstantial.

INSTRUCTION NO. 30

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel it is outweighed by other evidence, you may disregard the opinion entirely.

INSTRUCTION NO. 31

In determining the weight to be given to an opinion expressed by any witness who did not testify as an expert witness, you should consider his or her credibility, the extent of his or her opportunity to perceive the matters upon which his or her opinion is based and the reasons, if any, given for it. You are not required to accept such an opinion but should give it the weight to which you find it entitled.

INSTRUCTION NO. 32

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the records and other documents which are in evidence in this case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts and figures shown by the evidence in the case, you should disregard them.

INSTRUCTION NO. 33

During the trial of this case, certain testimony has been presented to you by way of depositions, consisting of sworn recorded answers to questions asked of the witnesses in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath or on a video recording played on a television set. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had been present, and had testified from the witness stand.

INSTRUCTION NO. 34

You, as jurors, are the sole judges of the credibility of witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witnesses, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

INSTRUCTION NO. 35

Tape recordings of Amvox messages have been received in evidence and have been played for you. Typewritten transcripts of these tape recorded Amvox messages have been furnished to you. These typewritten transcripts of the Amvox messages are being given to you solely for your convenience in assisting you in following the conversation or in identifying the speakers.

The tapes themselves are evidence in the case and the typewritten transcripts are not evidence. What you hear on the tapes is evidence. What you read on the transcript is not. If you perceive any variation between the two, you will be guided solely by the tapes and not by the transcripts.

If you cannot, for example, determine from the tape recording that particular words were spoken or if you cannot determine from the Amvox messages who said a particular word or words, you must disregard the transcripts insofar as those words or that speaker are concerned.

INSTRUCTION NO. 35A

You have heard evidence that there was an earlier trial of this case. You must decide this case solely on the evidence presented to you in this trial. The earlier trial should have no bearing on your decision in this case.

INSTRUCTION NO. 36

It is the duty of the attorney on each side of the case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against any attorney or his or her client because the attorney has made objection.

Upon allowing testimony or other evidence to be introduced over the objection of any attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of any such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the Court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely, and may draw no inference from the wording of it or speculate as to what the witness would have said if he or she had been permitted to answer any question.

INSTRUCTION NO. 37

A copy of these instructions will also accompany you to the jury room in a notebook. Do not write on the instructions in the notebook. Do not concern yourselves in any way with the numbering of the instructions, their sequence, or any gap in numbering. Instructions are numbered only for clerical convenience while the Court is preparing the instructions.

INSTRUCTION NO. 38

During the course of the trial, I may have occasionally asked questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related.

INSTRUCTION NO. 39

Upon retiring to the jury room you must elect one of your members to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

The verdict must represent the collective judgment of the jury. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors for the mere purpose of returning a unanimous verdict.

Remember at all times, you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Your verdict must be based solely upon the evidence received in the case. Nothing you have seen or read outside of court may be considered. Nothing that I have said or done during the course of this trial is intended in any way to somehow suggest to you what I think your verdict should be. Nothing said in these instructions and nothing in any form of verdict prepared for your convenience is to suggest or convey to you in any way or manner any intimation as to what verdict I think you should return. What the verdict shall

be is the exclusive duty and responsibility of the jury. As I have told you many times, you are the sole judges of the facts.

The Court has prepared a verdict form for your convenience. You are instructed that your answers to the interrogatories on the verdict form must be consistent with the instructions I have given you and with each other.

When you have reached a unanimous agreement as to your verdict, your foreperson will fill in, date and sign the verdict form upon which you have unanimously agreed. When you have reached unanimous agreement as to your verdict, the foreperson shall inform the bailiff and you shall return to the courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. But bear in mind that you are not to reveal to the Court or to any person how the jury stands, numerically or otherwise, on the question before you, until after you have reached a unanimous agreement.

INSTRUCTION NO. 40

The attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his or her sense of pride may be aroused, and he or she may hesitate to recede from an announced position if shown that it is wrong.

INSTRUCTION NO. 41

During your deliberations, you are able as a group to set your own schedule for deliberations. You may deliberate as late as you wish or recess at an appropriate time set by yourselves. You may set your own schedule for lunch and dinner breaks.

However, I do ask that you notify the court by a note when you plan to recess for the evening.