Members of the jury:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

It becomes my duty therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

You, as jurors, are the judges of the facts. But in determining what actually happened in this case — that is, in reaching your decision as to the facts -- it is your sworn duty to follow the law I am now in the process of defining for you.

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you may not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendants.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have produced them.

In this case all parties should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each component. The character and effect of the evidence presented by Aspen Highlands in support of its claims and the evidence presented by Aspen Skiing Corporation in support of its defense are not to be judged by dismembering it and viewing it in its separate parts but only by looking at it as a whole. Your duty is to look at the whole picture and not merely the individual portions of it.

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

In these instructions, the terms "person" or persons" include corporations.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations, partnerships, unincorporated associations and other organizations, stand equal before the law and are to be dealt with as equals in a court of justice.

The evidence in this case consists of the sworn testimony of witnesses, including that of expert witnesses, and all exhibits admitted in evidence.

It also includes the testimony which was read to you by way of deposition, consisting of sworn answers to questions asked of the witness 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, in the form of a deposition. Such testimony is entitled to the same consideration, and is to be judged as to credibility and weighed and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

In this case certain persons were permitted to testify as expert witnesses. When a witness is called as an expert in a particular field of technical knowledge or learning and is allowed to express opinions on matters within that field, such opinions are offered for the aid and assistance of the jury but not for the purpose of invading the jury's function in finding facts, nor the Court's function in deciding the law.

In determining the value, weight, and significance to be given such opinions, you should consider the extent of the qualification, experience and ability of the witness and the soundness of the study and data on which the opinions of the witness were based.

Insofar as the testimony of an expert witness is based on personal observation of particular facts and conditions, it is to be considered by you the same as that of any other witness. However, the opinions of experts based on hypothetical assumptions of fact, do not tend to prove the assumed facts upon which the opinions are based. The actual facts must be found by the jury from the basic evidence itself and not from assumptions of fact adopted by expert witnesses in forming opinions or in preparing summaries, computations, or other exhibits.

The jury is not bound to find facts according to expert testimony, but such testimony should be considered by the jury in connection with all the other evidence in the case. You are entitled to give such evidence as much weight and value as you think it is entitled, measured by the same standard as any other competent witness in the case.

The testimony of an expert and charts or summaries prepared by him and admitted in evidence are received for the purpose of explaining facts disclosed by books, records and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence of proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that you find that they are not accurate summaries of facts or figures otherwise shown by the evidence in the case, you are to disregard them.

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So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. "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 pointing to the existence 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 the evidence in the case, both direct and circumstantial.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, 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 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' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he 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 the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may 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, 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.

As the sole judges of the facts, you must determine which of the witnesses you believe, what portion of the testimony you accept and what weight you will attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves the reliability or unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which a witness gives his testimony on the stand, the opportunity that the witness had to observe the facts concerning which he testifies, the probability or improbability of the witness' testimony when viewed in the light of all of the other evidence in the case, are all items to be taken into your consideration in determining the weight, if any, you will assign to that witness' testimony. If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together. If, however, that is not possible, then you will have to determine which of the conflicting versions you will accept.

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As stated earlier, it is your duty to determine the facts, and in so doing, you must consider only the evidence I have admitted in the case. The evidence includes the sworn testimony of the witnesses and the exhibits in the record. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded. Anything you may have seen or heard outside the courtroom is not evidence, and you must entirely disregard it.

Whenever the attorneys on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proven.

Remember also that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding on you.

Also, during the course of trial I may occasionally have made comments to the lawyers. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

These instructions contain the law that will govern you in this case. The arguments of the lawyers are not the law and to the extent that their statements about the law differ from these instructions, you must disregard those statements and follow the law as given in these instructions.

The basic purpose of the antitrust laws is to protect, encourage, and foster free and unfettered competition. The laws were enacted to preserve and promote competition, but not particular, individual competitors. In the normal course of free and vigorous competition, it is to be expected that some businesses will suffer losses and some will enjoy success -- because they provide better services, a better product or otherwise better serve the public. This is an accepted and desirable result. The laws do not seek to shield competitors from the risks or effects of vigorous competition, to penalize successful competitors, or to shackle the competitive process.

Rather, the theory of these laws is that the open competition will result in the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress. Thus, the laws are intended to prevent exclusionary or anticompetitive conduct which serves to raise prices, restrict production, or interfere with or control the market to the detriment of purchasers and consumers. The laws are also designed to prevent undue concentrations of economic power when such concentrations are achieved through conduct that is designed to stifle competition or exclude competitors. To secure for the public the advantages which follow from free competition, the law restricts the manner in which competitors may acquire and use economic power, and forbids certain conduct or practices which have the purpose or tendency of impeding or destroying competition.

In these instructions, I will refer to the plaintiff, Aspen Highlands Skiing Corporation, as Aspen Highlands or as plaintiff. I will refer to the defendants, Aspen Skiing Corporation, Buttermilk Mountain Skiing Corporation and Snowmass Skiing Corporation as Aspen Skiing Corporation and its subsidiaries or as Aspen Skiing Corporation or as defendants.

Plaintiff's First Claim for Relief, unlawful monopolization, is based upon Section 2 of the Sherman Act. Section 2 provides, in pertinent part, that

> Every person who shall monopolize . . .
> any part of the trade or commerce . . .
> shall be . . . [in violation of the
> antitrust laws.]

In order to sustain a charge of unlawful monopolization, Aspen Highlands must have established, by a preponderance of the evidence, three essential elements:

(1) That Aspen Skiing Corporation and its subsidiaries possessed monopoly power in a relevant market or sub-market;

(2) That defendants willfully acquired this power or maintained it by exclusionary or anticompetitive means or used it for exclusionary or anticompetitive purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident; and

(3) That plaintiff suffered injury in its business as a direct result of defendants' monopoly power and exclusionary or anticompetitive conduct.

The first question that you must resolve under this claim is what constitutes the relevant market. Therefore, I will instruct you on the relevant market before explaining these three essential elements.

Relevant Market: The term "relevant market" is a term of art that has a unique meaning under the antitrust law, which may not be the same as your everyday notion of the term. Accordingly, it should be given only the meaning I will define for you.

An allegation of monopolization and possession of monopoly power has meaning only in connection with a relevant market.

Therefore, to find for plaintiff on the claim of monopolization, you must find that such a distinct relevant market does in fact exist. A relevant market has two components: one is the product market and the other is the geographic market.

1. Product market

The parties are in disagreement as to what the relevant product market is. Aspen Highlands claims that downhill skiing services in Aspen including multi-area, multi-day lift tickets is the relevant product market. Aspen Skiing Corporation and its subsidiaries claim that the relevant product market is downhill skiing at destination ski resorts.

Like many issues of fact, this one calls upon you to apply your collective common sense and experience to the record of evidence before you. The basic idea of a relevant product market is that the products or services within it can be substituted for each other, as a practical matter, from the buyer's point of view. Two products need not be identical to be in the same market. But they must be, as a matter of practical fact and the actual behavior of consumers, substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other.

One way you can tell whether products are reasonable substitutes for each other is to consider whether changes in the price of one have fairly direct and substantial effects upon the sales of the other. If so, the products are probably in the same market. You can also consider how people in the industry and the public at large view the products, whether the products have similar prices, whether the products are sold to similar customers, and whether they are sold by the same kind of sellers. Other factors which you should consider include the special characteristics and uses of each product, and the overlap between the consumers of different products.

In sum, you are being asked to decide which products compete with each other. No one factor is necessarily decisive, but the more of these criteria that are present, the more likely the particular market is a separate product or service market.

2. Sub-markets

Once you have determined the relevant product market, you next have to consider whether or not there exists within that product market a relevant sub-market. Even though a group of products are sufficiently interchangeable to be grouped in one product market, there may be within that group a smaller group of products that compete so directly with each other as to constitute a sub-market within the larger market. Or the products or services of a particular seller may have such particular characteristics and such particular consumer appeal and are sufficiently insensitive to price variations of other products that they constitute a relevant sub-market all by themselves. There can be both a relevant market and a relevant sub-market or just a relevant market without any relevant sub-market. Thus, if you decide that the relevant product market is downhill skiing at destination ski resorts, you must still determine whether downhill skiing services in Aspen including multi-area, multi-day lift tickets is a submarket within the larger market.

3. Relevant geographic market

Second, you must determine the relevant geographic market. The relevant geographic market is the area or areas in which these parties and their competitors compete for the sale of the products that form the relevant product market. It is the area or areas to which a potential customer may rationally turn for the service or product he needs.

Just as there can be a sub-market within a relevant product market, there can be a sub-market within a relevant geographic market. Your definition of the geographic market or sub-market must both correspond to the commercial realities of the ski industry and be economically significant. Thus, although the geographic market in some instances may be national or international, under other circumstances it may be as small as a single town or resort area.

In this case, Aspen Highlands contends that the relevant geographic market is the Aspen area, while Aspen Skiing Corporation and its subsidiaries contend

that it is North America. Thus, if you decide that the relevant product market is downhill skiing at destination ski resorts and the relevant geographic market, North America, you may still consider whether downhill skiing services in Aspen including multi-area, multi-day lift tickets form a relevant product sub-market, and if so, whether the Aspen area is a relevant geographic sub-market.

Monopolization: As I mentioned earlier, the elements of a claim of monopolization are:

(1) possession of monopoly power in the relevant market or sub-market;

(2) the willful use or maintenance of that power by exclusionary or anticompetitive means, as distinguished from growth or development as a consequence of a superior product, superior business sense, or historic accident; and

(3) injury to plaintiff's business as a direct result of defendants' monopoly power and willful use or maintenance of that power.

The first essential element that plaintiff must prove in support of its monopolization claim is that defendants possessed "monopoly power" in the relevant market or sub-market.

The term "monopoly power" means the ability to control prices in the relevant market or sub-market or to exclude competition from the relevant market or sub-market.

The power to "control" prices means the ability to set prices, usually to raise them, without regard to competition. In other words, monopoly power is a company's ability to raise prices without risk of losing customers to its competitors.

The power to "exclude competition" means a company's ability to keep other companies from competing for its customers, either by driving the other companies out of business or preventing them from getting started.

In determining whether Aspen Skiing Corporation had monopoly power the material consideration is not whether it actually raised prices or whether it excluded existing or potential competitors but whether it had the ability to control prices or to exclude such competition whenever it desired to do so. You need not find that such power was absolute, that defendants could sell at any price or had no competitors whatsoever.

After you determine the relevant market or sub-market, you may consider Aspen Skiing Corporation's percentage share of that market. If you find that Aspen Skiing Corporation controls more than 70% of the relevant market or sub-market, you may infer that it possesses monopoly power in that market.

The level of prices which a firm sets for its products does not necessarily demonstrate monopoly power. A firm may ordinarily charge as high a price for its product as the market will accept. Although this is a use of economic power, high prices may invite new competitors into the market. A company's pricing policies indicate monopoly power when it has the ability to raise prices without risk of losing customers to its competitors.

If you do not find that Aspen Skiing Corporation had monopoly power in the relevant market, the first essential element of the charge of monopolization, then your task is ended on this subject and you will decide the claim of monopolization against Aspen Highlands and in favor of Aspen Skiing Corporation. On the other hand, if you do find monopoly power, you must consider the second essential element, whether Aspen Skiing Corporation willfully acquired, maintained or used that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes.

"Willfully" as used in these instructions means acting knowingly and deliberately, but it does not mean that Aspen Skiing Corporation must have specifically intended to achieve or maintain monopoly power.

In considering whether the means or purposes were anticompetitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was "honestly industrial." Or it is said that monopoly power which is "thrust upon" a firm due to its superior business ability and efficiency does not constitute monopolization. For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which possesses monopoly power under a duty to cooperate with its business rivals. Also, a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner, does not violate Section 2 if valid business reasons exist for that refusal. In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available, or in other ways, and instead has the effect of impairing competition. To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies, which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or submarket.

Conduct which is directed at injuring competitors may be classified either as exclusionary conduct, which is conduct aimed at actual elimination of competition or at preventing it from coming into being, or as anticompetitive conduct,

which is action that restricts, interferes with, impairs, or frustrates the efforts of other firms to compete in the relevant market. Although these forms of conduct may be slightly different, they are not absolutely distinct. Therefore, I will use either term - "exclusionary" or "anticompetitive" - to refer to the types of conduct which Aspen Highlands must have proved in order to establish the second essential element of its charge of monopolization.

It can sometimes be difficult to determine the primary quality or nature of an act so as to classify it as honestly industrial or as exclusionary or anticompetitive. Nevertheless, you must decide. Given conduct may both help customers and hurt competitors. If this seems to be the case to you, you must ask yourselves whether it hurts competitors because it appeals to consumers. That is, was the harm to a competitor caused by customers' preference for defendants' products? If so, the kind of conduct involved is not exclusionary or anticompetitive because the goal of Section 2 is to protect competition itself rather than a particular competitor's right to thrive. If a business does poorly because it is faced with vigorous competition, this is not unlawful. In addition, so long as a company which possesses monopoly power acts reasonably, it is not necessary that the company adopt the least restrictive alternative available. It is the choice of an unreasonable alternative, not the failure to choose the least restrictive alternative, that may lead to liability. However, if the harm to a competitor is caused by something other than defendants' success in competing on the merits of its products and operations - if the harm is caused primarily or substantially by the defendants' deliberate efforts to injure or block competition - then you may find that the conduct was anticompetitive. Such conduct, whether to obtain monopoly power in the first place, or to hold on to it, or make use of it, establishes the second element of the offense of monopolization of the particular market involved.

You need not find that monopoly power was gained or maintained or used solely in anticompetitive ways in order to establish this element of monopolization. However, a preponderance of the evidence must show that the anticompetitive conduct played a significant or substantial role. An isolated or trivial episode will not make Aspen Skiing Corporation liable for monopolization if monopoly power was in other respects gained, retained, and employed in a fashion that is honestly industrial rather than anticompetitive. On the other hand, Aspen Highlands is not requried to prove every one of its allegations about

anticompetitive conduct. Once again, you have a problem for judgment, for thorough and sensitive weighing of the evidence. In the end, you must decide whether Aspen Highlands has carried its burden of proving, not merely an isolated or occasional act, but a substantial or significant amount of conduct that was exclusionary or anticompetitive in nature.

If you find that Aspen Highlands has not met this burden, then your verdict on the claim of monopolization must be for defendants. If you decide that Aspen Highlands has made this showing, then you must consider whether it has proven the third essential element of this claim, that it suffered injury in its business as a result of defendants' monopoly power and exclusionary or anticompetitive conduct. I will explain this element after instructing you on plaintiff's second claim for relief.

Plaintiff's Second Claim for Relief, contract, combination, or conspiracy in restraint of trade, is based on Section 1 of the Sherman Act. Section 1 provides, in pertinent part,

> Every contract, combination, . . . or conspiracy, in restraint of trade [or interstate commerce] . . . is . . . illegal . . . .

To establish this claim, Aspen Highlands must prove, by a preponderance of the evidence, three essential elements:

(1) that there was a contract, combination or conspiracy between Aspen Skiing Corporation and at least one other person or firm;

(2) that such contract, combination or conspiracy constituted an unreasonable restraint of trade or interstate commerce; and

(3) that such contract, combination or conspiracy directly caused injury to its business or property.

If you find that Aspen Highlands has proven each and every one of these elements by a preponderance of the evidence, then you should return a verdict on this claim for plaintiff and assess damages.

On the other hand, if Aspen Highlands has failed to meet its burden of proving any one of these three elements by a preponderance of the evidence, then you should return a verdict on this claim for defendants.

The first element of this offense is that there must be a contract, combination or conspiracy between Aspen Skiing Corporation and at least one other person or firm. A contract is an agreement. A combination or conspiracy exists when two or more persons or corporations knowingly join together to accomplish some unlawful purpose by concerted action, or to accomplish some lawful purpose by unlawful means. To act knowingly is to act voluntarily and intentionally, and not because of mistake or accident. The essence of a conspiracy is an agreement between two or more persons or corporations to violate or disregard the law.

Mere similarity of conduct among various persons, and the fact that they may have associated together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in this case need not show that the members of the alleged conspiracy entered into any express or formal agreement. Rather, the preponderance of the evidence must show that two or more persons or corporations, at least one of which was Aspen Skiing Corporation, came to a common and mutual understanding to accomplish an unlawful purpose.

There must be at least two separate persons or corporations who have reached an agreement or understanding in order to find that a conspiracy was formed. In that regard, you are instructed that a single corporation cannot agree, combine or conspire with its own officers or employees.

You are further instructed that it is not necessary for Aspen Highlands to join as defendants in this case all persons who may have participated with the defendants in the alleged contract, combination or conspiracy. A person injured by such action may recover against one or all of those participating, and he may enforce his right of recovery against one, or some, or all, at his election. So you are hereby instructed that it is immaterial, as a matter of law, that any other members may have not been joined in this suit by the plaintiff.

It is not enough to prove conspiracy against those charged that they have a common understanding or agreement or confederate to carry out an unlawful purpose and that they act together for that purpose. Not only must the unlawful conspiracy come into existence and at least Aspen Skiing Corporation be a party to it, but, some one or more of the parties to the conspiracy must do some act to effect the object of the conspiracy.

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If you find that there was such a contract, combination or conspiracy, then you should consider whether plaintiff has shown, by a preponderance of the evidence, that it constituted an unreasonable restraint on trade or interstate commerce. The phrase "in restraint of trade or interstate commerce" means any unreasonable interference with trade or commerce which takes place between persons or business organizations in one state and those of any other state; that is to say, trade or commerce which takes place, not wholly within the boundaries of a single state, but across the state lines. Even a wholly local activity can have a substantial effect on interstate commerce.

To restrain interstate trade or commerce means, then, to interfere unreasonably with the ordinary, usual and freely competitive market in interstate trade or commerce. The general term applies only to unreasonable restraints and not to all possible restraints of trade. The law does not define what kinds of restraints are unreasonable. In most cases, it is for the jury to determine from a consideration of all the facts and circumstances whether the conduct of the Defendant created a restraint on interstate commerce and, if so, whether the restraint was reasonable or unreasonable. However, in certain instances, particular types of restraints are considered unlawful, without regard to whether they appear to be unreasonable in the circumstances.

The amount or quantity or value of the interstate trade or commerce involved or affected by an unreasonable restraint of trade is immaterial. The antitrust laws brand as unlawful any contract or combination or conspiracy which would operate to restrain unreasonably any interstate trade or commerce regardless of how small in amount or quantity or value.

Rule of reason: The question of whether an alleged contract, combination, or conspiracy constitutes an "unreasonable" restraint of trade or interstate commerce must be determined on the basis of all of the facts and circumstances. It cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question you must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help you to interpret the facts and to predict consequences.

If you find that Aspen Highlands has not proven by a preponderance of the evidence that Aspen Skiing Corporation was a party to a contract, combination or conspiracy in restraint of trade or interstate commerce, then your verdict on this claim must be for defendants. If you decide that Aspen Highlands has made this showing, then you must consider whether it has proven the third essential element of this claim, that it suffered injury in its business as a result of such contract, combination or conspiracy.

As I have indicated, the last essential element of each of plaintiff's claims for relief is that the alleged antitrust violation has directly caused injury to plaintiff's business or property. That is, Aspen Highlands is not entitled to recover any losses it may have sustained as a result of poor business practices or management, unfavorable business conditions generally, or other causes, if any. Nor can Aspen Highlands win simply by showing that it did not earn as much money as it would have liked. Therefore, if you find that Aspen Highlands has proven one or more antitrust violations by Aspen Skiing Corporation, but has failed to prove, by a preponderance of the evidence, that such violations directly caused injury to its business or property, your verdict on all claims must be for defendants. A direct cause is one which in the natural and ordinary sequence of events, and unbroken by any efficient intervening cause, produces the injury, or substantially contributes to the injury. However, if you find that Aspen Highlands has proven one or more antitrust violations by Aspen Skiing Corporation and has proven that such violations directly caused injury to its business or property, then you should return a verdict on the proven claims for plaintiff and assess damages, if any.

If you should find, from a preponderance of the evidence in the case, that Aspen Highlands is entitled to a verdict, the law provides that it is to be fairly compensated for all damage, if any, to its business and property, which was directly caused by the defendants' antitrust violation. In arriving at the amount of the award, you should include any damages suffered by plaintiff because of lost net profits; that is to say, profits which the plaintiff would have made, but for defendants' antitrust violation. The net profits of a business are determined by subtracting the costs and expenses of the business from its gross income or gross profits.

The fact that the precise amount of plaintiff's damages may be difficult to ascertain should not affect plaintiff's recovery, particularly if the defendants' wrongdoings have caused the difficulty in determining the precise amount. You may base your assessment of the amount of damages on reasonable estimates of what the net profits would have been.

On the other hand, you may not award damages to Aspen Highlands if your determination of the amount of damages is based upon speculation or conjecture. An allowance for lost profits may be included in the damages awarded only when there is some reasonable basis in the evidence in the case for determining that plaintiff has in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment.

In arriving at the amount of a loss of profits sustained by Aspen Highlands, you are entitled to consider any past actual earnings of its business, as well as any other evidence in the case bearing upon the issue, such as a projection of lost sales or an estimate of what plaintiff's share of the market would have been had there been no antitrust violations.

You may not award to plaintiff damages which could have been avoided by reasonable efforts on plaintiff's part. If you find that Aspen Highlands could reasonably have avoided all or part of any injury resulting from defendants' actions, then you must reduce any award of damages to the extent those damages could reasonably have been avoided or reduced by Aspen Highlands.

It is a principle of the antitrust laws that a person faced with an unlawful arrangement which is capable of injuring his property may not sit idly by and allow damages to accrue. He must do whatever he reasonably can both to avoid and to reduce the amount of his damages.

Irrespective of anything you may have read or heard about the award of damages or the method of determining damages in antitrust cases, if you find from a preponderance of the evidence that plaintiff is entitled to recover in this case, you are to consider only the actual amount of damage to plaintiff's business or property, if any, and any verdict which you may render in favor of plaintiff shall be limited to that amount and shall not include any amounts for attorney's fees, costs, or anything else other than such actual damages which you may have determined according to my previous instructions.

The fact that you have been instructed as to the proper measure of damages should not be considered by you as intimating any view of the Court as to which side of this litigation is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff from a preponderance of evidence in the case and under the instructions you have been given, and are no indication at all as to which side the Court thinks should prevail.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. 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. You must each decide the case for yourself, but 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 reexamine 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, or for the mere purpose of returning a verdict.

Remember at all times that 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.

The marshal will now escort you to the jury room.

Upon reaching the jury room, you should first select one of your number to act as your foreperson who will preside over your deliberations and will speak for you here in court. A form of verdict entitled Special Interrogatories to the Jury has been prepared for your convenience.

(Read)

~~[Explain verdict]~~

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it. When you have agreed upon your verdict, your foreperson should notify the marshal that you have agreed upon a verdict, but the verdict should not be revealed to the marshal. The foreperson shall keep in his or her possession the verdict form until otherwise instructed by the court.

20X

22 JUN 1981

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 79-Z-1012

ASPEN HIGHLANDS SKIING CORPORATION, a Colorado corporation, Plaintiff, v. ASPEN SKIING CORPORATION, a Delaware corporation, BUTTERMILK MOUNTAIN SKIING CORPORATION, a Colorado corporation, and SNOWMASS SKIING CORPORATION, a Colorado corporation, Defendants.	SPECIAL INTERROGATORIES TO THE JURY

We, the Jury, hereby answer these Special Interrogatories as follows:

I. MONOPOLIZATION:

A. Relevant Market

1. Product Market: What do you find to be the relevant product market in this case? (Check one)

✓ (a) Downhill skiing at destination ski resorts

____ (b) Downhill skiing services in Aspen including multi-area, multi-day lift tickets.

____ (c) Other _____ (Describe)

2. Do you find that there is a relevant product sub-market?

✓ Yes

____ No

3. If your answer to Question 2 is yes, identify the relevant product sub-market.

DOWNHILL SKIING SERVICES IN ASPEN INCLUDING MULT-AR, MULTI-DAY LIFT TICKETS.

4. Geographic Market: What do you find to be the relevant geographic market?

✓ North America

____ Aspen Area

____ Other _____ (Describe)

5. Do you find there is a relevant geographic sub-market?

✓ Yes

____ No

6. If the answer to Question 5 is yes, identify the relevant geographic sub-market.

CM ~~ASPEN, Colorado~~ ASPEN AREA

B. Monopoly Power: Do you find by a preponderance of the evidence that during the years 1977 through 1981 the defendants possessed monopoly power, that is, the power to control prices in the relevant market or sub-market or to exclude competition from the relevant market or sub-market?

✓ Yes

____ No

If your answer to the preceding question is "yes," proceed to Question I.C. If your answer to the preceding question is "no," proceed to Question II.

C. Willful Acquisition, Maintenance or Use of Monopoly Power: Do you find by a preponderance of the evidence that the defendants willfully acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident?

✓ Yes

____ No

If your answer to the preceding question is "yes," proceed to Question I.D. If your answer to the preceding question is "no," proceed to Question II.

D. Damages:

Do you find by a preponderance of the evidence that the plaintiff suffered injury in its business as a direct result of the defendants' willful acquisition, maintenance or use of monopoly power?

✓ Yes

____ No

II. CONTRACT, COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE:

A. Contract, Combination or Conspiracy:

1. Do you find by a preponderance of the evidence that the defendants contracted, combined or conspired with some other person or entity not a party to this case to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means?

_____ Yes

__✓__ No

If the answer to the preceding question is "yes," proceed to Question II.A.2. and then to Question II.B. If your answer to the preceding question is "no," proceed to the signature block below and sign and date these Special Interrogatories.

2. Indicate below the name of the person or entity with whom you find that the defendants agreed to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means.

_____

_____

B. Anticompetitive Effects: Do you find by a preponderance of the evidence that any contract, combination, or conspiracy constituted an unreasonable restraint of trade?

_____ Yes

_____ No

If your answer to the preceding question is "yes," proceed to Question II.C. If your answer to the preceding question is "no," proceed to the signature block and sign and date these Special Interrogatories.

C. Damages:

Do you find by a preponderance of the evidence that the plaintiff suffered injury in its business as a direct result of any contract, combination or conspiracy?

_____ Yes

_____ No

III. AMOUNT OF DAMAGES:

If your answer to Question I.D., or II.C., or both, is "yes," indicate below the dollar amount of such actual damages, if any, to which you find by a preponderance of the evidence that the plaintiff is entitled.

$ 2,500,000.00 .

Respectfully submitted,

DATED: June 18, 1981

C. Alan Nott
Foreperson of the Jury

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