[4349] FINAL INSTRUCTIONS OF THE COURT

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In determining whether Plaintiffs have met their burden of establishing that the Defendants threatened a lawsuit alleging infringement of this Sorbothane patent, knowing that there was no basis for the infringement action, you are to determine whether there is clear and convincing evidence that the Defendants threatened the lawsuit with knowledge that there was no infringement.

You must further find that the threatened patent infringement suits were done for the purpose of eliminating competitors in the relevant market.

This next series deals with attempt to monopolize.

The Plaintiff also alleges that it was injured by the Defendants' unlawful attempt to monopolize. In order to win on the claim of attempted monopoly, the Plaintiff must prove each of the following elements by a preponderance of the evidence: first, that the Defendants had a specific intent to achieve monopoly power in the relevant market; second, that the Defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent; third, that there was a dangerous probability that Defendants could sooner or later achieve its goal of monopoly power in the relevant market; fourth, that the Defendants' conduct occurred in or affected interstate commerce; and, fifth, that the Plaintiff was injured [4350] in the business or property by the Defendants' exclusionary or restrictive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, you must find for the Defendant and against the Plaintiff on Plaintiff's attempt to monopolize claim.

If the Plaintiff has shown that the Defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the Defendants' marketing power.

This would deal with specific intent in that area, Ladies and Gentlemen.

In this case, the Plaintiff argued that the Defendant—correction. In this case, the Plaintiff argues that the conduct underlying the claim of attempt to monopolize also constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act.

Specifically, the Plaintiff claims that the Defendant engaged in vertical price fixing, horizontal territory division arrangement, and a group boycott in furtherance of the attempt to monopolize the market for athletic shoe inserts, Polymer shoe inserts, and Sorbothane athletic shoe inserts in the United States.

If you find, on the basis of this conduct, that the [4351] Plaintiff has proved a substantial claim of restraint of trade under the instructions you have received contained in Section 1 of the Sherman Act, then you may infer from such conduct that the Defendants have the specific intent to achieve monopoly power.

Specific intent may be inferred from conduct clearly threatening to competition or clearly exclusionary. That is conduct whose anticipated benefits are dependent upon a tendency to discipline or eliminate competition and thereby enhance a firm's long-term ability to reap the benefits of monopoly power.

Ladies and Gentlemen, I think what we ought to do is take another brief recess. It seems that my time estimate is very much awry. There are more instructions I have to give you.

I think we should complete these before we all go to lunch, and I think, unless I get a substitute here, I think we better just—and the reporter—we ought to break for another ten minutes, and then we'll resume the Charge to the Jury.

If, Ladies and Gentlemen, you would please bear in mind the admonition I previously gave you, we'll be in recess for ten minutes.

(Recess.)

(Jury present.)

THE COURT: Good morning again, Ladies and Gentlemen. [4352] The Court would find all members of the Jury Panel present, together with Counsel.

Continuing, then, Ladies and Gentlemen, the instructions relative to attempt to monopolize.

Another element of the offense of attempt to monopolize is that the Defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent.

An offense of an attempt to monopolize is concerned only with the unreasonable acts or practices that have the actual or reasonable or foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way, or of destroying competition.

The antitrust laws encourage vigorous and honest competition and the mere fact that one company is successful in winning sales or market shares from competitors does not mean that its conduct is exclusionary or anticompetitive.

Conduct that involves the introduction of superior product, the lowering of production costs, the exercise of superior business judgment, or reasonably responding to competition should never be found to be exclusionary or restrictive, but some practices that promote competition

in the short run may be illegal under the Sherman Act if they impair competition in an unnecessarily restrictive way or are used to obtain monopoly by eliminating competition.

Although the exclusionary or restrictive acts need not [4353] be sufficient in themselves to bring about a monopoly, Plaintiffs must prove that the acts or practices engaged in by the Defendants had a significantly exclusionary or restrictive effect of a type which, if continued, are likely to result ultimately in a monopoly.

In some cases, it may be necessary to prove a relevant market and a firm's power in that market in order to show a dangerous probability of success. A dangerous probability of success may be inferred from direct evidence of specific intent, or from conduct of accomplishing the unlawful design, or evidence of conduct alone, provided it is conduct that forms the basis for a substantial restraint of trade or is clearly a threat to competition or clearly exclusionary.

Therefore, if a Plaintiff has not proved that Defendants had power in a relevant market, you still may find for the Plaintiff on the claim of attempt to monopolize if you find from the direct evidence that the Defendant specifically attempted to achieve monopoly power, and that you further find that the Defendants engaged in conduct harmful to competition in furtherance of that intent.

Furthermore, even in absence of direct evidence, not specific intent, you may find for the Plaintiff if you conclude either that the Defendants engaged in conduct that formed the basis for substantial restraint of trade under Section 1 of the Sherman Act under the instructions you have received from [4354] determining

conspiracies or combinations in restraint of trade, or that the conduct was plainly harmful to the competition, or exclusionary.

That is, that its benefits were dependent upon its tendencies to discipline or eliminate competition and enable the Defendant to reap the benefits or monopoly power in the future.

Unilateral refusals to deal are acceptable only in the absence of purpose to create or maintain monopoly. Thus, a business may violate Section 1 of the Sherman Act if it exercises its power to deal with others, including its own distributor, to achieve or maintain a monopoly.

Supply and credit restraints imposed by a manufacturer upon a single distributor in an attempt to put the distributor out of business and further the manufacturer's attempt to monopolize have been held to be sufficient to support a claim for attempted monopoly.

Plaintiffs must also establish that the injury which she claims to have been suffered was an injury to her business or property if she is to recover damages.

The term "business" includes any commercial venture or interest, and you are instructed that a Plaintiff has been injured in its business if you find that she suffered injuries to any of her commercial interests or enterprises as a result of the Defendants' alleged antitrust violations.

[4355] The term "property" includes anything of value which Plaintiff owns or possesses. You are instructed that Plaintiff has been injured in her property if you find that anything of value which she owns or possesses has been damaged as a result of the Defendants' antitrust violations.

You are further instructed that the Plaintiff has been injured in her property if you find that she has paid an inflated price for goods or services, or has lost money as a result of the Defendants' alleged antitrust violations.

Now, Ladies and Gentlemen, we come to an opportunity to place a new tape in our device.

(Pause.)

Continuing our discussion, then, Ladies and Gentlemen, on conspiracy to monopolize, I would define that for you.

There are four essential elements which the Plaintiff must prove in order to establish its claim that the Defendants conspired to monopolize within the meaning of Section 2 of the Sherman Act.

First, that there was a conspiracy between the Defendants to monopolize an appreciable amount of identifiable interstate or foreign commerce of the United States, which commerce Plaintiffs claim to be the market as previously discussed.

Second, that, if so, the Defendants entered into such conspiracy with a specific intent to monopolize that commerce.

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