

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

ESCP CORP., an Illinois corporation.

Plaintiff,

vs.

PREMIER SOURCE USA, INC.,
an Illinois corporation and
ROBERT A. ALLBAUGH,

Defendants.

No. 3:07-cv-0098-JAJ

**FINAL
JURY INSTRUCTIONS**

INSTRUCTION NO. 1
INTRODUCTION / DUTIES / BURDEN

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 so given to the facts as you find them from the evidence.

Counsel will quite properly refer to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you of course are to be governed by the instructions.

You are not to judge 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 in the case.

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.

Whenever a party must prove something, they must do so by the preponderance of the evidence. Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

The fact that some of the parties in this lawsuit are corporations should not affect your decision. All persons are equal before the law and corporations are entitled to the same fair and conscientious decision by you as any other person.

INSTRUCTION NO. 2
EVIDENCE

You shall base your verdict only upon the evidence and these instructions. Evidence is: (1) testimony in person and exhibits received by the Court.

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide. The following are not evidence: (1) statements, arguments, questions and comments by the lawyers; (2) objections and rulings on objections; and (3) anything you saw or heard about this case outside the courtroom.

You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable. In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witness's testimony. There are many factors which you may consider in deciding what testimony to believe, for example: (1) whether the testimony is reasonable and consistent with other evidence you believe; (2) the witness' appearance, conduct, intelligence, memory and knowledge of the facts; (3) whether the witness has given statements in the past that are inconsistent with his or her testimony at trial; and (4) the witness' interest in the trial, their motive, candor, bias and prejudice.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection or lapse of memory or

an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

**INVOCATION OF THE FIFTH AMENDMENT'S PRIVILEGE
AGAINST SELF-INCRIMINATION**

The defendant, Robert Allbaugh, has invoked his privilege under the Fifth Amendment to the United States Constitution to not answer certain questions. Allbaugh has the right to assert this privilege to refuse to answer any question if a truthful answer may tend to incriminate him in a criminal proceeding, but his reliance on such a privilege permits you to infer that his answers to the specific questions he refused to answer would have been adverse to his interests.

INSTRUCTION NO. 3
SUMMARY OF CLAIMS

This is a civil case brought by plaintiff, ESCP Corp., against the defendants, PREMIER SOURCE, USA., INC. (hereinafter called "Premier Source") and ROBERT A. ALLBAUGH.

In its first claim, ESCP alleges Premier Source violated a statute known as the Lanham Act by using ESCP's product images and diagrams as Premier Source's own images and diagrams at Premier Source's website. ESCP alleges such acts were willful and (1) have the likelihood of affecting interstate commerce by deceiving or confusing the public, and (2) constitute a false designation of Premier Source's goods or services by passing them off as Premier Source's when Premier Source has taken ESCP's rack design, images and sales literature as its own, and (3) constitute trade dress infringement. Premier Source denies it is liable to ESCP under the Lanham Act.

In its second claim, ESCP asserts that Premier Source and Allbaugh intentionally interfered with ESCP's prospective business relations and caused monetary damages to ESCP, for which ESCP should be compensated by the defendants.

In its third claim, ESCP asserts that it had trade secrets, and Allbaugh and Premier Source violated the Iowa Trade Secrets law prohibiting the misappropriation and use of these claimed trade secrets. Allbaugh and Premier Source deny this claim.

INSTRUCTION NO. 4
LANHAM ACT

ESCP Corp. has made a claim for recovery based on Premier's use of the images of ESCP's products on Premier's website. This claim is based on a section of the federal statute known as the Lanham Act. The Lanham Act provides that any person who shall use a false designation of origin in connection with any goods or any container for goods shall be liable to any person who is or may be damaged by such false representation.

To establish its claim against Premier, the plaintiff must prove by a preponderance of the evidence the following elements:

1. That the images of ESCP's racks used by Premier are a non-functional feature of plaintiff's product;
2. That images of ESCP's racks are distinctive; and
3. That there is a likelihood of confusion among ordinary prudent purchasers as to whether Premier's racks came from or are otherwise authorized or licensed by some other source, namely, ESCP.

You may find that the element of distinctiveness is satisfied because the images used by Premier on their website have an intrinsic nature that serves to identify a particular source, namely a product of ESCP.

If you find that the plaintiff has established all of these elements, you must find for the plaintiff on this claim.

DAMAGES

If you find in favor of ESCP on its Lanham Act claim, then ESCP is entitled to recover as actual damages the profits realized by Premier resulting from such conduct. Plaintiff is entitled to recover monetary damages, measured by Premier Source's profits gained as a result of the alleged infringement, when this amount can be determined with reasonable certainty. The amount of damages can be approximated, but may not be speculative.

WILLFULNESS

If you find in favor of ESCP under this theory, then you must decide whether the conduct of Premier Source USA was “willful.” You must find Premier Source USA’s conduct was willful if you find by the preponderance of the evidence that, when Premier Source USA violated the Lanham Act, Premier Source knew it was in violation of the Lanham Act, or acted with reckless disregard of that law.

INSTRUCTION NO. 5
INTENTIONAL INTERFERENCE WITH
PROSPECTIVE BUSINESS RELATIONS

To recover under its intentional interference claim against defendant Robert Allbaugh and/or defendant Premier Source, ESCP must prove all of the following elements:

1. The plaintiff has a prospective business relationship with Ohio Rack, Inc., Pilkington Glass or Cardinal Glass;
2. Allbaugh and/or Premier knew of the prospective relationship;
3. Allbaugh and/or Premier intentionally and improperly interfered with the relationship by diverting sales of racks from ESCP to Premier;
4. The interference either caused Ohio Rack, Pilkington Glass or Cardinal Glass not to continue the relationship with ESCP, or prevented ESCP from continuing the relationship; and
5. The nature and amount of ESCP's damages.

If the plaintiff has proved all of the elements as to either or both Allbaugh and Premier, then the plaintiff is entitled to damages in some amount. If the plaintiff has failed to prove all of these elements as to either Allbaugh or Premier, the plaintiff is not entitled to damages from that defendant.

With respect to the above elements, you are instructed that a "prospective business relationship" means a reasonably likely business relationship of financial benefit to the plaintiff. You are further instructed that a defendant's interference with a prospective business relationship is intentional if the defendant either interferes with the prospective business relationship on purpose or knows the conduct is substantially certain to interfere with the prospective business relationship. Finally, a defendant's interference with a prospective business relationship is improper if the defendant's interference is done with the purpose of financially harming or destroying plaintiff's business. A defendant's

actions do not constitute improper interference with prospective business relations if the defendant acts to benefit himself or itself by proper means even if those actions result in incidental interference. If a defendant acts for more than one purpose in interfering with plaintiff's prospective business relationship, the improper purpose must be the predominate purpose. Otherwise, you must find in defendant's favor on this claim.

In deciding whether defendant Allbaugh's conduct was improper, you may consider that an employee has a duty of loyalty to his employer. This duty, which exists during the employment period, prevents an employee from engaging in any other service or business that intentionally and improperly interferes with the employer's prospective business relations.

DAMAGES

If you find in favor of ESCP on its Intentional Interference with Prospective Business Advantage claim against either or both defendants, then ESCP is entitled to recover the profits that ESCP lost as a result.

INSTRUCTION NO. 6
MISAPPROPRIATION OF TRADE SECRETS

To recover against either defendant under plaintiff's third claim alleging misappropriation of trade secrets, the plaintiff must prove all of the following propositions:

1. The customer lists, billing rates, labor rates, production drawings, material specifications, fabrication job costs, fabrication job charges, quality control methods or financial information of ESCP constitute trade secrets.
2. The defendant misappropriated ESCP's trade secrets.
3. The misappropriation of the trade secrets was a proximate cause of damage to the plaintiff.

The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct. "Substantial" means that the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

4. The nature and extent of damage.

If the plaintiff has failed to prove any of these propositions against a defendant, the plaintiff cannot recover damages from that defendant. If the plaintiff has proved all of these propositions against a defendant, the plaintiff is entitled to recover damages in some amount from that defendant.

A "trade secret" is any formula, pattern, compilation, program, device, method, technique or process which

1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, persons other than plaintiff; and
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In determining whether the customer lists, billing rates, labor rates, production drawings, material specifications, fabrication job costs, fabrication job charges, quality control methods or financial information of ESCP constitute "trade secrets," you may consider the following factors:

- (a) the extent to which the information is known outside of plaintiff's business;
- (b) the extent to which it is known by employees and others involved in plaintiff's business;
- (c) the extent of measures taken by the plaintiff to guard the secrecy of the information;
- (d) the value of the information to plaintiff and to plaintiff's competitors;
- (e) the amount of effort or money expended by plaintiff in developing the information;
- (f) the ease or difficulty with which the information could be properly acquired or duplicated by others.

A trade secret is misappropriated if it is:

1. Acquired by improper means or from a person known to the defendant(s) to have acquired it by improper means,
2. Disclosed or used by a person who acquired it by improper means or from a person known to have acquired it by improper means,
3. Disclosed or used by a person who, at the time of the disclosure or use, knows that the trade secret is acquired under circumstances requiring its secrecy to be maintained or its use limited,
4. Disclosed or used by a person who at the time of disclosure or use knows that the trade secret is derived from or through a person who acquired it under circumstances requiring its secrecy to be maintained or its use limited, or

5. Disclosed or used by a person who, before a material change in the person's position, knows that the information is a trade secret and that the trade secret has been acquired by accident or mistake.

"Improper means" include theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy or espionage.

DAMAGES

IF you find in favor of ESCP on its Misappropriation of Trade Secrets claim, then ESCP is entitled to recover the profits that the defendant received as a result of the misappropriation.

PUNITIVE DAMAGES

ESCP also makes a claim for punitive damages on its Trade Secrets Act claim. You are entitled to, but not required to, award ESCP punitive damages. The decision to award punitive damages, and the amount of those damages if you decide to award them, are within your discretion. Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence that the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all the evidence including:

1. The nature of defendant's conduct.
2. The amount of punitive damages which will punish and discourage like conduct by the defendant in view of his or its financial condition.
3. The plaintiff's actual damages.

INSTRUCTION NO. 7
DAMAGES

If you find in favor of the plaintiff on one or more of its claims, then the plaintiff is entitled to recover damages. Keep in mind that in determining damages, you must use your sound judgment based upon impartial consideration of the evidence. The amount you assess for any item of damage must not exceed the amount caused by the opposing party as proved by the evidence. In awarding damages, you must not engage in speculation, guess or conjecture. The damages must have a reasonable basis in the evidence, but need not be proven with precision. Also your judgment must not be exercised arbitrarily or out of sympathy or prejudice for or against the parties.

DUPLICATIVE DAMAGES & QUOTIENT VERDICT

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. Further, in arriving at an item of damage you cannot arrive at a figure by taking down an estimate of each juror as to an item of damage, and agreeing in advance that the average of those estimates shall be your item of damage.

INSTRUCTION NO. 8
DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach 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.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Your verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court security officer that you are ready to return to the courtroom.

DATED this 12th day of June, 2009.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

ESCP CORP.,

Plaintiff,

vs.

PREMIER SOURCE USA, INC.,
ROBERT ALLBAUGH, and B & C
SALES, INC.,

Defendants.

No. 3:07-cv-00098-JAJ

**VERDICT
FORM**

1. ESCP Corp. v. Premier Source USA, Inc.

(Answer Part A or Part B)

_____ A. We, the jury, find in favor of ESCP Corp. and against Premier Source USA, Inc. on the following claim(s):

_____ Lanham Act

_____ Intentional Interference With Prospective Business Relations

_____ Misappropriation of Trade Secrets

_____ B. We, the jury, find in favor of Premier Source USA, Inc., and against ESCP on all of ESCP's claims.

If you found in favor of ESCP on the Lanham Act Claim, was Premier Source USA, Inc.'s conduct "willful" as that term is defined in Instruction No. 4?

_____ Yes

_____ No

2. **ESCP Corp. v. Robert A. Allbaugh**
(Answer Part A or Part B)

_____ A. We, the jury, find in favor of ESCP Corp. and against Robert A. Allbaugh on the following claim(s):

_____ Intentional Interference With Prospective Business Relations

_____ Misappropriation of Trade Secrets

_____ B. We, the jury, find in favor of Robert A. Allbaugh, and against ESCP on all of ESCP's claims.

Answer Question 3 only if you found in favor of ESCP in #1A above.

3. We award the following damages against Premier Source USA, Inc.

Lanham Act Claim (Premier's profits) \$ _____

Intentional Interference With Prospective Business Relations
(ESCP's lost profits) \$ _____

Misappropriation of Trade Secrets
Premier's profits \$ _____

Punitive Damages \$ _____

Total \$ _____

Answer Question 4 only if you found in favor of ESCP in #2A above.

4. We award the following damages against Robert A. Allbaugh

Intentional Interference With
Prospective Business Relations
(ESCP's lost profits) \$ _____

Misappropriation of Trade Secrets
Allbaugh's profits \$ _____

Punitive Damages \$ _____

Total \$ _____

If you awarded damages against both defendants for the intentional interference with prospective business relations claim, answer Question 5 which will be used by me to avoid awarding the same damages twice.

5. Are the damages awarded against both defendants awarded to compensate for the same or different lost profits?

_____ Same Lost Profits _____ Different Lost Profits

Date: _____

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror