UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IRA GREEN, INC., Plaintiff,	)	
v.	)	C.A. No. 10-207-M
MILITARY SALES & SERVICE CO., Defendant.	)	

JURY INSTRUCTIONS

I. GENERAL INSTRUCTIONS

Now that you have heard all of the evidence and the arguments of counsel, it is my job to instruct you on the law that is applicable to this case.

I will send a written copy of my instructions into the jury room.

A. PROVINCE OF THE COURT AND JURY

It is your duty as jurors to follow the law as I state it to you. You are not to be concerned with the wisdom of any rule of law stated by me. It is your duty to apply that law that I am about to give you to the facts of the case as you determine those facts to be from the evidence in this case.

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

Further, nothing I say in these instructions and nothing that I have said or done during the trial is to be taken as an indication that I have any opinion about the facts of the case. I do not. It is not my function to determine the facts, but rather it is your function to do so.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All parties --

and the law -- expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences. All parties are entitled to the same fair trial at your hands. All parties stand equal before the law, and are to be dealt with as equals in a court of justice.

B. EVIDENCE IN THE CASE

The evidence from which you are able to decide what the facts are consists of: the sworn testimony of witnesses and the exhibits that have been received into evidence.

You are to consider only the evidence that has been properly put before you in determining the facts in this case. Evidence that the court admits in full is properly before you for your consideration; evidence that this court has stricken or refused to admit is not a proper subject for your deliberations and should not be given consideration by you. Admitted evidence will be available to you in the jury room for consideration during your deliberations.

It is the duty of counsel to protect the rights and interests of his or her client, and in the performance of that duty counsel freely may make objections to the admission of proffered evidence and should not, in any manner, be penalized for doing so.

The fact that the Court admitted evidence over objection should not influence you in determining the weight you should give such evidence. Nor should statements made by counsel, either for or against the admission of such evidence, influence your determination of the weight you will give the evidence, if admitted. In other words, you should determine the weight you will give such evidence on the basis of your own consideration of it and without regard to the ruling of the Court or the statements of counsel concerning the admissibility of such evidence.

C. NOT EVIDENCE

Certain things are not evidence, and you may not consider them in deciding what the facts are.

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

2. Questions and objections by lawyers are not evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

D. EVIDENCE – DIRECT, INDIRECT, OR CIRCUMSTANTIAL

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

As a general rule, the law makes no distinction between direct or circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

E. INFERENCES

In your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are allowed to make reasonable inferences from the evidence.

Inferences are deductions or conclusions that reason and common sense lead you to draw from facts that have been established by the evidence in this case. Inferences, however, may not be based on speculation or conjecture. They must be based on evidence. Let me give you an example of an inference. If your mailbox was empty when you left home this morning, and you find mail in it when you go home tonight, you may infer that the letter carrier delivered the mail. Now, obviously, you didn't see the letter carrier deliver the mail, but from the fact that it was empty this morning and is filled tonight, you can properly infer that the letter carrier came in the interim and delivered the mail. That is all that we mean by an inference. You are permitted to draw reasonable inferences that seem justified in light of your experience, and from facts that you find have been proven.

F. CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;

2. the witness's memory;

3. the witness's manner while testifying;

4. the witness's interest in the outcome of the case and any bias or prejudice the witness may have;

5. whether other evidence contradicted the witness's testimony; and

6. the reasonableness of the witness' testimony in light of all the evidence.

After making your own judgment, you may believe everything a witness says, or part of it, or none of it at all. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact.

G. DEPOSITION TESTIMONY

During the trial of this case, certain testimony has been read to you by way of deposition and presented to you by video, consisting of sworn recorded answers to questions asked of the witness in advance of trial. Such testimony is entitled to the same consideration, and is to be considered by the jury in the same way as if the witness had been present and had testified from the witness stand.

H. OPINION EVIDENCE - EXPERT WITNESS

While the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions, an exception exists as to those persons whom we refer to as expert witnesses. These are witnesses who, by education and experience, have become expert in some art, science, profession, or calling, and thus may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

If testimony from an expert witness is to have any evidentiary value, it must speak in terms of "probabilities" rather than mere "possibilities." Although absolute certainty is not required, the conclusions of an expert must be reached to a reasonable degree of certainty – that

is, to a probability. In order for an expert's opinion to be considered by you, it must have substantial probative value and not be based on speculation, conjecture, or surmise.

You should give an expert opinion such weight as you may think it deserves. If you conclude that the reasons given in support of the expert's opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

I. BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE

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

To establish by "a preponderance of the evidence" means to prove that something is more probably true than not true. In other words, if you were looking at opposite ends of a scale, the plaintiff's evidence would have to make one end of the scale tip somewhat to its side.

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find," I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

II. CASE-SPECIFIC INSTRUCTIONS

A. THE PLAINTIFF'S CLAIMS

This is a civil case brought by a company called Ira Green, Inc. It asserts three claims against Military Sales & Service – 1) tortious interference with its alleged business contracts that Ira Green had with AAFES, J.L. Darling, Omega Pacific, and Petzl, 2) tortious interference with prospective business relationships, and 3) defamation. You are asked to determine whether MSS is liable for any alleged tortious interference with contracts and business relationships and/or

defamation of Ira Green's products and if so, how much money, if any, to award Ira Green in damages.

MSS denies each of these claims.

The elements of the first two claims somewhat overlap so I will tell you about them together.

B. TORTIOUS INTERFERENCE WITH CONTRACT

In order to prove its claim for tortious interference with contract, Ira Green must prove:

1) the existence of a contract or contracts;

2) that MSS knew of the contract or contracts;

3) that MSS intentionally and improperly interfered with Ira Green's contract or contracts; and

4) that MSS's interference caused damages to Ira Green.

I will first define what a contract is for you. A contract is an agreement that is legally binding on both parties to the agreement. A contract need not be in any particular form or words, and may be either written or oral. The key factor in determining whether a contract exists is the intent of the parties as evidenced by their acts and the surrounding circumstances. In order for a contract to be formed, both parties must manifest agreement to all essential items of the contract and an intent to be bound by it. There can be no contract if only one party consents to the terms or agrees to be bound.

C. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

Ira Green's second claim is for interference with prospective business relationships. In order to prove its claim, Ira Green must prove:

1) the existence of a business relationships or expectancies;

2) that MSS knew of the business relationships or expectancies;

3) that MSS intentionally and improperly interfered with Ira Green's business relationships or expectancies; and

4) that MSS's interference caused damages to Ira Green.

Now I will define what a "business relationship" is for you. A business relationship consists of a reasonable expectation that the Plaintiff would enjoy some economic advantage or benefit from a prospective business relationship with another. It requires proof that such a relationship existed or would have existed but for the Defendant's actions.

So, the first claim involves intentional and improper interference with a contract or contracts and the second claim involves intentional and improper interference with a prospective – or future – business relationship. Other than that, the elements of the claims are one in the same.

D. INTENTIONAL AND IMPROPER INTERFERENCE DEFINED

Intentional interference is an element of both tortious interference claims. I will now define the term for you. Ira Green must show that MSS acted both intentionally and for an improper purpose when allegedly interfering with a contract or contracts or prospective business relationships. No showing of actual malice is necessary; rather, a showing of legal malice, or an intent to do harm without justification will suffice.

In determining whether MSS acted improperly, you may consider: 1) the nature of MSS's conduct, 2) MSS's motive, 3) the contractual interest with which the conduct interferes, 4) the interest sought to be advanced by MSS, 5) the balance of the social interest in protecting freedom of action of MSS and the contractual freedom of Ira Green, 6) the proximity of MSS's conduct and the interference complained of, and/or 7) the parties' relationship.

E. DEFENSES – JUSTIFICATION

A defendant is not liable simply for committing an intentional act that interferes with a plaintiff's contracts or business relationships. The interference also must be impermissible or unjustified. In other words, a defendant would not be liable for legitimately competing with a plaintiff for business.

If you find that Ira Green has proven that MSS acted intentionally and for an improper purpose, the burden shifts to MSS to prove that its interference was justified. Many factors are instructive in determining whether an alleged interference with contracts or business relationships occurred without justification or was otherwise improper. These include the nature of the actor's conduct, the interests of the party with whom the actor's conduct interferes, and the relations between the parties.

If you find that MSS was justified in interfering with Ira Green's contracts and/or business relationships, you should find that MSS is not liable for tortious interference with contracts and/or business relationships.

F. DEFAMATION

Ira Green's third claim is for defamation. To prevail on its defamation claim, Ira Green must prove:

(1) that MSS made a false and defamatory statement concerning Ira Green;

(2) MSS published the unprivileged publication to a third party;

(3) that MSS knew or should have known that the statement was false or would create a false impression; and

(4) Ira Green suffered damages as a result.

An essential element in a defamation action is that the defamatory statement must be false. A defamatory statement in this case would consist of any words, if false, imputing conduct that injures Ira Green's reputation, or which tends to degrade it in society or bring it into public hatred or contempt.

Ordinarily, opinion statements are not defamatory. Defamatory statements by definition must contain or imply false statements of facts, not statements of opinion, and the statements must defame a person or corporation. There is an exception to this generality – an opinion statement is defamatory if it implies the existence of undisclosed facts that are defamatory – that is, they are provable as false.

In this case, Ira Green has alleged that MSS made defamatory statements about the quality and durability of Ira Green's Storm Saf paper. You must decide if MSS's alleged statements were provably false or were opinions that would leave a false impression that those statements were based on undisclosed defamatory facts.

G. DEFAMATION – DEFENSES – TRUTH

In its defense to Ira Green's defamation claim, MSS contends that the statements it made about the Storm Saf paper were true. Truth is a complete defense in a defamation action no matter how much harm is done by the statements. Ira Green has the burden of establishing that the statement complained of was false. If you find that MSS's statements were true, then you must find for MSS on the defamation claim.

H. DAMAGES – GENERALLY

I will now turn to the question of damages. In so doing, this Court does not intend to indicate that it is of the opinion that MSS is liable or that Ira Green is owed damages. If you find that MSS is not liable, you will not consider the question of damages.

A party seeking damages must prove the existence and extent of its damages. In other words, you may make an award of damages only to the extent that you find damages have been proven by a preponderance of the evidence by the plaintiff. Damages are defined in the law as that amount of money that will compensate an injured party for the harm or loss sustained. The rationale behind damages is to restore a person to the position he/she was in prior to the harm or the loss. Damages, then, is the amount of money that will replace, as near as possible, the loss or harm proximately caused by a defendant's conduct.

The damages you award must not be oppressive or unconscionable, and you may assess only such damages as will fairly and reasonably compensate plaintiff. You must confine your deliberations to the evidence, and you must not base an award of damages or the amount of any such award on speculation or conjecture. At the same time, damages do not need to be calculated or proved with mathematical exactitude; all that is required is that they are based on reasonable and probable estimates. In making an award of damages, you must determine the precise amount to be awarded.

I will now discuss the type of damages sought by Ira Green in this case.

Ira Green seeks to be compensated for the tortious interference and defamation claims against MSS resulting from MSS's actions. If you find that MSS tortiously interfered with Ira Green's business contracts and/or prospective business relationships and/or defamed its products, you must consider whether and, if so, in what amount, Ira Green is entitled to recover money damages from MSS on the actual harm MSS's conduct caused to its business.

III. FINAL PROCEDURAL INSTRUCTIONS

Ladies and Gentleman, in a moment I will dismiss you so that you may commence your deliberations. However, before I do that I need to give you some instructions about the procedures you must use in the course of your deliberations.

As I said at the beginning of my instructions, it goes without saying that prejudice, sympathy or compassion should not be permitted to influence you in the course of your deliberations. From what I have said I do not and did not mean to imply that you should approach your consideration of this case in an intellectual vacuum. You are not required to put aside or to disregard your experiences and observations in the ordinary, everyday affairs of life. Indeed, your experiences and observations in the ordinary, everyday affairs of life are essential to your exercise of reasonably sound judgment and discretion in the course of your deliberations; and it is your right and duty to consider the evidence in the light of such experiences and observations.

During your deliberations, you must not communicate with or provide any information to anyone outside of the jury room by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, or computer. You may not communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations.

Now, in order for you to return a final verdict, your decision must be unanimous. That means that you cannot return a verdict unless and until all eight of you are in agreement as to the verdict.

Therefore, in the course of your deliberations and in your consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open to conviction with respect to the point in dispute so that you will not be precluded or prevented from achieving a unanimous verdict by mere stubbornness. It is your right to maintain your conviction. Each vote of each juror is as important as the vote of any other juror, and you need not give up your sincerely held conviction simply because a majority holds to the contrary.

I am designating juror #8, Mr. Murphy, as the Foreperson of this jury. Mr. Murphy, it will be your responsibility to organize the group and facilitate organized and healthy deliberations. The Foreperson's opinion, voice, or vote, however, is no more meaningful than any other juror.

When you are in the jury room, you will be provided with the evidence that has been admitted in this case. It may take us a few minutes to gather it up, but as soon as we do it will be brought to the jury room.

You will also be given a verdict form. When you have reached a verdict, the Foreperson will fill out that form and sign it. Once the verdict form is complete, you will inform the Court Security Officer.

[REVIEW OF VERDICT FORM]

If, in the course of your deliberations, you deem it necessary to be further instructed or assisted by the Court in any way, the Foreperson should reduce such request or question to writing, sign it, and give it to the Court Security Officer in whose charge you will now be placed. The Court Security Officer will then bring such written request to me and I, in consultation with

the attorneys, will determine an appropriate response. Other than this method, please do not attempt to communicate privately or in any other way with the Court or with anyone outside the jury room.