JURY

JURY INSTRUCTIONS

VISUAL CREATIONS, INC. V. IDL WORLDWIDE, INC.

Duty of Jury to Find Facts and Follow Law

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. Also, you must not read into these instructions or into anything the court may have said or done as giving any suggestion as to what verdict you should return - that is a matter entirely up to you.

You should not worry about memorizing or writing down all of the instructions as I state them, because I will send into the

jury room a written copy of my instructions. However, you must know that the law is as I will give it to you from the bench; the written copy is merely a guide to assist you.

What Is Evidence

I want to review with you what you can consider as evidence for making your decision. The evidence from which you are able to decide what the facts are consists of:

(1) the sworn testimony of witnesses;

(2) the exhibits which have been received into evidence; and

(3) any facts to which the lawyers have agreed or stipulated.

What Is Not Evidence

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their openings 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. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of 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, or that you have been instructed to disregard, 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.

Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eye witness. Circumstantial evidence is proof of one or more facts from which you could find another fact.

You should consider both kinds of evidence. As a general rule, the law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Direct evidence can prove a material fact by itself. It does not require any other evidence. It does not require you to draw any inferences. A witness's testimony is direct evidence when the witness testifies to what he saw, heard, or felt. In other words, when a witness testifies about what is known from his own personal knowledge by virtue of his own senses, what he sees, touches, or hears-that is direct evidence. The only question is whether you believe the witness's testimony. A document or physical object may also be direct evidence when it can prove a material fact by itself, without any other evidence or inference. You may, of course, have to determine the genuineness of the document or object.

Circumstantial evidence is the opposite of direct evidence. It cannot prove a material fact by itself. Rather, it is evidence

that tends to prove a material fact when considered together with other evidence and by drawing inferences. There is a simple example of circumstantial evidence that I used at the beginning of this trial that you may recall.

Assume that when you got up this morning it was a nice, sunny day. But when you looked around you noticed that the streets and sidewalks were very wet. You had no direct evidence that it rained during the night. But, on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to infer that it had rained during the night.

Not all circumstantial evidence presents such a clear compelling inference; the strength of the inferences arising from circumstantial evidence is for you to determine. It is for you to decide how much weight to give to any evidence.

Inference from circumstantial evidence may be drawn on the basis of reason, experience, and common sense. Inferences may not, however, be drawn by guesswork, speculation, or conjecture.

The law does not require a party to introduce direct evidence. A party may prove a fact entirely on circumstantial evidence or upon a combination of direct and circumstantial evidence. Circumstantial evidence is not less valuable than direct evidence.

You are to consider all the evidence in the case, both direct and circumstantial, in determining what the facts are, and in arriving at your verdict.

Credibility of Witnesses

In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it at all. 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's testimony in light of all the evidence.

Witnesses - Number - Weight of Testimony

In evaluating the testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in the light of all of the evidence, you believe that the witness is mistaken or has testified falsely or that he or he is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness's testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines where the weight of the evidence lies. Rather, it is the quality of the witnesses' testimony that counts.

Thus, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced. If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of the evidence lies on the side of that witness.

Similarly, just because there may be more witnesses testifying on one side of an issue than on the other does not

mean that the weight of the evidence lies in favor of the greater number of witnesses. Once again, it is the credibility or quality of the testimony that determines whise the weight of the evidence lies.

Corporations

The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this case. At all times, you should consider treating this matter as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life or in the community. Corporations act through their agents and employees.

Burden of Proof - Fair Preponderance

Although the law generally imposes on the Plaintiff the responsibility or burden of proving its claim, the burden of proof in this case is more complicated. That is, which I will further explain later on, Defendant IDL Worldwide, Inc. ("IDL") has the burden of proof on a certain issue and Plaintiff Visual Creations, Inc. ("VCI") has the burden of proof on a separate issue. For now, you should remember that the burden of proof in this case stays with the party making the claim in question. For instance, where one party has the burden of proof, it is not up to the other party to disprove the claim. The party with the burden must prove the things it claims by what is called a fair preponderance of the evidence, which I will now define in more detail.

I have just told you that the burden of proof in this case is on the party making the claim in question. I will now describe in detail just what that party must prove in order to prevail on ~~his~~ its claim.

In this case, the party must prove its claim by what the law refers to as "a fair preponderance of the evidence" which is another way of saying that the party must prove them by "the greater weight of the evidence."

To put it another way, you must be satisfied that the evidence shows that what the party making a claim is claiming is "more probably true than not."

Do not confuse the burden of proving something by a fair preponderance of the evidence with the burden of proving something beyond a reasonable doubt. As most of you probably know or have heard, in a criminal case the prosecution must prove the defendant is guilty beyond a reasonable doubt. That is a very stringent standard of proof. However, this is not a criminal case. Therefore, in order to prevail, the party need not prove its claim beyond a reasonable doubt; it need only prove it by a fair preponderance of the evidence.

Perhaps the best way to explain what is meant by a fair preponderance of the evidence is to ask you to visualize an old fashioned scale with two counter balancing arms and use it to mentally weigh the evidence with respect to the claim being made by the party.

If, after you have heard all the evidence relevant to the claim, you determine that the scale tips in favor of the party with the burden of proof, no matter how slightly it may tip, then that party has sustained its burden of proving that particular claim to you by a fair preponderance of the evidence because it has made the scale tip in its favor.

If, on the other hand, you determine that the scale tips in favor of the other party, or that the scale is so evenly balanced that you cannot say whether it tips one way or the other, then the party with the burden has failed to prove its claim by a fair preponderance of the evidence because it has not made the scale tip in its favor.

Specific Burden of Proof (Burden Shifting)

In this case, IDL claims that the IDL Purchase Order, dated January 24, which includes an arbitration provision, represents the parties' agreement. IDL has the initial burden of proving, by a preponderance of evidence, that the IDL Purchase Order represents the parties' agreement. This will be the first question you must answer.

VCI denies that this Purchase Order represents the parties' agreement. Instead, VCI claims that an agreement was reached by an email exchange culminating in the email IDL sent on January 18, 2017. VCI has the burden of proving, by a preponderance of the evidence, that the agreement between the parties formed at that moment. So if you answer no to the first question, this will be the second question you must answer.

Now, if you conclude that the agreement between the parties was reached on January 24, then the agreement includes the arbitration provision and there are no further questions for you to answer.

If, however, you conclude that an agreement between the parties formed on January 18, then you must proceed to answer several other questions.

First, IDL contends that even if the parties reached an agreement on January 18, the parties' prior course of dealing

effectively incorporated an arbitration provision; you will need to decide this question.

Second, IDL contends that even if an arbitration provision was not incorporated by the parties' prior course of dealing, the agreement was modified by virtue of the January 24 Purchase Order.

Parties to a contract may modify their contracts either explicitly in writing or through their course of dealing. You will need to decide whether that occurred here.

Finally, IDL contends that even if the agreement between the parties formed on January 18, that it was subsequently amended and superseded by the parties on various dates after January 24, the date of the Purchase Order. Thus, IDL claims that the arbitration provisions in the Purchase Orders associated with these changes were made part of these subsequent amendments.

Specific Claims

I am now going to instruct you on the specific law that applies to this case. The law will guide you as to the factual determinations you must make. You must accept the law that I give you, whether you agree with it or not.

Plaintiff VCI and Defendant IDL agree that they formed an agreement for VCI to make and IDL to buy certain custom-built in-store retail displays for flat-screen televisions made by Samsung. But the parties disagree on the question of when the agreement was formed, and what was included. Stated differently, the parties diverge as to what makes up, and what doesn't make up, their agreement. Put simply, this is the question you must answer here: at what point did the parties form a contract, and what did that contract include?

A contract is a legally enforceable agreement made between two or more entities. A contract may be formed in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of such a contract. An agreement sufficient to constitute a contract may be found even though the moment of its making is not determined.

Before a contract can be created, the agreement between the parties must be a mutual one. That is, the parties must share a mutual desire to be legally bound by the material contract terms. Material contract terms are the important or

substantial terms, i.e., those terms which are more than mere inconsequential details. Importantly, in deciding whether there was an agreement, it is the parties' outward and objective manifestations of assent rather than their undisclosed or subjective intentions that are important.

In determining whether the parties reached an agreement, you may consider the nature, the purpose, and the circumstances surrounding the transaction, including the parties' course of performance, course of dealing, and usages of trade in the pertinent industry.

You should also note that under the law the failure to read a contract is no excuse and cannot justify avoidance of contract terms. Although a party's argument that font size is too small to read does not automatically mean there was no agreement, it may be relevant to whether there was an agreement between the parties.

A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction, which can fairly be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. A course of dealing between the parties is relevant in determining the meaning of the parties' agreement, may give particular meaning to specifications of the agreement, and may supplement or

qualify the terms of the agreement. A writing that either party contends was intended as a final expression of their agreement may be explained or supplemented by the parties' prior course of dealing. Such a writing is to be read on the assumption that the course of prior dealings between the parties was taken for granted by the parties when the document was created.

A "course of performance" refers to the parties' conduct during their performance of a particular agreement, when referenced post-agreement. In other words, the parties course of performance in this particular case would refer to their conduct and objective manifestations limited to the context of this particular transaction.

"Usage of trade" is any practice or method of dealing that is followed in a certain community, occupation, or trade, often enough that it justifies an expectation that it should be followed with respect to a particular transaction between the parties.

As I explained, parties may modify or change their contractual agreements. An agreement modifying a contract needs no consideration to be binding. Consideration is a word we use in the law to mean remuneration, payment, or compensation. Consideration is an exchange between the parties of something of value. In other words, it consists

of some benefit which flows to one of the parties or some responsibility undertaken by the other. However, you should remember that consideration is not needed for a modification here.

There are three ways in which IDL claims the agreement, if formed on January 18, was modified to include an arbitration provision. First, IDL claims the parties' prior course of dealing effectively incorporated an arbitration clause; if you find this to be correct, then you need not proceed further. However, if you conclude that the agreement between the parties was not modified by a prior course of dealing, IDL additionally asserts that the arbitration agreement was included by the Purchase Order of January 24. If you reach this question, you will be asked to decide whether the January 24 Purchase Order's inclusion of the arbitration agreement was a "material" alteration. VCI contends that the Purchase Order was a written confirmation of a prior agreement that included additional terms materially altering the agreement. If the inclusion of an arbitration provision was a material alteration, it cannot become part of the agreement. VCI has the burden of proof on this question. A provision is a material alteration if that provision would result in surprise or hardship if one party added it to the agreement without the express knowledge of

the other party. If you find that the arbitration provision materially altered the parties' agreement, then it does not become part of the contract.

The third way IDL contends that the arbitration provision was included is that the parties subsequently amended their agreement in a manner that included the arbitration provision by way of subsequent change orders contained in purchase orders.

Selection of Foreperson and Duty to Deliberate

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that should. Do not come to a decision simply because other jurors think it is right.

Communications with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

Return of Verdict

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.

Verdict - Unanimity Required

In order to return a verdict in this case, all of you must agree as to what that verdict will be. You cannot return a verdict for either party unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

Jury Recollection Controls - Rehearing Testimony

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. Understand that in a short trial, generally, your collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. However keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

Copy of Instructions

I have instructed you on the law that governs your deliberations. As I mentioned at the beginning, I will send into the jury room a written copy of my instructions. You are reminded, however, that the law is as I have given it to you from the bench; and the written copy is merely a guide to assist you.