INSTRUCTION NO. 1

Ladies & Gentlemen of the Jury:

Now that you have heard the evidence and the argument, 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 I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred 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 are of course to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

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 expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his or her 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 defendant as to that claim.

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 is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

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 called them, all exhibits received in evidence, regardless of who may have produced them, and all facts which may have been admitted or stipulated.

Certain deposition testimony was also received in evidence. Depositions contain sworn testimony, with counsel for each party being entitled to ask questions. Deposition testimony was read to you in open court and played for you on a television set from a video tape player. Deposition testimony may be accepted by you, subject to the same instructions which apply to witnesses testifying in open court.

Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

Some evidence is admitted for a limited purpose only. When I instructed you that an item of evidence had been admitted for a limited purpose, you were also instructed to consider it only for that limited purpose and for no other.

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides have stipulated or agreed as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Any evidence as to which an objection was sustained by the Court, and any evidence

ordered stricken by the Court, must be entirely disregarded.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- 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, 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 are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. 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 contrary to 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 or manner while on the stand. Consider the witness' ability to observe the matters as to which he or she has testified, and whether he or she 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 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. 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, and 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 as you may think it deserves. You may accept or reject the testimony of any witness in whole or in part.

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 any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility as you may think it deserves.

If a witness is shown to have knowingly testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

The weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witnesses and which evidence appeals to your minds as being most accurate, and otherwise trustworthy.

At the end of the trial you will have to make your decision based on what you recall of

the evidence. You will not have a written transcript to consult.

Any finding of fact you make must be based on probabilities, not possibilities. It may not be based on surmise, speculation, or conjecture.

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 damage 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 and return a just verdict based upon the evidence in the case and the law as the court has presented it to you.

INSTRUCTION NO. _____

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "opinion witnesses." Witnesses who, by education and experience, have acquired knowledge in some art, science, profession, or calling, may state their opinions as to relevant and material matters, in which they profess to have particular knowledge, and may also state their reasons for the opinion.

You should consider each opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of the witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

As I have told you several times, you, the jury, are the sole judges of the facts of this case.

INSTRUCTION NO. _____

The original written instructions are a part of the court record. You are not permitted to write any notes on the original instructions or to deface them in any way. The original instructions and the exhibits are to be returned to the Court at the conclusion of your deliberations.

The Courtroom Deputy will now escort you to the jury room. Upon reaching the jury room, you are to select one of your members to be the foreperson of the jury. Your foreperson will preside over your deliberations. Your foreperson and all the other members of the jury must sign whatever verdict you reach. You must all agree on your verdict.

When you have agreed upon your verdict, your foreperson should notify the marshal or Courtroom Deputy that you have agreed upon a verdict, but the verdict should not be revealed to anyone. The foreperson shall keep the verdict forms, these instructions, and the exhibits until instructed further by the Court.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the marshal or the Courtroom Deputy, written on the form provided and signed by your foreperson or by one of the members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing on the proper form, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing or orally here in open Court.

You will note from the oath about to be taken by the marshals and the Courtroom Deputy that they too, as well as all other persons, are forbidden to communicate in any way or manner

with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person - not even to the Court - how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

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Craig B. Shaffer
United States Magistrate Judge