

## JURY INSTRUCTIONS

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## PRELIMINARY INSTRUCTIONS

Members of the Jury: Now that you have heard all of the evidence and the argument of the attorneys, it is my duty to give you instructions as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions, and to apply that law to the facts you find from the evidence.

You are not to single out one instruction alone as stating the law. You must consider the instructions as a whole. The fact I have given an instruction on any issue does not mean you should find one way or the other as to that issue.

You are not to be concerned with the wisdom of any rule of law stated by the Court. You must apply the law given in these instructions whether you agree with it or not.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term “evidence” includes the sworn testimony of the witnesses and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls.

Under the Federal Rules of Evidence, experts are permitted to rely on a variety of materials in forming their opinions, including materials that are not in evidence in this case. Evidence does not include documents that may have been seen or considered by experts, or about which experts were examined or cross-examined at trial, unless those documents are also admitted as exhibits in the record. Therefore, while an expert’s testimony is evidence in this case, some of the materials on which the expert relied are not evidence in this case, although an expert is entitled to rely upon them in making his opinion.

You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

In saying that you must consider all the evidence, I do not mean to suggest that you must necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness, including expert witnesses and the weight to be given to the testimony of each witness.

In determining the credibility of any witness, you may properly consider the demeanor of the witness while testifying, frankness or lack of it, and his or her interest in the outcome of the case, if any.

In deciding the facts of this case you must not be swayed by bias or prejudice or sympathy or public opinions. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is not a respecter of persons, a corporation and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

INSTRUCTION NO. 1.

ANTITRUST CLAIMS

The plaintiff in this case, Conwood Company, seeks damages for injury to its business and property, claimed to have been suffered or sustained as a result of alleged violations by the defendant, United States Tobacco Company, of the antitrust laws of the United States.

Section 2 of the Sherman Antitrust Act states that every person who shall monopolize, or attempt to monopolize, any part of the trade or commerce shall be guilty of a violation of the antitrust laws. Conwood claims that U.S. Tobacco unlawfully monopolized the market for moist snuff and also attempted to monopolize the moist snuff market, injuring Conwood. U.S. Tobacco denies these claims.

The word "person" includes not only every individual, but also every corporation, partnership and every other organization, of any kind.

The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage, to the fullest extent practicable, free and open competition in the market place; and to prevent the accomplishment of a monopoly in any business or industry; all to the end that the consuming public may receive better goods and services at a lower cost.

The antitrust laws were enacted for the protection of competition, not competitors. Therefore, Conwood must prove that U.S. Tobacco's acts injured not only Conwood itself, but injured competition in the relevant market.

## INSTRUCTION NO. 2.

### ANTITRUST: Elements of Monopoly Claim

Conwood claims that U.S. Tobacco unlawfully monopolized the moist snuff industry and thereby injured Conwood.

There are three essential elements which Conwood must prove by a preponderance of the evidence in order to establish its claim that U.S. Tobacco has monopolized within the meaning of the antitrust laws:

- 1) That U.S. Tobacco possessed monopoly power in a relevant market;
- 2) That U.S. Tobacco willfully maintained that power through restrictive or exclusionary conduct; and
- 3) That Conwood was injured in its business or property because of U.S. Tobacco's restrictive or exclusionary conduct.

Conwood must prove that each one of these elements is more likely true than not. That is called a preponderance of evidence. If Conwood fails to persuade you on every essential element of Conwood's monopolization claim, then you must find for U.S. Tobacco.

## INSTRUCTION NO. 2.1

### ANTITRUST: Definition of Monopoly Power

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from the market or by preventing new competition from entering the market.

To establish the possession of monopoly power, Conwood need not prove that prices were raised or that competition actually was excluded, but only that U.S. Tobacco had the power to raise prices or exclude competition.

Further, to conclude that U.S. Tobacco had monopoly power, you need not find that U.S. Tobacco could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that U.S. Tobacco did not have the power to control prices or exclude competition, then you must conclude that it did not have monopoly power.

The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was willfully maintained. A person who maintains monopoly power through normal growth and development, as a

consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge.

## INSTRUCTION NO. 2.2

### ANTITRUST: Relevant Market

Before it can be determined whether a person has monopolized a field of competition in a particular line of trade or commerce, it must first be determined what is the "area of effective competition" applicable in this case. In antitrust law, this is known as defining what is called the "relevant market."

Charges of monopolization can only be judged in the framework of the relevant market. The relevant market which plaintiff claims is applicable in this claim is as follows: all moist snuff brands in the United States. Plaintiff must, therefore, prove by a preponderance of the evidence that the relevant market applicable in this case is all moist snuff brands.

In determining the relevant market, the "area of effective competition" must be determined by reference to: (1) a product market and, (2) a geographic market. The parties agree that the relevant geographic market is the entire United States.

In determining the product market, the basic idea is that the products within it are interchangeable as a practical matter from the buyer's point of view. This does not mean that products must be identical to be in the same relevant market. It means that they must be, as a matter of practical fact and the actual behavior of consumers, substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other.

Conwood claims that the relevant market includes all moist snuff brands. U.S. Tobacco denies that this is the relevant market. In sum, you must decide which products compete with each other.

If you find that the relevant market is all moist snuff brands in the United States, then you

must find that Conwood has established this requirement and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

## INSTRUCTION NO. 2.3

### ANTITRUST: Existence of Monopoly Power

If you find that a relevant market of moist snuff has been proved, you should then determine whether U.S. Tobacco possesses monopoly power in that market. There are a number of factors you should consider, none of which is necessarily controlling.

For example, you have heard evidence about U.S. Tobacco's market share. You may infer whether or not monopoly power exists from U.S. Tobacco's share of the relevant market. Market share is a firm's share of total industry sales, shipments, production, capacity, or reserves, expressed as a percentage of the whole. There are a variety of ways to measure market share, but whatever measure you use must be reasonable and consistently applied.

If you determine that U.S. Tobacco's share of the relevant market is less than 50 %, that market share by itself does not permit you to infer that U.S. Tobacco possesses monopoly power. If you determine that U.S. Tobacco's share of the relevant market is 80 % or higher, that is strong evidence of the existence of monopoly power. If you determine that U.S. Tobacco's market share is somewhere between 50% and 80%, you may infer the existence of monopoly power from that share, and the inference is stronger the higher U.S. Tobacco's market share is within that range.

You may also consider the trend in U.S. Tobacco's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor is the number and size of U.S. Tobacco's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to U.S. Tobacco in the relevant market, this may tend to indicate that U.S. Tobacco

has monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in that market, this may be evidence that U.S. Tobacco does not have monopoly power.

You also may consider the history of entry into and exit from the market by other companies. Entry of companies into the market may indicate that U.S. Tobacco lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market, may indicate the existence of monopoly power.

The existence of monopoly power also may be shown by evidence that defendant had the power to raise prices appreciably without a substantial loss of business to competitors or by evidence that U.S. Tobacco had profit margins that were extraordinarily high or maintained high rates of return over a long period of time.

If you find that U.S. Tobacco had monopoly power, then you must find that Conwood has established this requirement and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

## INSTRUCTION NO. 2.4

### ANTITRUST: Willful Maintenance of Monopoly Power

The next element that Conwood must prove is that U.S. Tobacco willfully maintained monopoly power through restrictive or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Restrictive or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining U.S. Tobacco's monopoly power.

To prove U.S. Tobacco acted willfully, Conwood must prove either that U.S. Tobacco engaged in restrictive or exclusionary acts or practices with the conscious object of furthering the dominance of U.S. Tobacco in the relevant market or that this was the necessary direct consequence of U.S. Tobacco's conduct or business arrangements.

You may not find that a company willfully maintained monopoly power if it has maintained that power through the exercise of superior foresight and skill; or because of economic or technological efficiency, including efficiency resulting from scientific research; or because of a change in cost or taste has driven out all but one supplier. The acts or practices that result in the maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

Mere possession of monopoly power, if lawfully acquired, does not violate the antitrust laws. But it is unlawful to use monopoly power, however lawfully acquired, to foreclose

competition, to gain a competitive advantage, or to destroy a competitor. Therefore, a company that has lawfully acquired monopoly power may not use that power to maintain or tighten its hold on the market. Such use may be shown by conduct that depends for its success on the company's monopoly power, as distinguished from conduct that could be successfully employed by firms without monopoly power in the relevant market.

In determining whether there has been an unlawful exercise of monopoly power, you must bear in mind that a company has not acted unlawfully simply because it has engaged in ordinary competitive behavior that would have been an effective means of competition if it were engaged in by a firm without monopoly power, or simply because it is large and efficient. To find U.S. Tobacco liable for monopolization because of the maintenance of lawfully acquired monopoly power through the use of that power, you must determine that U.S. Tobacco actually exercised monopoly power to maintain or tighten its control of the market.

If you find that U.S. Tobacco willfully maintained monopoly power, then you must find that Conwood has established this element and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

## INSTRUCTION NO. 2.5

### ANTITRUST: Injury and Causation

If you find that U.S. Tobacco has violated Section 2 of the Sherman Act as alleged by Conwood, then you must decide if Conwood is entitled to recover damages from U.S. Tobacco.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property caused by the violation.

For Conwood to establish that it is entitled to recover damages, it must prove that it was injured as a result of U.S. Tobacco's alleged violation of antitrust laws. This is sometimes referred to as proving "causation" or "fact of damage." Proving causation does not require Conwood to prove the dollar value of its injury. It requires only that Conwood prove that it was in fact injured by U.S. Tobacco's alleged antitrust violation. If you find that Conwood has established that it was in fact injured, you may then consider the amount of Conwood's damages. It is important to understand, however, that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that Conwood has established that it was in fact injured.

To establish injury, Conwood must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that U.S. Tobacco's alleged illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that some damage flowed to it as a result of U.S. Tobacco's alleged antitrust violation. Conwood is not required to prove that U.S. Tobacco's alleged antitrust violation was the sole cause of its injury; nor need Conwood eliminate all other possible causes of injury. It is enough if Conwood has proved that the alleged antitrust violation was a material cause of its injury. Injury may be established by inference or circumstantial evidence. However, if you find that Conwood's injury was caused

solely by something other than the alleged antitrust violation or if you find that Conwood was not injured, then you must find that Conwood has failed to prove that it is entitled to recover damages from U.S. Tobacco.

### INSTRUCTION NO. 3.

#### ANTITRUST: Elements of Attempt to Monopolize Claim

Conwood also claims that U.S. Tobacco has violated the federal antitrust laws by attempting to monopolize the moist snuff industry in the United States.

There are four essential elements which Conwood must prove in order to establish that U.S. Tobacco was liable for attempted monopolization within the meaning of the antitrust laws:

- 1) That U.S. Tobacco engaged in restrictive or exclusionary conduct;
- 2) That U.S. Tobacco had a specific intent to monopolize in the relevant market of all moist snuff brands in the United States;
- 3) That there was a dangerous probability that U.S. Tobacco would achieve its goal of monopoly power in the relevant market; and
- 4) That Conwood was injured in its business or property by U.S. Tobacco's restrictive or exclusionary conduct.

Conwood must prove that each one of these elements is more likely true than not. That is called a preponderance of evidence. If Conwood fails to persuade you on every essential element of the attempt to monopolize claim, then you must find for U.S. Tobacco.

The definitions of "monopoly power," "relevant market," and "injury and damages" are the same in this claim as they are in the monopoly claim.

INSTRUCTION NO. 3.1

ANTITRUST: Exclusionary or Restrictive Conduct

I have previously instructed you on exclusionary conduct. That instruction applies here as well.

## INSTRUCTION NO. 3.2

### ANTITRUST: Intent

There are several ways in which Conwood may prove that U.S. Tobacco had the specific intent to monopolize. There may be evidence of direct statements of U.S. Tobacco's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant. You must be careful, however, to distinguish between U.S. Tobacco's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

If you find that U.S. Tobacco had the specific intent to monopolize in the relevant market, then you must find that Conwood has established this requirement and you must consider the remaining elements of its attempt to monopolize claim. Otherwise, you must find for U.S. Tobacco.

### INSTRUCTION NO. 3.3

#### ANTITRUST: Dangerous Probability of Success

If you find that U.S. Tobacco had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you also must determine if the evidence shows the next element of attempt to monopolize: namely, that there was a dangerous probability that U.S. Tobacco would sooner or later succeed in achieving monopoly power if it continued to engage in the same or similar conduct. In determining whether there was a dangerous probability of success, you should consider the following factors:

- 1) the market share and power of defendant as compared to its competitors;
- 2) whether U.S. Tobacco's share of the relevant market was increasing or decreasing;
- 3) the actual or probable impact on competition of U.S. Tobacco's restrictive or exclusionary acts or practices; and
- 4) whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real: that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

If you find that there was a dangerous probability of success, then you must find that Conwood has established this requirement and you must consider the remaining elements of its attempt to monopolize claim. Otherwise, you must find for U.S. Tobacco.

#### INSTRUCTION NO. 4.

#### ANTITRUST: Damages

If you find that U.S. Tobacco either monopolized or attempted to monopolize in accordance with these instructions, the law provides that Conwood should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. A defendant's violations of the antitrust laws often create a situation in which it is hard to determine the precise amount of damages suffered by the plaintiff. Conwood's right to be fairly compensated should not be affected by any difficulty you may have in determining the precise amount of the recovery so long as there is a reasonable basis in the evidence for your award. You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

If you find that U.S. Tobacco violated the antitrust laws and that this violation caused injury to Conwood, then you must determine the amount of damages, if any, Conwood is entitled to recover. Damages may include lost profits, destruction of a business or deprivation of the opportunity to engage in a business, or increased costs incurred because of a violation.

If you find that U.S. Tobacco did commit an antitrust violation, then you must calculate the profits, if any, that Conwood lost as a result of U.S. Tobacco's antitrust violation. Profit means net profit: the amount by which Conwood's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. You may calculate net profit in the following way.

You have heard evidence of the market share that Conwood would have had in the

absence of U.S. Tobacco's antitrust violation. You may calculate Conwood's loss of profit by considering market share, evidence of the size of the market, and evidence relating to the profit margin Conwood would have secured on such sales.

You should not interpret the fact that I have given instructions about Conwood's damages as an indication in any way that I believe that Conwood should, or should not, win this claim.

INSTRUCTION NO. 5.

CONVERSION COUNTERCLAIM

U.S. Tobacco has brought a claim of conversion against Conwood. U.S. Tobacco claims that Conwood wrongfully took its property from retail locations.

You will find for U.S. Tobacco if you are satisfied from a preponderance of the evidence:

- 1) That Conwood representatives wrongfully took U.S. Tobacco advertising and display racks from retail locations; and
- 2) That all of the advertising or display racks taken belonged to U.S. Tobacco ; and
- 3) That U.S. Tobacco was damaged thereby.

Otherwise, you will find for Conwood.

If you find for U.S. Tobacco, you may award damages in an amount that will reasonably and fairly compensate U.S. Tobacco.

## INSTRUCTION NO. 6.

### AGENCY

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by a person, then the law holds that person responsible for such acts, the same as if the acts had in fact been done by such person.

A corporation is in law a person, but of course it cannot act otherwise than through its directors, or officers, or employees, or other agents. The law therefore holds a corporation responsible for all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority, as would usually be the case if done in the ordinary course of their employment, or in the ordinary course of the corporation's business.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Every act of every director, or officer, or employee, or other agent, on behalf of, or in the name of a corporation, if done within the scope of his authority, is in law the act of the corporation itself.

INSTRUCTION NO. 7.

VERDICT MUST BE UNANIMOUS

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to the verdict. Your verdict must be unanimous in that all of you must agree to it.

## INSTRUCTION NO. 8.

### NOTES

Now I would like to say something about the notes that you have taken during the trial. Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you have not taken notes, you should rely upon your own independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you have taken notes or not, each of you must form and express your own opinion as to the facts of the case.

You will notice that we do have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

## INSTRUCTION NO. 9.

### DELIBERATION

It is your duty as jurors, to consult with one another, and to deliberate with a view to reach an agreement, if you can do so without violence 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 the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman here in Court.

You will take these forms to the jury room and, when you have reached unanimous agreement your foreperson fill in and sign the forms which set forth the verdict upon which you unanimously agree with respect to each issue in this case; you will then return with your decision to the courtroom.