IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

PSK, LLC d/b/a OVERHEAD DOOR COMPANY OF CEDAR RAPIDS AND IOWA CITY, Plaintiff, vs. RANDY HICKLIN d/b/a A-1 AMERICAN GARAGE DOOR REPAIR and ADVANCED GARAGE DOOR REPAIR; and DANETTA HICKLIN d/b/a A-1 AMERICAN GARAGE DOOR REPAIR and ADVANCED GARAGE DOOR REPAIR, Defendants.	No. 09-CV-105-LRR **FINAL JURY INSTRUCTIONS**

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of trial or during trial are not repeated here.

In considering these instructions, the order in which they are given is not important.

INSTRUCTION NO. 1

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

INSTRUCTION NO. 2

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, you may consider a witness's intelligence, the opportunity a witness had to see or hear the things testified about, a witness's memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

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, a 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.

INSTRUCTION NO. 3

In these instructions you are told that your verdict depends on whether you find certain facts have been proven. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by a preponderance of the evidence. To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proven.

The preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 4

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 5

You have heard evidence claiming certain witnesses made statements before this trial while under oath which were inconsistent with what those witnesses said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You may also use these statements to help you decide if you believe these witnesses. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it, or if you believe it for any other reason.

INSTRUCTION NO. 6

You will remember that certain summaries were admitted in evidence. You may use those summaries as evidence, even though the underlying documents and records are not here. However, the accuracy of those summaries has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way in which they were prepared.

INSTRUCTION NO. 7

The fact that a plaintiff or defendant is a corporation should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

INSTRUCTION NO. 8

To recover on its unfair competition claim, PSK must prove, by a preponderance of the evidence, all of the following propositions:

1. At the time the Hicklins entered the market, the term "overhead" had acquired secondary meaning, as explained in Instructions No. 10 and No. 11;
2. The Hicklins' used the same or a similar word, term or symbol in connection with their goods or services;
3. The Hicklins' conduct was likely to cause confusion, mistake, or to deceive as to the affiliation, connection or association of the Hicklins with PSK, or as to the origin, sponsorship, or approval of the Hicklins' goods and services by PSK, as explained in Instruction No. 12; and
4. PSK was damaged by the Hicklins' conduct.

If PSK has proven all of these propositions, your verdict must be for PSK, unless you find that PSK is not entitled to recover for the reasons stated in Instructions No. 13 or 14.

INSTRUCTION NO. 9

You are instructed that the word "overhead" is generic when used in connection with garage doors. Anyone has the right to use and advertise a generic term as long as it does not use the term in a way that creates a likelihood of confusion as to the origin, affiliation, connection, association, sponsorship or approval of its goods or services.

INSTRUCTION NO. 10

In order to recover on its unfair competition claim, PSK must prove that the public associates the term "overhead" with PSK's products and services. This is known as "secondary meaning." A term acquires secondary meaning when, in the minds of the public, the primary significance of the term is to identify the source of the product or service rather than the product or service itself.

To prove secondary meaning, PSK must show that the term "overhead" has become so associated in the public mind with PSK's goods and services that it serves to identify the source of the goods and services and distinguish them from those of others.

Secondary meaning does not require that the consuming public identify a source by name, but it does require that the public recognize the mark and associate it with a single source.

INSTRUCTION NO. 11

In determining whether the term "overhead" has acquired secondary meaning, you may, but are not required to, consider the following:

1. Consumer testimony;
2. Exclusivity, length and manner of use of the term "overhead";
3. Amount and manner of advertising of the term "overhead";
4. Amount of sales and number of customers;
5. Established place in the market; and
6. Proof of intentional copying.

INSTRUCTION NO. 12

In determining whether a likelihood of confusion exists, you may draw on your common experience as citizens of the community. In addition to this general knowledge, you may, but are not required to, consider:

1. The strength of PSK's mark, "overhead";
2. The similarity between the parties' marks;
3. The degree to which the parties' goods and services are in competition with one another;
4. The Hicklins' intent to confuse;
5. Evidence of actual confusion; and
6. The degree of care reasonably expected of customers or potential customers.

In light of these factors and your common experience, you must determine if customers or potential customers, neither overly careful nor overly careless, would be confused as to the origin, affiliation, connection, association, sponsorship or approval of the Hicklins' goods and services.

INSTRUCTION NO. 13

The Hicklins claim that PSK cannot succeed on its unfair competition claim because the term "overhead" is descriptive of the Hicklins' goods, services or business and that the Hicklins have used the term "overhead" fairly and in good faith solely to describe their goods, services or business.

If the Hicklins have proven this proposition by a preponderance of the evidence, your verdict must be for the Hicklins. If the Hicklins have failed to prove this proposition, then consider whether PSK is entitled to recover under the other instructions.

INSTRUCTION NO. 14

The Hicklins claim that PSK cannot succeed on its unfair competition claim because PSK inexcusably delayed in asserting its claim. To succeed on this defense, the Hicklins must prove, by a preponderance of the evidence, that:

1. PSK had knowledge of the facts of the Hicklins' unfair competition;
2. PSK inexcusably delayed asserting its rights; and
3. The Hicklins were prejudiced by PSK's delay.

If the Hicklins have proven these propositions by a preponderance of the evidence, your verdict must be for the Hicklins. If the Hicklins have failed to prove any of these propositions, then consider whether PSK is entitled to recover under the other instructions.

"Knowledge," as used in this Instruction, means actual knowledge or notice of facts that would cause a reasonably prudent person to investigate further.

INSTRUCTION NO. 15

If you find in favor of PSK on its claim, you must award PSK such sum as you find will fairly and justly compensate PSK for any damages you find it sustained as a direct result of the Hicklins' unfair competition. However, I must explain to you now some matters applicable to all of your determinations of damages.

In arriving at the amount of damages on a claim, you cannot establish a figure by taking down the estimate of each juror as to damages and agreeing in advance that the average of those estimates shall be your award of damages for that claim.

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture. Although the precise amount of PSK's damages may be difficult to determine, that should not affect PSK's recovery. On the other hand, PSK is not to be awarded purely speculative damages. Damages may be awarded only when there is some reasonable basis in the evidence in the case for determining that PSK has in fact suffered a loss, even though the amount of such loss is difficult to determine.

You must not award damages under any of these Instructions by way of punishment or through sympathy. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against any of the parties. The amount you assess for any item of damage must not exceed the amount caused by the wrongful conduct of the Hicklins as proved by the evidence.

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INSTRUCTION NO. 15 (Cont'd)

The fact that I am instructing you on the proper measure of damages should not be considered an indication that I have any view as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance, in the event that you should find that PSK is entitled to damages in accord with the other instructions.

INSTRUCTION NO. 16

If you find for PSK on its unfair competition claim, you must determine PSK's damages. PSK has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate PSK for any injury that was proximately caused by the Hicklins' conduct.

You should consider whether any of the following exists, and if so to what extent, in determining PSK's damages:

1. PSK's lost profits as a result of the Hicklins' unfair competition; and
2. Corrective advertising costs reasonably required to correct any public confusion caused by the Hicklins' unfair competition.

INSTRUCTION NO. 17

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 the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

INSTRUCTION NO. 18

If you find for PSK on its unfair competition claim, as stated in Instruction No. 8, then you must also determine whether the Hicklins acted willfully, that is, knowingly created a likelihood of confusion.

INSTRUCTION NO. 19

If you find that the Hicklins willfully engaged in unfair competition, as stated in Instruction No. 18, then, in addition PSK's damages as described in Instruction No. 16, you may, but do not have to, find that PSK is entitled to the Hicklins' profits attributable to the unfair competition. However, if you find that the Hicklins did not willfully engage in unfair competition, as stated in Instruction No. 18, then you may not award the Hicklins' profits to PSK.

The Hicklins' profits consist of the amount of money in sales that it made due to the unfair competition, after deducting expenses directly associated with those sales. Expenses are all operating and production costs, excluding fixed costs, incurred in producing the sales. PSK has the burden of proving the amount of the Hicklins' sales attributable to the unfair competition. The Hicklins have the burden of proving the expenses associated with those sales.

You may not include in any award of the Hicklins' profits any amount that you included in determining PSK's actual damages.

INSTRUCTION NO. 20

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes, and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 21

In conducting your deliberations and returning your Verdict Form, there are certain rules you must follow. I shall list those rules for you now.

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 each other in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because your decisions 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.

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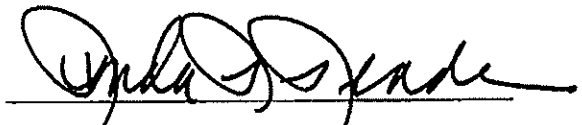
INSTRUCTION NO. 21 (Cont'd)

Fourth, your verdict must be based solely on the evidence and on the law which I have given 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.

Fifth, I am giving you a Verdict Form. A Verdict Form is simply the written notice of the decisions that you reach in this case. The answers to the questions in the Verdict Form must be the unanimous decisions of the jury. You will take the Verdict Form to the jury room, and when you have completed your deliberations and each of you has agreed on the answers to the Verdict Form, your foreperson will fill out the form, and sign and date it. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your decisions. When you have reached your decisions, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return your verdict in accord with the evidence and these instructions.

DATED this 31st **day of** March**, 2011.**



Linda R. Reade, Chief Judge
United States District Court
Northern District of Iowa