

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ACOUSTIC SYSTEMS, INC.,
Plaintiff,

V.

WENGER CORPORATION and
STEVE BRIGHT,
Defendants.

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A-97-CA-436SC

JURY CHARGE

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INSTRUCTIONS FOR THE JURY

MEMBERS OF THE JURY:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you the jury are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

You have heard the closing arguments of the attorneys. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

This is a civil case in which in which Acoustic Systems, Inc. has charged Wenger Corporation and its employee, Steve Bright, with tortiously interfering with prospective and existing contracts, disparaging Acoustic Systems and its products, violating Texas and federal antitrust laws, and competing unfairly. Acoustic Systems has the burden of proving its claims against Wenger and Mr. Bright by what is called a preponderance of the evidence. When more than one allegation is made, as in this case, you should consider each allegation and the evidence pertaining to it independently.

You will be given questions to answer concerning the issues in this case. Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. The parties have agreed to unanimous verdict. Therefore, all of you, as jurors, must agree to each question in order to render a verdict in this case.

I. GENERAL INSTRUCTIONS

A. BIAS—CORPORATE PARTY INVOLVED

Do not let bias, prejudice or sympathy play any part in your deliberations. A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.

When a corporation is involved in actions, of course it may act only through natural persons as its agents or employees. Any authorized action by an official, employee, or agent of a corporation constitutes an action by that corporation. Therefore, the corporation is responsible for any unlawful acts of its officials, employees, or agents made while they were acting within the scope of the authority given them by that corporation or within the scope of their duties as an official, employee, or agent of that corporation. Evidence that an act was done as part of the job assigned to an official or employee of a corporation is sufficient for you to conclude the act was authorized by that corporation.

B. PREPONDERANCE OF THE EVIDENCE

The preponderance of the evidence standard means that a party has to produce evidence which, when considered in light of all of the facts, leads you to believe that what that party alleges is more likely true than not.

C. CONSIDERATION OF THE EVIDENCE

You must consider only the evidence in this case. However, you may draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. You may make deductions and reach conclusions that reason and common sense lead you to make from the testimony and evidence.

There are two types of evidence you may consider. One is direct evidence—such as testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of circumstances that tend to prove or disprove the existence or nonexistence of certain other facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

In determining whether any fact has been proved in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them. The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

You are the sole judges of the credibility or “believability” of each witness and the weight to be given the witness’s testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision, I suggest you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with any party to the case? Did the witness have a good

memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few considerations that may help you determine the accuracy of what each witness said.

The testimony of a witness may be discredited, or given less weight, by showing that the witness testified falsely concerning some important fact, or by evidence that, at some other time, the witness said or did something, or failed to say or do something, which is inconsistent with testimony the witness gave before you during the trial.

D. EVIDENCE OF THE CASE

If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the lawyer's assertion as evidence of that fact. The lawyer's statements are not evidence. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard the fact as proved.

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, the jury must, unless otherwise instructed, accept the Court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, or any testimony, exhibit or conduct that the Court has instructed you to disregard must not be considered by you and must not be used for any purpose in reaching your verdict.

E. ALL AVAILABLE EVIDENCE NEED NOT BE PRODUCED

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

F. IMPEACHMENT BY WITNESSES' INCONSISTENT STATEMENTS

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely about some important fact, or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony he gave at the trial.

You should remember that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth. People may tend to forget some things or remember other things inaccurately. If a witness has made a misstatement, you must consider whether it was simply an innocent lapse of memory or an intentional falsehood, and that may depend upon whether it concerns an important fact or an unimportant detail.

G. DEPOSITION TESTIMONY

Certain testimony was presented to you through a deposition. A deposition is the sworn, recorded answers to questions asked a witness in advance of the trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, that witness' testimony may be presented, under oath, in the form of a deposition. Some time before this trial, attorneys representing the parties in this case questioned this witness under oath. A court reporter was present and recorded the testimony. The questions and answers were read to you or shown to you on video. This deposition testimony is entitled to the same consideration and is to be judged by you as to credibility and weighed and otherwise considered by you insofar as possible in the same way as if the witness had been present and had testified from the witness stand in court.

H. DEMONSTRATIVE EVIDENCE

You will recall during the course of this trial, I admitted certain exhibits, graphs, pictures, and items as demonstrative exhibits. A demonstrative exhibit is an illustration of a witness's testimony. The demonstrative exhibit is not evidence, but is only given to you to assist you in understanding the testimony or evidence given. If your recollection of the evidence differs from the exhibit, rely on your recollection.

I. EXPERT WITNESSES

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field—he is called an expert witness—is permitted to state his opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from the witness's employment or from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he testifies regularly as an expert witness and his income from such testimony represents a significant portion of his income.

J. BURDEN OF PROOF

In deciding whether any fact has been proven, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

K. USE OF NOTES TAKEN BY JURORS

Any notes that you have taken during this trial are only aids to your memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

L. LIMITING INSTRUCTION CONCERNING EXHIBITS

You are instructed that a number of exhibits that were admitted contain in themselves or in their attachments “hearsay” statements. These exhibits and/or attachments were admitted to show the state of mind of the recipient after his review of the exhibit and/or attachment and not for the truth of the statements contained in those exhibits or attachments. The exhibits covered by this instruction are listed as follows:

Plaintiff's Exhibits

Defendants' Exhibits

309	45	325
387	47	359
419	49	365
420	89	366
421	180	369
424	189	372
427	192	375
428	197	384
538	201	386
	203	388
	209	389
	213	390
	227	392
	233	409
	234	
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M. LIMITING INSTRUCTION CONCERNING PROJECTS

You are instructed that Acoustic Systems is not seeking lost profit damages on projects other than the twenty-two (22) projects listed in their expert report by Paul Benoit.

Those projects include:

Appomattox Reg. High School	Judson High School
Belle Chasse High School	Lemont High School
MacArthur High School	Brenham High School
Mansfield High School	Buhler High School
McNeil High School	Colt's Neck High School
Edgewood Fine Arts Academy	Northeastern Illinois Univ.
Emory University	Samuel Clemens High School
Sandra Day O'Connor High School	Francis Scott Key High School
Superstition Skyline High School	Grand Ledge High School
Trinity High School	Howard Payne High School
Westark Community College	Howard W. Blake High School

However, you may consider the testimony you have heard regarding other projects for the purpose of deciding whether Wenger has wrongfully engaged in a pattern of anti-competitive conduct.

II. THE PARTIES' CONTENTIONS

Plaintiff's Contentions

Plaintiff Acoustic Systems contends that Wenger used the following tactics to exclude Acoustic Systems from the market of modular music practice rooms: 1) improperly influencing public school band directors and other school officials to choose Wenger's products; 2) improperly influencing architects to specify the use of Wenger products; 3) improperly disseminating false and disparaging statements about Acoustic Systems; 4) improperly using specifications; and 5) improperly created confusion about Acoustic Systems and its products and Wenger and its products in the marketplace. Acoustic Systems asserts that as a result of Wenger's conduct, Wenger was able to retain its dominance in the marketplace, to cause Acoustic Systems to lose contracts and other business opportunities, and to reap excessive profits. Acoustic Systems further alleges that Wenger's misrepresentations concerning Acoustic Systems' products harmed Acoustic Systems' reputation.

Defendants' Contentions

Defendants Wenger and Steve Bright contend that 1) they have not wrongfully interfered with Acoustic Systems' attempts to sell music practice rooms; 2) they have not unlawfully defamed or disparaged Acoustic Systems or its products; and 3) they have not violated any antitrust laws. Wenger and Mr. Bright assert that Wenger has been engaged in the sale of music education products for over fifty years, and that Wenger's reputation for quality products and its national sales force have contributed to its success. Wenger also asserts that, on the other hand, Acoustic Systems' limited sales force, poor name recognition in the music education market, and spotty track record of its music practice rooms are the primary reasons why Acoustic Systems has not sold more music practice rooms. Wenger and Mr. Bright further contend that Acoustic Systems' failure to win any particular project for the sale of music practice rooms was the result of the independent choice of the customer and the customer's subjective preference for Wenger's rooms over Acoustic Systems' rooms.

III. SUMMARY OF THE ISSUES

I will now summarize the issues that you must decide and for which I will provide instructions to guide your deliberations.

1. Whether Wenger and Mr. Bright have violated the federal or state antitrust laws;
2. Whether Wenger and Mr. Bright have tortiously interfered with any existing contract between Acoustic Systems and one or more third parties;
3. Whether Wenger and Mr. Bright have tortiously interfered with any prospective contracts between Acoustic Systems and one or more third parties;
4. Whether Wenger and Mr. Bright have published statements that have unlawfully disparaged or defamed Acoustic Systems;
5. Whether Wenger and Mr. Bright engaged in unfair competition and false description of their products under the Lanham Act; and
6. If you should find Wenger or Mr. Bright liable, you will then determine what amount, if any, of damages Acoustic Systems has proved by a preponderance of the evidence to have been caused by Wenger's allegedly unlawful conduct.

IV. CLAIMS

ANTITRUST CLAIMS UNDER THE SHERMAN ACT - GENERALLY

The purposes of the antitrust laws are to preserve and advance the system of free and open competition, and to secure to everyone an equal opportunity to engage in business, trade, and commerce. This policy is the primary feature of the private free enterprise system. The law promotes the concept that free competition produces the best allocation of economic resources. However, it recognizes that in the natural operation of the economic system, some competitors are going to lose business while others prosper. An act becomes unlawful only when it constitutes an unreasonable restraint on interstate commerce.

A. UNLAWFUL MONOPOLIZATION

Acoustic Systems alleges that it was injured by Wenger's unlawful monopolization of the relevant market. To prevail on its claim of monopolization, Acoustic must prove each of the following elements by a preponderance of the evidence:

First, that Wenger had monopoly power in a properly defined relevant market;

Second, that Wenger willfully acquired or maintained that power through restrictive or exclusionary conduct;

Third, that Wenger's activities occurred in or affected interstate commerce; and

Fourth, that Acoustic Systems was injured in its business or property because of Wenger's alleged restrictive or exclusionary conduct.

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 that market or by preventing new competition from entering the market.

To establish the possession of monopoly power, Acoustic Systems need not prove that prices were raised or that competition was actually excluded, but only that Wenger had the power to raise prices or exclude competition.

Further, to conclude that Wenger had monopoly power, you need not find that Wenger 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 Wenger did not have the power to control prices or to exclude competition, then you must conclude that it did not have monopoly power.

1. Relevant Market

Defining the relevant market is essential because you are required to make a judgment about whether Wenger has power over prices or competition. To do so, you must be able to determine what economic forces, if any, restrain its freedom to act as it pleases. The most likely and most important restraining force will be competition from other firms and their products. This includes all firms and products that act as real and practical restraints on Wenger's power to set prices as it pleases. All the firms and products that exert this restraining force are considered to be within what is called the relevant market.

There are two aspects you must consider in defining a relevant market. The first is the relevant product market; the second is the relevant geographic market.

The basic idea of a relevant product market is that the products within it are reasonable substitutes from a buyer's point of view; that is, the products compete with each other. This does not mean that the products must be identical to be in the same product market. It means that, as a matter of practical fact and the actual behavior of buyers, the products are reasonable substitutes for the buyer's needs.

There are a number of factors you may consider in determining whether products are reasonable substitutes for each other. The basic test is whether changes in the price of one product cause a considerable number of customers to switch from one product to another. If so, the products are in the same market. You may also consider how people in the industry and the public at large view the products; whether the products have the same or similar characteristics or uses; whether the products have similar prices; whether changes in the price of one product are followed by changes

in the price of the other product; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

In sum, to determine the relevant product market, you must decide which products compete with each other. Products do not have to be identical to be in the same relevant market, but they must compete meaningfully with each other. In this case, the parties dispute what the relevant product market is. Acoustic Systems defines the relevant product market as modular (or prefabricated) music practice rooms. Wenger contends that the relevant product market includes all music practice rooms, whether prefabricated or constructed on-site.

The other aspect of relevant market to be considered is the geographic area within which the products compete. In this case, the parties agree that the relevant geographic market is the United States.

If after considering all of the evidence you find that Acoustic Systems has proved both a relevant market and a relevant geographic market, then you must find that Acoustic Systems has established the relevant market requirement and you must consider the remaining elements of Acoustic Systems' monopolization claim. If you find that Acoustic Systems has not proved a relevant product market, then you must find for Wenger and against Acoustic Systems on this claim.

2. Existence of a Monopoly Power

If you find that a relevant market has been proved, you should then determine whether Wenger has monopoly power in that market. There are a number of factors you should consider, none of which is necessarily controlling:

- (1) Wenger's share of the relevant market;
- (2) The trend in Wenger's market share;
- (3) The number and size of Wenger's competitors;
- (4) The history of entry into and exit from the market by other companies;
- (5) Whether Wenger had the power to raise prices appreciably without substantial loss of business to competitors; and

(6) Whether Wenger had profit margins that were extraordinarily high or maintained extraordinarily high rates of return over a long period of time.

In considering these six (6) factors, you are further instructed as follows.

You may infer whether or not monopoly power exists from Wenger'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 Wenger's share of the relevant market is less than fifty (50) percent, that market share by itself does not permit you to infer that Wenger has monopoly power. However, a market share of less than fifty (50) percent does not preclude a finding of monopoly power if there is other evidence indicating that Wenger has monopoly power. If you determine that Wenger's share of the relevant market is eighty (80) percent or higher, that is strong evidence of the existence of

monopoly power, but is not conclusive as all factors must be considered. If you determine that Wenger's market share is somewhere between fifty (50) percent and eighty (80) percent, you may choose to infer the existence of monopoly power from that share, and the inference is stronger the higher Wenger's market share is within that range; that determination is influenced by your consideration of all the other factors.

You may also consider the trend in Wenger's market share. A declining market share may indicate an 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 Wenger's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to Wenger in the relevant market, this may tend to indicate that Wenger has monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in the market, this may be evidence that Wenger does not have monopoly power.

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

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

If you find that Wenger had monopoly power, then you must find that Acoustic Systems has established this requirement and you must consider the remaining elements of its monopolization claim. If you find that Wenger did not have monopoly power, then you must find for Wenger and against Acoustic Systems on this monopolization claim.

3. Willful Acquisition of Maintenance of Monopoly Power

The next element that Acoustic Systems must prove is that Wenger willfully acquired or maintained monopoly power through predatory or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Predatory 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 securing or maintaining Wenger's monopoly power.

To prove that Wenger acted willfully, Acoustic Systems must prove either that Wenger engaged in predatory or exclusionary acts or practices with the conscious object of furthering the dominance of Wenger in the relevant market or that this was the necessary direct consequence of Wenger's conduct or business arrangements.

You may not find that Wenger willfully acquired or maintained monopoly power if it has acquired or maintained that power solely through the exercise of superior foresight and skill; or because of natural advantages, such as unique geographic access to raw materials or markets; or because of economic or technological efficiency, including efficiency resulting from scientific research; or by obtaining a lawful patent; or because a change in cost or taste has driven out all but one supplier; or simply because the market is so limited that it is impossible to efficiently produce the product except by a plant large enough to supply the whole demand. The acts or practices that result in the acquisition or 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.

Acoustic Systems claims that Wenger has engaged in exclusionary conduct by engaging in the tactics that are enumerated on page 16 of this jury charge. Those tactics may be summarized as follows:

- (1) proposing specifications to architects and school officials that are tailored to Wenger's music practice rooms and exclude elements of Acoustic Systems' music practice rooms;
- (2) allegedly making false statements to customers regarding whether Wenger's patent precludes Acoustic Systems from providing an electronically-enhanced music practice room; and
- (3) allegedly making false statements regarding Acoustic Systems' music practice rooms and Wenger's music practice rooms that lead to confusion in the marketplace.

With regard to the issue of specifications, you are instructed that it is not exclusionary for a company to attempt to persuade a customer to adopt specifications in a competitive bidding situation that favor that company's products to the exclusion of other companies' products, unless that company has manipulated the customer's representatives to the point that the integrity of the decisional process has been violated. For example, bribes and threats are not competition on the merits. On the other hand, it is not unlawful or exclusionary to persuade a customer to adopt specifications favoring one's product by aggressively touting one's products as being superior to a competitor's product, even if done in ways that may be wrong, misleading or debatable.

Accordingly, to prove that Wenger's conduct was wrongful, Acoustic Systems must prove that Wenger has engaged in conduct that has co-opted the independent judgment of the school decision makers (the school officials and/or the architects) so that they were not acting in what they thought

was the best interest of the schools regarding selection of music practice rooms. Otherwise, you should find for Wenger and against Acoustic Systems on this issue.

With regard to Acoustic Systems' claim that Wenger has made false statements regarding Acoustic Systems' products or Acoustic Systems' ability to provide an electronically-enhanced music practice room in light of Wenger's patent, and Acoustic Systems' claim that Wenger has made false statements that caused confusion, you are instructed that Acoustic Systems must prove that such statements were:

- (1) clearly false;
- (2) clearly material to the customers' purchasing decision;
- (3) clearly likely to induce reasonable reliance;
- (4) made to consumers having little understanding of the subject matter;
- (5) continued for extended periods of time; and
- (6) not readily susceptible to counter statement, explanation, or other neutralizing effort

or offset by Acoustic Systems.

If you find that Wenger willfully acquired or maintained monopoly power, then you must find that Acoustic Systems has established this element and you must consider the remaining elements of its monopolization claim. If you find that Wenger did not willfully acquire or maintain monopoly power, then you must find that Wenger is not guilty of monopolization, and you must accordingly find for Wenger and against Acoustic Systems on its monopolization claim.

4. Interstate Commerce

If you find that Wenger willfully acquired or maintained its monopoly power through restrictive or exclusionary conduct, you should then determine whether Wenger's conduct occurred in or affected interstate commerce. Interstate commerce refers to transactions in goods or services between one or more persons in one state and one or more persons in another state.

One way Acoustic Systems may prove an effect on interstate commerce is by showing that any alleged conspirator's activities that were affected by the conspiracy had some effect on commerce.

The restraint alleged, or the activities of Wenger that were affected by the restraint, may have had a substantial effect on interstate commerce even though some or all of the parties to the conspiracy were not engaged in activities in interstate commerce and even though some or all of the activities may have been carried out wholly within one state.

The unlawful acts or practices may have a substantial effect on interstate commerce even though Wenger is not engaged in activities in interstate commerce and even though some or all of the activities may have been carried out wholly within one state.

B. ATTEMPTED MONOPOLIZATION

To prevail on its claim of attempted monopolization, Acoustic Systems must prove each of the following elements by a preponderance of the evidence:

First, that Wenger engaged in exclusionary or restrictive conduct.

Second, that Wenger had a specific intent to achieve monopoly power in a relevant market.

Third, that there was a dangerous probability that Wenger would achieve its goal of monopoly power in the relevant market.

Fourth, that Wenger's conduct occurred in or affected interstate commerce. I have just instructed you on page 30 of this jury charge as to the law that you must apply in determining whether Wenger's conduct occurred in or affected interstate commerce.

Fifth, that Acoustic Systems was injured in its business or property by Wenger's alleged exclusionary or restrictive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for Wenger and against Acoustic Systems on Acoustic Systems' attempted monopolization claim.

1. Exclusionary or Restrictive Conduct

Another element of the offense of attempt to monopolize is that defendant engaged in exclusionary or restrictive conduct in furtherance of its specific intent.

The offense of attempt to monopolize is concerned only with unreasonable acts or practices that have the actual or reasonably foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way or of destroying competition.

The antitrust laws encourage vigorous and honest competition, and the mere fact that one company is successful in winning sales or market share from its competitors does not mean that its conduct is exclusionary or anti-competitive. Conduct that involves the introduction of superior products, the lowering of production costs, the exercise of superior business judgment, or reasonably responding to competition can never be found to be exclusionary or restrictive. But some practices that promote competition in the short run may be illegal under the Sherman Act if they impair competition in an unnecessarily restrictive way or are used to attain a monopoly by eliminating competition.

Although the exclusionary or restrictive acts need not have been sufficient in themselves to bring about a monopoly, Acoustic Systems must prove that the acts or practices engaged in by defendant had a significant exclusionary or restrictive effect or are of the type which, if continued, are likely to result ultimately in a monopoly.

2. Specific Intent

If you find that Acoustic Systems has proved a relevant market, according to the law as I have previously instructed you, you must then decide whether Wenger had the specific intent to monopolize that market. In other words, you must decide if the evidence shows that Wenger acted with the conscious object of acquiring the power to control prices or to exclude or destroy competition in the relevant market.

There are several ways in which Acoustic Systems may prove that Wenger had the specific intent to monopolize. There may be evidence of direct statements of Wenger'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 Wenger at about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of Wenger. You must be careful, however, to distinguish a defendant's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Even if you decide that the evidence does not prove directly that Wenger actually intended to obtain a monopoly, specific intent may be inferred from what Wenger did. For example, if the evidence shows that the natural and probable consequence of Wenger's alleged exclusionary conduct in the relevant market was to give Wenger control over prices or to exclude or destroy competition, and that this was plainly foreseeable by Wenger, then you may infer that Wenger specifically intended to acquire monopoly power.

3. Dangerous Probability of Success

If you find that Wenger had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you must also determine if the evidence shows the next element of attempt to monopolize: namely, that there was a dangerous probability that Wenger 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:

First, the market share and power of Wenger as compared to its competitors in the relevant market;

Second, whether Wenger's share of the relevant market was increasing or decreasing;

Third, the actual or probable impact on competition of Wenger's alleged restrictive or exclusionary acts or practices; and

Fourth, whether there were barriers to entry in the relevant market that 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 Wenger would ultimately achieve its goal of monopoly power.

C. CONDUCT IN COMBINATION, CONCERT OR CONSPIRACY TO MONOPOLIZE

Acoustic Systems claims Wenger acted in combination, concert or conspiracy to monopolize the relevant market.

To establish this claim Acoustic Systems must prove the following elements of conspiracy to monopolize by a preponderance of the evidence:

- 1) Conduct in combination, concert or conspiracy;
- 2) That restrained trade;
- 3) In a particular market;
- 4) Conduct that occurred in or affected interstate commerce.

Before you can find that Wenger acted in combination, concert or conspiracy alleged by Acoustic Systems, the evidence must show that Wenger knowingly joined in the unlawful plan at its inception or at some later time with the intent to advance or further some object or purpose of the conspiracy.

To act knowingly means to act voluntarily and intentionally, and not because of mistake or accident or other innocent reason. A person may become a member of a conspiracy without full knowledge of all the details of the conspiracy, the identity of all its members, or the parts they played. Knowledge of the essential nature of the plan is enough.

A person who knowingly joins an existing conspiracy, or who participates only in part of a conspiracy with knowledge of the overall conspiracy, is just as responsible as if he had been one of those who formed or began the conspiracy and participated in every part of it.

There can be sufficient evidence of a combination or conspiracy when one conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another competitor who has an anti-competitive motive. Conspirators who are not competitors of the victim may have no interest in curtailing competition in a market in which they do not compete; nevertheless, when they have been enticed or coerced to share in an anti-competitive scheme, there is still a combination within the meaning of the Sherman Act.

The membership of a defendant in a conspiracy must be based only on evidence of its own statements or conduct. In determining whether any defendant was a member of the alleged conspiracy, you should consider only the proof of that particular defendant's statements and conduct, including any evidence of that defendant's knowledge or lack of knowledge, status, and participation in the events involved, and any other evidence of participation in the conspiracy alleged.

If you find that the alleged conspiracy existed, then the acts and statements of the conspirators are binding on all of those who you find were members of the conspiracy. But statements of any conspirator that were not made in furtherance of the conspiracy, or that were made before its existence or after its termination, may be considered as evidence only against the person who made them.

Once a person is found by you to be a member of a conspiracy, he or she is presumed to remain a member and is responsible for all actions taken by all conspirators during and in furtherance of the conspiracy until it is shown that the conspiracy has been completed or abandoned or that the person has withdrawn from the conspiracy.

A corporation is not involved in a conspiracy if the agreement is between itself and its employees; the conspiracy must involve the corporation and one or more independent persons.

D. TORTIOUS INTERFERENCE WITH EXISTING CONTRACT

In order for you to find that Wenger and/or Mr. Bright tortiously interfered with an existing contract between Acoustic Systems and Lyda Constructors (concerning the Sandra Day O'Connor High School project), Acoustic Systems must prove to you by a preponderance of the evidence as to contract alleged:

1) that a contract existed between Acoustic Systems and Lyda Constructors (concerning the Sandra Day O'Connor High School project);

2) that Wenger and /or Mr. Bright willfully and intentionally caused interference with that contract;

3) that Wenger and/or Mr. Bright's willful and intentional interference caused Lyda Constructors to breach a positive duty owed to Acoustic Systems under that contract; and

4) that Acoustic Systems suffered actual damages that were proximately caused by the breach of the duty under the contract.

To form a contract, the parties must have the same understanding of the subject matter of the contract and all its essential terms. Failure to agree on or include an essential term renders an agreement unenforceable because there is no contract. In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions. A contract may be oral or written.

Where there is a condition that must be satisfied before there is a right to performance, no contract is formed until that condition has been satisfied. Rather, the contract is a prospective contract until the condition is satisfied.

For you to find that Wenger and/or Mr. Bright tortiously interfered with an existing contract between Acoustic Systems and a third party, Acoustic Systems must show that Wenger and/or Mr. Bright had actual knowledge of the existence of the contract, or, at least, knowledge of such facts and circumstances that would lead a reasonable person to believe in their existence. Knowledge, for purposes of this requirement, is a clear perception of fact, an awareness of truth. It differs from suspicion, which is based upon doubt or an absence of trust. A mere suspicion that a contract might have existed is not enough to establish an intentional interference with it.

For you to find that Wenger and /or Mr. Bright tortiously interfered with the existing contract between Acoustic Systems and Lyda Constructors, you must also find that Wenger and/or Mr. Bright desired to interfere with the contract, if any, or believed that interference was substantially certain to result from its actions.

Acoustic Systems must not only show that Wenger and/or Mr. Bright willfully and intentionally interfered, but that one or both actually caused Lyda Constructors to breach a duty owed to Acoustic Systems under the contract. If Lyda Constructors terminated the contract with Acoustic Systems without breaching any duty owed to Acoustic Systems under the contract, then Wenger and/or Mr. Bright have not interfered with that contract. As long as a company does not use wrongful means, it may cause a third party not to continue in a contract with the company's competitor if that contract is subject to cancellation by its own terms. "Wrongful means" includes physical violence, intimidation, defamation, injurious falsehood, fraud and the like, but does not include persuasion or limited economic pressure.

E. TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTS

In order for you to find that Wenger and/or Mr. Bright tortiously interfered with a prospective contract between Acoustic Systems and a third party in connection with certain music practice room projects, Acoustic Systems must prove by a preponderance of the evidence as to each prospective contract alleged:

1) that there was a reasonable probability that Acoustic Systems and a third party would have entered into a contract;

2) that Wenger and/or Mr. Bright acted unlawfully in intentionally preventing the relationship from occurring;

3) that Wenger and/or Mr. Bright were not privileged or justified in their actions; and

4) that Wenger and/or Mr. Bright's tortious conduct was a proximate cause of actual damages or loss to Acoustic Systems.

For you to find a prospective contract between Acoustic Systems and a third party, Acoustic Systems must show a reasonable probability that, in view of all the circumstances, it would have entered into a contract with a third party. It need not be absolutely certain that they would have entered into a contract, but there must be a reasonable assurance that they would have done so except for Wenger and/or Mr. Bright's interference.

For you to find that Wenger and/or Mr. Bright tortiously interfered with a prospective contract between Acoustic Systems and a third party, Acoustic Systems must show that Wenger and/or Mr. Bright acted intentionally and unlawfully to prevent the contractual relationship between Acoustic Systems and a third party. Acoustic Systems may not recover from Wenger and/or Mr. Bright if their persuasion of others not to deal with Acoustic Systems was part of lawful behavior. Conduct that is

merely "sharp" or unfair is not actionable and cannot be the basis for a claim of tortious interference with prospective business relationships. On the other hand, conduct that is itself unlawful (such as physical violence, intimidation, defamation, injurious falsehood, fraud and the like) can form the basis of a claim for tortious interference with prospective contracts.

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F. PROXIMATE CAUSE

You have heard me refer to the concept of "proximate cause" throughout these instructions. I will now define that term for you.

"Proximate cause" means that cause which, in natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. Thus, "proximate cause" has two prongs: 1) actual cause, and 2) foreseeability. There may be more than one proximate cause of an event.

G. COMMERCIAL DEFAMATION

In order for you to find that Wenger and/or Mr. Bright published false and defamatory statements about Acoustic Systems and its products that caused Acoustic Systems to suffer certain losses, Acoustic Systems must show that:

- 1) Wenger and/or Mr. Bright published a statement reasonably understood by those who heard it to be "defamatory;"
- 2) the statement was false;
- 3) Wenger and/or Mr. Bright made the statement with malice; and
- 4) Wenger and/or Mr. Bright's statement proximately caused Acoustic Systems' damages.

A defamatory statement is one that tends to injure a person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach a person's honesty, integrity, virtue or reputation or to publish the natural defects of anyone and thereby expose the person to hatred, ridicule, or financial injury. An essential element of defamation is that the alleged statement is stated as one of fact and not opinion. A statement that is substantially true is not defamatory. Furthermore, the communication must play a substantial part in inducing others not to deal with Acoustic Systems with the result that special damage, in the form of the loss of trade or other dealings, is established.

To "defame" is to publish a false statement with malice. "Malice" is defined as ill will, spite, evil motive, or purpose to injure another. "Publish" means to communicate a statement to a third person in such a way that he or she understands the words to be defamatory.

H. UNFAIR COMPETITION / PRODUCT DISPARAGEMENT UNDER THE LANHAM ACT

Acoustic Systems seeks to recover for unfair competition and product disparagement under a federal statute known as the Lanham Act. To recover under the Lanham Act against either defendant (Wenger or Steve Bright), Acoustic Systems must prove each of the following elements by a preponderance of the evidence: 1) the defendant made a false or misleading statement of fact in commercial advertising or promotion about Acoustic Systems' music practice room products; 2) the statement actually deceived or was likely to deceive a substantial segment of the intended audience; 3) the deception was material in that it was likely to influence purchasing decisions; 4) the statement resulted in actual or probable injury to Acoustic Systems; and 5) Wenger or Mr. Bright caused its product to enter interstate commerce.

I will now address each of these elements in more detail.

The statements must be statements of fact. General assertions of superiority or general statements of opinion cannot form the basis of liability under the Lanham Act. Rather, the statements must be specific and measurable claims, capable of being proved false or of being reasonably interpreted as statements of objective fact upon which consumers would be justified in relying. A statement of opinion or belief, on the other hand, conveys the speaker's state of mind, and even though it may be used to attempt to persuade the listener, it is a subjective communication that may be accepted or rejected, but not proven true or false.

Statements that constitute mere "puffery" are also not actionable. "Puffery" comes in at least two possible forms:

1) an exaggerated, blustering and boasting statement upon which no reasonable buyer would be justified in relying; or

2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.

The statements must also be false or misleading. A statement is false if it is literally not true. A statement is "misleading" when, although literally true, it implies something that is false.

The statements must be material. A false statement is "material" if it has a tendency to deceive consumers so as to affect their purchasing decision. However, if the statements at issue are not literally false but merely misleading, Acoustic Systems must present evidence that the consumers were actually deceived.

Also included within these elements is the element of causation. That is, Acoustic Systems must prove that the allegedly disparaging statements were a substantial factor in causing Acoustic Systems to lose the specific sales about which it complains.

You are instructed that the product in question were entered into interstate commerce.

I. THE LANHAM ACT – BAD FAITH CLAIMS OF PATENT COVERAGE/INFRINGEMENT

Acoustic Systems also contends that Wenger and/or Steve Bright have violated the Lanham Act by falsely stating to Acoustic Systems' potential customers that Acoustic Systems could not provide an electronically-enhanced music practice room due to Wenger's patent.

To find liability under the Lanham Act based on such a claim, you must first find that Acoustic has established all of the elements for liability under the Lanham Act, as I have just instructed you on pages 43 and 44.

Because these alleged statements pertain to a patent held by Wenger, to find liability under the Lanham Act based on such statements, you must additionally find that Wenger and/or Mr. Bright made these statements in bad faith – that is, that Wenger and/or Mr. Bright made the statements with knowledge or reckless disregard of their falsity. This is because the Patent Laws protect a patent owner from making representations about its patent rights, as long as the patent owner does not act in bad faith.

V. DAMAGES GENERALLY

I will now instruct you on the law that you must apply in determining damages if you should find Wenger and/or Mr. Bright liable to Acoustic Systems on any of Acoustic Systems' claims.

The fact that I am instructing you as to the proper measures of damages should not be construed as intimating any view of the Court as to which party is entitled to prevail on these issues. Instructions as to the measure of damages are given for your guidance in the event you find from the evidence that Wenger and/or Mr. Bright is liable to Acoustic Systems, and that Acoustic Systems is entitled to recover damages from Wenger and/or Mr. Bright.

A. COMPENSATORY DAMAGES

If you find that Wenger and/or Mr. Bright is liable to Acoustic Systems, you must determine an amount that is fair compensation for Acoustic Systems' damages. You must determine what sum of money, if any, if paid now in cash, would reasonably and fairly compensate Acoustic Systems for any economic injury you find was proximately caused by Wenger and/or Mr. Bright's wrongful conduct. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole - that is, to compensate the plaintiff for the damage that the plaintiff has suffered. Acoustic Systems has the burden of proving damages by a preponderance of the evidence, and it is up to you to decide what damages, if any, have been proved.

Your award must be based on the evidence, and not upon speculation, guesswork, or conjecture. On the other hand, the law does not require that Acoustic Systems prove the amount of its damages with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

B. ANTITRUST DAMAGES GENERALLY

If you find that Acoustic Systems has been injured by an antitrust violation committed by Wenger, the law provides that Acoustic Systems 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 victim. Acoustic Systems' 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 Acoustic Systems 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 Wenger violated the antitrust laws and that this violation caused injury to Acoustic Systems, then you must determine the amount of damages, if any, Acoustic Systems 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 Wenger did not commit an antitrust violation, then you should skip this instruction. If you find that Wenger did commit an antitrust violation, then you must calculate the profits, if any, that Acoustic Systems lost as a result of Wenger's antitrust violation. Profit means net profit: the amount by which Acoustic Systems' 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 either of the following ways, but not both:

[Before and After Measure] You have heard evidence of Acoustic Systems' profit margins and revenue growth in a period before the antitrust violation. You have also heard evidence of total market growth. If you find that the earlier period is a reliable guide to estimate what Acoustic Systems' net profit would have been later, in the absence of the antitrust violation, then you may calculate Acoustic Systems' loss of profits by comparing (a) Acoustic Systems' profit margins and revenue growth in the earlier period with (b) Acoustic Systems' profit margins and revenue growth, together with total market growth for sales of modular music practice rooms, thereafter.

[Market Share Measure] You have heard evidence of the market share that Acoustic Systems had in the period before the antitrust violation. If you find that the earlier period is a reliable guide to estimate what Acoustic Systems' market share would have been later, in the absence of the antitrust violation, then you may calculate Acoustic Systems' loss of profit by considering market share, evidence of the size of the market, and evidence relating to the profit margin Acoustic Systems would have secured on such sales.

C. LOST PROFITS ON SPECIFIC PROJECTS

Acoustic Systems seeks to recover the amount of net profits it lost in connection with the twenty-two (22) specific projects Acoustic Systems contends it would have won but for Wenger and/or Mr. Bright's wrongful conduct.

If you find that Acoustic Systems has established a reasonable probability that it is entitled to lost profit damages for the specific projects, you should next consider the measure of those damages. In doing so, you should consider the number of lost sales, the gross revenues that Acoustic Systems would have obtained from the lost sales, and the cost that Acoustic Systems would have incurred in making those sales.

**D. DAMAGES FOR UNFAIR COMPETITION / PRODUCT
DISPARAGEMENT UNDER THE LANHAM ACT**

You have heard evidence of Wenger's net profits from sales of modular music practice rooms. If you find that Wenger engaged in unfair competition/product disparagement under the Lanham Act, then you must calculate the amount of Wenger's net profits from sales of modular music practice rooms.

E. PUNITIVE DAMAGES

If you find that Wenger and/or Mr. Bright are liable for intentionally interfering with Acoustic Systems' contractual relations and/or prospective contractual relations, or engaging in commercial defamation, you may also award Acoustic Systems punitive damages, if you find that Wenger and/or Mr. Bright acted with malice by clear and convincing evidence.

"Malice" means:

- (a) a specific intent by the defendant to cause substantial injury to the plaintiff; or
- (b) an act or omission by the defendant,
 - (i) which, when viewed objectively from the standpoint of the defendant at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
 - (ii) of which the defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

"Punitive damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding punitive damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of Wenger and/or Mr. Bright.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of Wenger.

Acoustic Systems has the burden of proving that punitive damages should be awarded, and the amount of damages, by clear and convincing evidence.

Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required.

VI. MULTIPLE CLAIMS/MULTIPLE DEFENDANTS

You must not award compensatory damages more than once for the same injury. For example, if Acoustic Systems prevails on two claims and establishes a dollar amount for its damages, you must not award it any additional damages on each claim. Acoustic Systems is only entitled to be made whole once, and may not recover more than it has lost. Of course, if different damages are attributed to the separate claims, then you must compensate Acoustic Systems fully for all of its damages.

With respect to punitive damages, you may make separate awards on each claim that Acoustic Systems has established.

You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim. Although there are two defendants in this case, it does not necessarily follow that if one is liable, the other also is liable. Each defendant is entitled to fair, separate and individual consideration of his case without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury. If so, Acoustic Systems is not required to establish how much of the injury was caused by each particular defendant whom you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages. If you decide that both of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without determining individual percentages of liability.

VII. DUTY TO DELIBERATE

It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you are wrong. However, do not give up your honest beliefs solely because the others think differently, or merely to finish the case.

Remember that in a very real way you are the judges—judges of the facts. Your only interest is to seek the truth from the evidence in the case.

VIII. INSTRUCTIONS ON DELIBERATION

When you retire to the jury room to deliberate, you may take with you this charge and the exhibits that the Court has admitted into evidence. Select your Foreperson and conduct your deliberations. If you recess during your deliberations, follow all of the instructions that I have given you concerning your conduct during the trial. After all of you have agreed to your response to each of the jury questions, your Foreperson must fill in your answers to the written questions and sign and date the verdict form. Return this charge together with your written answers to the questions. Unless I direct you otherwise, do not reveal your answers until such time as you are discharged. You must never disclose to anyone, not even to me, your numerical division on any question.

If you want to communicate with me at any time, please give a written message to the Court Security Officer, who will bring it to me. I will respond as promptly as possible either in writing or by meeting with you in the courtroom. I will first show the attorneys your question and my response before I answer your question.

After you have reached a verdict, you are not required to talk with anyone about the case unless I order you to do so. After I read the following jury questions, you may retire to the jury room to conduct your deliberations.

SIGNED this ____ day of June, 2001.

STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE
Presiding under 28 U.S.C. § 636(c)