

NO. 89-0359

DON DAVIS and Wife, SUSIE DAVIS  
Individually and d/b/a  
T.V. TOPICS

V.

POST-NEWSWEEK CABLE

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IN THE 336TH JUDICIAL

DISTRICT COURT OF

GRAYSON COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.
3. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
4. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

5. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

6. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

7. You may render your verdict upon the vote of ten or more members of the jury. That same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

### INSTRUCTIONS

Answer only the questions that you are specifically instructed to answer. Your answers should be in the form indicated following each question. When the answer called for is a date, state the month, day, and year.

Questions to be answered "Yes" or "No" should be answered "Yes" if you so find from a preponderance of the evidence. Otherwise, answer "No." Your answers to all other questions must be based on a preponderance of the evidence, and the burden to establish such preponderance is on the plaintiff.

QUESTION NO. 1

Do you find that Post-Newsweek Cable, Inc. materially breached its contract, if any, with Mr. and Mrs. Davis?

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 dealings. You may not consider the parties' unexpressed thoughts or intentions. Whether or not there was a valid contract must be based upon objective standards of what the parties said and did. To determine whether there was a contract, and if so, what the terms of the contract were, you must look to the communications between the parties and the acts and circumstances surrounding these communications. The terms must also be sufficiently certain so that neither party can reasonably misunderstand them.

You are further instructed that a breach of contract is material if the breach is of sufficient significance that a reasonable person would attach importance to it in considering whether a party has substantially performed its obligations under the contract. The above issue must be answered "No" if the contract, if any, was not capable of being performed within one year.

You are further instructed that a contract may be verbal or written, or it may be partially oral and partially in writing.

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

If you have answered Question No. 1 "Yes," then answer Question No. 2. Otherwise, do not answer Question No. 2.

QUESTION NO. 2

What sum of money, if paid now in cash, would reasonably and fairly compensate Plaintiffs for their harm, if any, due to the defendant's breach of contract?

You are instructed that any damages that might be recovered for breach of contract must be measured by the amounts of profits lost as a result of the breach.

You are further instructed that you may consider the natural, probable and foreseeable consequences of the breach of contract, if any.

ANSWER IN DOLLARS AND CENTS, IF ANY.

ANSWER: \$ \_\_\_\_\_

QUESTION NO. 3

Did Post-Newsweek Cable, Inc. fail to act fairly and in good faith in its dealing with Plaintiffs?

You are hereby instructed that "good faith" means honesty in fact in the conduct or transaction concerned. The duty of good faith and fair dealing merely requires parties to "deal fairly" with one another and does not encompass the more onerous burden that requires one party to place the interest of the other party before his own.

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

If you have answered "Yes" to Question No. 3, then answer Question No. 4. Otherwise, do not answer Question No. 4.

QUESTION NO. 4

What sum of money, if paid now in cash, would reasonably and fairly compensate Plaintiffs for their harm, if any, due to Defendant's breach of its duty of good faith and fair dealing with Plaintiffs?

ANSWER IN DOLLARS AND CENTS, IF ANY.

ANSWER: \$ \_\_\_\_\_

If you have answered question no. 4, then answer question no. 5. Otherwise, do not answer question no. 5.

QUESTION NO. 5

Do you find that Post-Newsweek Cable, Inc.'s failure to act fairly and in good faith in its dealings with Mr. and Mrs. Davis was the result of gross negligence or was intentional?

Intentional means an act done knowingly, deliberately, willfully or designedly.

Gross negligence means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it.

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

QUESTION NO. 6

Do you find that Post-Newsweek Cable, Inc. tortiously interfered with existing contracts or prospective business relationships, if any, of Mr. and Mrs. Davis?

You are hereby instructed that "tortious interference" with an existing contract means:

- (1) That there was a contract subject to interference,
- (2) That the act of interference by Post-Newsweek was willful and intentional,
- (3) That such intentional act was a proximate cause of Plaintiffs' damage, and
- (4) That actual damage or loss occurred.

You are hereby instructed that it is not possible for Post-Newsweek to willfully and intentionally interfere with the Plaintiffs' contract unless Post-Newsweek had actual knowledge of the existence of the contract and of the Plaintiffs' interest in the contract or, at least, knowledge of such facts and circumstances that would lead a reasonable man to believe in their existence.

You are further instructed that tortious interference with prospective business relationships means:

- (1) That there was a reasonable probability that Plaintiffs would have entered into a contract had there been no interference,
- (2) That Post-Newsweek acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming Plaintiffs; and
- (3) Actual damage or loss occurred.

Malice, within this context, means an unlawful act done intentionally and without justification or excuse.

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

QUESTION NO. 6a

Do you find that Post-Newsweek Cable, Inc., was privileged or justified in interfering, if it did so, with Plaintiffs' contracts, if any?

A person is privileged or justified to interfere with the contract of another with motive or purpose, at least in part, to advance or protect his own business or financial interests. But one who interferes only out of spite, to do injury to others, or for other bad motive, has no justification, and his interference is improper.

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

QUESTION NO. 6b

Do you find that Post-Newsweek Cable, Inc., was privileged or justified in interfering, if it did so, with Plaintiffs' prospective business relationships, if any?

A person is privileged or justified to interfere with the prospective business relationships of another with motive or purpose, at least in part, to advance or protect his own business or financial interests. But one who interferes only out of spite, to do injury to others, or for other bad motive, has no justification, and his interference is improper.

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

QUESTION NO. 6b

Do you find that Post-Newsweek Cable, Inc., was privileged or justified in interfering, if it did so, with Plaintiffs' prospective business relationships, if any?

A person is privileged or justified to interfere with the prospective business relationships of another with motive or purpose, at least in part. But one who interferes only out of spite, to do injury to others, or for other bad motive, has no justification, and his interference is improper.

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

If you have answered "Yes" to Question No. 6, then answer Question No. 7. Otherwise, do not answer Question No. 7.

QUESTION NO. 7

Did Post-Newsweek Cable, Inc. act with malice in interfering with existing contracts, if it did so, of Plaintiffs?

You are instructed that "malice" means ill-will, spite, evil motive, or injuring another on purpose.

ANSWER "YES" OR "NO."

ANSWER \_\_\_\_\_

If you have answered Question No. 6 "Yes," then answer Question No. 8. Otherwise, do not answer Question No. 8.

QUESTION NO. 8

What sum of money, if paid now in cash, would reasonably and fairly compensate Plaintiffs for Defendant's tortious interference with existing contracts or prospective business relationships?

You are instructed that the measure of actual damages for tortious interference with the contract is that amount of damages which would put the plaintiffs in the same economic position they would have been in had the contract interfered with, if any, been actually performed.

ANSWER IN DOLLARS AND CENTS, IF ANY.

ANSWER: \_\_\_\_\_

If you have answered "Yes" to question no. 5 or to question no. 7, then answer question no. 9. Otherwise, do not answer question no. 9.

QUESTION NO. 9

What sum of money, if any, should be assessed against Post-Newsweek Cable, Inc., as exemplary damages and awarded to plaintiffs?

"Exemplary damages" means an amount that you may, in your discretion, assess as punishment of the wrongdoer and as a warning and example to the wrongdoer and others to deter the same or similar conduct in the same or similar conduct in the future. In determining the amount of exemplary damages, if any, you may consider:

1. The nature of the conduct;
2. The character of the conduct;
3. The degree of culpability of the wrongdoer;
4. The situation and sensibilities of parties concerned;
5. The extent to which such conduct offends a public sense of justice and propriety; and
6. The size of an award needed to deter similar conduct in the future.

ANSWER IN DOLLARS AND CENTS, IF ANY.

ANSWER: \$ \_\_\_\_\_

## QUESTION NO. 10

Did Post-Newsweek Cable, Inc., monopolize, or attempt to monopolize, the publishing and dissemination of comprehensive direct-mail cable t.v. program listing guides to cable subscribers in Sherman and Denison, Texas, by engaging in predatory pricing?

### Instruction

In order to answer the above issue "Yes," the Plaintiff must prove by a preponderance of the evidence the following three elements:

(1) That the relevant market was the publishing and dissemination of comprehensive direct-mail cable t.v. program listing guides to cable subscribers in Sherman and Denison, Texas.

In connection with this issue, you are instructed that in determining the relevant market, you must consider the following: (a) the presence or absence of reasonable interchangeability of use between the product and/or service itself and substitutes for it; (b) whether there is industry or public recognition of the alleged relevant market as a separate economic entity; (c) whether the product and/or service has peculiar characteristics and uses; (d) whether unique production facilities are required to manufacture or provide the product and/or service; (e) whether there are distinct customers of the product and/or service; (f) whether there are distinct prices for the product and/or service; (g) whether prices in the alleged relevant market are sensitive to price changes or other products; and (h) whether there are specialized vendors of the product and/or service.

You are further instructed that in determining whether Plaintiffs have established a relevant market, you cannot limit your consideration to Post-Newsweek Cable, Inc.'s method of distribution of its guide. The fact that a defendant is able to satisfy all of a customer's needs in one manner of distribution does not mean that the defendant is free from competition from other types of distributors. Defining the relevant market first requires a determination of the product market. This inquiry necessitates an examination of which products are considered reasonably interchangeable by consumers for the same purposes. If other types of distribution

are reasonably interchangeable with defendant's method of distribution, they must be included in the relevant market.

(2) That Post-Newsweek Cable, Inc., monopolized or attempted to monopolize the relevant market.

You are instructed that, with reference to this portion of the question, you must answer "Yes" to this question if you find that the defendant either monopolized or attempted to monopolize the publishing and dissemination of comprehensive direct-mail cable t.v. program-listing guides to cable subscribers in Sherman and Denison, Texas. In order to find that the defendant monopolized this market, you must find that (a) the defendant possessed monopoly power, which means the power to control price or to exclude competition in the relevant market; and (b) the defendant willfully acquired or maintained its monopoly power, rather than growing or developing it as a consequence of a superior product, business acumen, or historic accident. You are further instructed that a primary criterion used to determine whether a defendant has monopoly power in a relevant market is the defendant's share of a properly defined relevant market. The Plaintiffs must prove Post-Newsweek Cable, Inc.'s market share with competent evidence.

In order to find that the defendant attempted to monopolize that market, you must find that it (a) had the specific intent to monopolize a relevant market; (b) took overt acts in furtherance of a scheme to monopolize; and (c) had a dangerous probability of success. A defendant must have a market share of at least fifty percent before he can be guilty of monopolization. In order for the Plaintiffs to prove an attempted monopolization, in addition to proving the relevant market as previously defined and proving that Post-Newsweek Cable, Inc. charged predatory prices, the Plaintiffs must also prove that there was a dangerous probability that Post-Newsweek Cable, Inc. would unlawfully monopolize a relevant market, i.e., that if unchecked, Post-Newsweek Cable, Inc., would sooner or later acquire by improper means the power to control prices or exclude competition in a relevant market. The Plaintiff must prove that the defendant's intent was to do more than compete vigorously. Rather, the forbidden specific intent is that of acquiring and exercising the power to fix prices or to exclude competition. You are further instructed that if you find that

the defendant acted in good-faith pursuit of legitimate business objectives rather than with the intent to acquire or maintain monopoly power, then it cannot be guilty of a monopolization or attempted monopolization under Texas anti-trust laws.

And, (3), that Post-Newsweek Cable monopolized or attempted to monopolize the publishing and dissemination of comprehensive direct-mail cable t.v. program listing guides to cable subscribers in Sherman and Denison, Texas, by engaging in predatory pricing.

You are instructed that predatory pricing involves two essential elements. First, Plaintiff must prove Post-Newsweek Cable, Inc. had an objectively reasonable expectation of recouping its losses, if any, due to the alleged predatory pricing by charging higher prices later, that is, the predatory pricing was economically feasible. Second, Plaintiff must prove that the price charged by Post-Newsweek Cable, Inc. was below Post-Newsweek Cable, Inc.'s average variable cost.

You are instructed that the Plaintiffs must prove through sufficiently precise evidence of cost, that the price charged by Post-Newsweek Cable, Inc. was below its average variable cost.

ANSWER "YES" OR "NO."

ANSWER \_\_\_\_\_

If you have answered Question No. 10 "Yes," then answer Question No. 11. Otherwise, do not answer Question No. 11.

QUESTION NO. 11

Do you find that Post-Newsweek Cable, Inc.'s monopolization of the relevant market, if any, or attempted monopolization of the relevant market, if any, as you have found in your answer to Question No. 10 was a cause of anti-trust injury to the Plaintiffs?

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

You are instructed that the Plaintiffs may not recover damages under the anti-trust laws unless they prove that they sustained an anti-trust injury, which is to say injury of the type the anti-trust laws were intended to prevent. The Plaintiffs must prove that their injury flowed from the defendant's unlawful conduct. Injury, although causally related to an anti-trust violation, nevertheless, will not qualify an antitrust injury unless it is attributable to an anti-competitive aspect of the defendant's conduct.

If you have answered Question No. 11 "Yes," then answer Question No. 12. Otherwise, do not answer Question No. 12.

QUESTION NO. 12

What sum of money, if any, if now paid in cash, would reasonably and fairly compensate Plaintiffs for their actual damages, if any, as a result of Post-Newsweek Cable, Inc.'s monopolization of the relevant market, if any, or attempted monopolization, if any, of the relevant market?

ANSWER IN DOLLARS AND CENTS, IF ANY.

ANSWER: \$ \_\_\_\_\_

If you have answered Question No. 10 "Yes," then answer Question No. 13. Otherwise, do not answer Question No. 13.

QUESTION NO. 13

Do you find that Post-Newsweek Cable, Inc.'s monopolization of the relevant market, if any, or attempted monopolization of the relevant market, if any, as you have found in your answers to Question 10, was committed flagrantly or willfully?

ANSWER "YES" OR "NO."

ANSWER: \_\_\_\_\_

If you have answered "Yes" to question no. 3 or question no. 6, then answer question no. 14.  
Otherwise, do not answer question no. 14.

QUESTION NO. 14

What sum of money, if paid in cash now, would fairly and reasonably compensate the plaintiffs for their mental anguish, if any?

ANSWER IN DOLLARS AND CENTS, IF ANY.

ANSWER:

Don Davis: \$ \_\_\_\_\_

Susie Davis: \$ \_\_\_\_\_

QUESTION NO. 15

What is a reasonable for the necessary services of Davis' attorney in this case, stated in dollars and cents?

Answer with an amount for each of the following:

- a. For preparation and trial.

Answer: \_\_\_\_\_

- b. For an appeal to the Court of Appeals.

Answer: \_\_\_\_\_

- c. For an appeal to the Supreme Court of Texas, including making or responding to an application for writ of error.

Answer: \_\_\_\_\_