

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

Filed 3/28/86

AUSTIN DIVISION

Clerk, U. S. District Court
Western District of Texas

By [Signature]
Deputy

POUNDS PHOTOGRAPHIC LABS, INC.

VS.

NORITSU AMERICA CORPORATION,
ET AL

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CIVIL NO. A-83-CA-463

COURT'S INSTRUCTIONS TO THE JURY

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COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

You have heard all of the evidence in this case and in a moment will hear the arguments of counsel for the parties, but first it is my duty to give you the instructions of the Court concerning the law applicable to this case.

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

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation or partnership is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations and partnerships, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation or partnership is involved, of course, it may act only through natural persons as its agents, partners or employees; and, in general, any agent, partner or employee of a corporation or partnership may bind the corporation or partnership by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation or partnership, or within the scope of his duties as an employee of the corporation or partnership.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and

reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Plaintiff or to the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

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

In a civil action such as this the party asserting a claim, as hereafter described, has the burden of proving every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

Where more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it, separately, as you would had each claim been tried before you separately; but in determining any fact in issue you may consider the testimony of all of the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If a preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim.

SHERMAN ACT

In this case Plaintiff claims that the Defendants violated Title 15, United States Code, Sections 1 and 2, commonly known as the Sherman Act, which is a part of the antitrust laws of the United States.

Section 1 of the Sherman Act provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States is declared illegal.

Section 2 of the Sherman Act provides in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize, any part of trade or commerce, shall have violated the antitrust laws of the United States.

The general objectives of the antitrust laws, including the Sherman Act, are to preserve and advance our system of free and open competition, and to secure to everyone an equal opportunity to engage in the business trade and commerce of this Country--a policy which is the primary feature of our private enterprise system. The law promotes the concept that free competition yields the best allocation of economic resources, but it also recognizes that in the natural operation of our economic system some competitors are going to lose business while others prosper.

INTERSTATE COMMERCE

The term "interstate commerce" refers to business transacted across state lines or between persons or entities having their residences or businesses in different states. It differs from intrastate commerce which is business done within a single state. There can be no violation of the Sherman Act unless you determine that the activities of the Defendants as challenged by the Plaintiff have actually occurred in interstate commerce or, if done within this state, that such activities constituted a restraint on interstate commerce involving a not insubstantial amount of such commerce. In other words, it is not necessary that the disputed transactions be shown to be interstate transactions in and of themselves so long as such transactions are shown to have affected interstate commerce in a not insubstantial way.

RELEVANT MARKET

In considering the law relative to these allegations of violations of Sections 1 and 2 of the Sherman Act, it will be necessary for you to determine the relevant market or submarket in this case.

The relevant market consists of two dimensions: the geographic market and the product/service market. The relevant geographic market is the area of effective competition. The outer boundaries of a relevant product/service market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product/service itself and substitutes for it.

Within a broad product/service market, well-defined submarkets may exist which, in themselves, constitute product/service markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical factors as: (1) industry or public recognition of the submarket as a separate economic entity; (2) the product's or service's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes; and (7) specialized vendors. No one factor is necessarily decisive, but the more of these factors that the particular submarket fulfills, the more likely it is a separate submarket.

Plaintiff claims, and Defendants dispute, that the relevant geographic market is the Austin Metropolitan Statistical Area which consists of Travis, Hays and Williamson Counties. Plaintiff contends that the "one-hour" or "minilab" business constitutes a relevant submarket of the broader photofinishing market. Defendants dispute that the "one-hour" or "minilab business" is a relevant submarket. You must determine this dispute.

When I refer to a "relevant market" hereafter in these instructions, I mean a relevant market or submarket.

MONOPOLIZATION CLAIM

Plaintiff claims that Back-In-A-Flash, Ltd., acting through its general partners, Hubert H. Ingraham, Jr., and Gerald L. McNaron, unlawfully monopolized interstate trade or commerce in the relevant market in violation of Section 2 of the Sherman Act. There are two essential elements which the Plaintiff must prove by a preponderance of the evidence in order to establish its claim of unlawful monopolization; as follows:

First: That Back-In-A-Flash, Ltd., possessed monopoly power in a relevant market;

Second: That Back-In-A-Flash, Ltd., willfully acquired or maintained that power as distinguished from growth or development as a consequence of a superior product or service, business acumen, or historic accident.

With regard to the first element, "monopoly power" is the power either to thwart, to exclude, to eliminate competition or to control prices. In determining whether Back-In-A-Flash, Ltd., possessed monopoly power, you are instructed that such power ordinarily may be inferred from a predominate share of the market but is not necessarily conclusive evidence of monopoly power. Monopoly power also may exist where the defendant has control over an essential facility to which other competitors necessarily must have access to do business.

With regard to the second element, you are instructed that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to

destroy a competitor is unlawful. Moreover, it is as unlawful to prevent a person from engaging in business as it is to drive him out of business. Conduct designed to barricade access to a market can constitute one means of unlawful monopolization.

The mere possession of a monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was willfully acquired and maintained. A person who acquires monopoly power through normal growth and development, as a consequence of having a superior product, or business acumen, or through historical accident, has not unlawfully monopolized a market as defined in this charge.

THE ATTEMPT TO MONOPOLIZE CLAIM

Plaintiff also claims that Back-In-A-Flash, Ltd., acting through its general partners, Hubert H. Ingraham, Jr., and Gerald L. McNaron, unlawfully attempted to monopolize interstate trade or commerce in the relevant market in violation of Section 2 of the Sherman Act. The offense of "attempt to monopolize" also has two essential elements:

- (1) Specific intent to monopolize; and
- (2) a dangerous probability that the attempt to monopolize will be successful.

With regard to the first element, "specific intent to monopolize" means the specific intent to exclude competition in a relevant market. As to the second element, Plaintiff must show some act or acts done in furtherance of an intent to monopolize, which, although insufficient to actually produce monopoly power, creates a dangerous probability that monopolization will occur. As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly committed. With respect to the issue of intent, the jury is entitled to consider any statements made or acts done or omitted by Defendants, and all facts and circumstances in evidence in the case which may aid determination of state of mind.

Further, it is not necessary, in order to constitute an attempt to monopolize that the defendant's action actually succeed in achieving monopoly power.

THE CONSPIRACY TO MONOPOLIZE CLAIM

Plaintiff further claims that all of the Defendants unlawfully conspired to monopolize interstate trade or commerce in the relevant market in violation of Section 2 of the Sherman Act. There are four essential elements Plaintiff must prove by a preponderance of the evidence to establish the offense of conspiracy to monopolize:

- (1) the existence of a conspiracy;
- (2) overt acts done in furtherance of the conspiracy;
- (3) an effect upon a substantial amount of interstate commerce; and
- (4) the existence of a specific intent to monopolize.

A conspiracy is formed when two or more persons or entities knowingly join together to accomplish some unlawful purpose by concerted action. To act knowingly is to act voluntarily and intentionally, and not because of mistake or accident. The essence of a conspiracy is an agreement between two or more persons or entities to violate or disregard the law. However, the evidence in the case need not show that the members of an alleged conspiracy entered into any express or formal agreement.

In order to establish the existence of the required conspiracy, the Plaintiff must show by a preponderance of the evidence in the case that the Defendants knowingly came to a common and mutual understanding to accomplish or to attempt to

accomplish an unlawful purpose. A silent understanding can be shown by the course of conduct of the parties. It is enough that, knowing that concerted action was contemplated and invited, the defendants gave their adherence to the scheme and participated in it. So, if a defendant, with knowledge of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing participant--a conspirator.

One who knowingly joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

In determining whether or not a defendant was a member of a conspiracy, the jury is not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence in the case as to his own conduct--by what he himself knowingly said or did.

You will note that there must be at least two separate persons or entities who have reached an agreement or understanding in order to find that a conspiracy was formed. In that regard you are instructed that a single entity (e.g., a corporation or partnership) cannot agree, combine or conspire with its own officers, partners or employees to supply the collaborative element of a Sherman Act violation.

I have previously defined for you the term "interstate commerce." I also defined the phrase "specific intent to monopolize" in my instructions regarding the attempt to monopolize claim and that definition is also applicable here.

THE SECTION 1 CLAIM

In this case Plaintiff claims that all of the Defendants violated Section 1 of the Sherman Act.

The specific conduct which Plaintiff claims violated Section 1 of the Sherman Act is an alleged conspiracy between Noritsu America Corporation and its employee Jerry Elwinger, on the one hand, and Back-In-A-Flash, Ltd., and its partners Hubert H. Ingraham, Jr. and Gerald L. McNaron, on the other hand, to exclude, hinder or delay Plaintiff's entry into the minilab photo finishing market.

There are three essential elements which the Plaintiff must prove by a preponderance of the evidence in order to establish its claim under Section 1 of the Sherman Act, as follows:

- First: That there was a conspiracy between the Defendants to exclude, hinder or delay Plaintiff's entry into the minilab photo finishing market;
- Second: That such conspiracy constituted an "unreasonable restraint on interstate commerce as hereafter defined; and
- Third: That such conspiracy constituted a restraint on interstate commerce involving a not insubstantial amount of such commerce.

I have already defined for you what a "conspiracy" is in connection with Plaintiff's conspiracy to monopolize claim. That definition is applicable here.

With regard to the second element, the requirement that the restraint of trade be unreasonable is referred to as the "rule of reason" test of illegality. You are instructed therefore that "restraint of trade" as used in Section 1 of the Sherman Act applies only to unreasonable restraints and not to all possible restraints of trade. The antitrust law seeks to maintain free competition in interstate commerce, in order to protect the public interest. The end sought by the antitrust law is the prevention of unreasonable restraints in business and commercial transactions which tend to restrict production, raise prices, or otherwise control or affect the market to the detriment of purchasers or consumers of goods and services; the public is to be protected in order to secure to them the advantages which accrue to them from free competition in the market. Not all restraints of trade are unreasonable restraints. All business affects trade in some way. Therefore, in determining whether a "restraint of trade" exists, you must decide whether the conduct which you have found tends to restrict or otherwise control free and open competition. In determining whether or not such an unreasonable restraint exists, you need not find a specific injury, but you must find that the conduct tends or is reasonably calculated to prejudice the public interest.

I have previously defined the term "interstate commerce" for you and that definition is applicable here.

TEXAS ANTITRUST LAWS

Plaintiff also claims that all of the Defendants have violated the antitrust laws of the State of Texas. Under the portions of the Texas antitrust laws pertinent to this case, the formation of a trust or conspiracy in restraint of trade is illegal and prohibited.

A "trust" is a combination of capital, skill, or acts by two or more persons or entities to: (1) restrict, or tend to restrict, trade or commerce, or the free pursuit of a lawful business; or (2) prevent or lessen competition in the sale or purchase of tangible personal property; or (3) agree not to sell tangible personal property for market.

A "conspiracy" in restraint of trade is where two or more persons or entities engaged in buying or selling tangible personal property agree not to sell tangible personal property to another person or entity.

There are two essential elements which the Plaintiff must prove by a preponderance of the evidence in order to establish its claim under the Texas antitrust laws, as follows:

- First: That the Defendants entered into a "trust" or "conspiracy in restraint of trade" as those terms have been defined for you; and
- Second: That the Plaintiff suffered injury as a proximate result of the alleged trust or conspiracy in restraint of trade.

The Texas antitrust laws differ from the federal Sherman Act in that it is not necessary that the trust or conspiracy in restraint of trade have affected interstate trade or commerce and it is immaterial whether the alleged restraint of trade was reasonable or unreasonable.

A manufacturer may sell his product to whomever he pleases and he may choose to place only one or two or three distributors in any particular city. However, an agreement between a manufacturer and a retailer that the manufacturer will not sell its products to others in a particular territory is unlawful, in and of itself, under Texas antitrust laws.

THE WRONGFUL INTERFERENCE CLAIM

Lastly, Plaintiff claims that Back-In-A-Flash, Ltd., acting through its general partners, Ingraham and McNaron, wrongfully interfered with Plaintiff's prospective contractual relationship with Noritsu. There are four essential elements Plaintiff must prove by a preponderance of the evidence to establish its claim of wrongful interference: (1) there was a reasonable probability that Plaintiff would have entered into a contractual relationship; (2) Defendants acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming Plaintiff; (3) Defendants' actions were not privileged or justified; and (4) actual harm or damage occurred as a result.

Defendants' acts of interference, if any, would be privileged or justified if they were done in pursuance of reasonable competition. This privilege however is limited to what is considered to be within the realm of "fair play". The courts take the position that if the means of competition are fair, advantage should remain where success has put it, but if the acts complained of do not rest on some legitimate interest or if there is sharp dealing or overreaching or other conduct below the behavior of fair men similarly situated, the acts are not privileged.

INJURY AND CAUSATION

With regard to each of Plaintiff's claims, Plaintiff must establish as a part of its claims that it suffered injury in its business as a proximate result of the alleged violations. An injury to a business can be said to be the "proximate result" of a violation only when the act or transaction constituting the violation directly and in a natural and continuous sequence produces, or contributes substantially to producing, such injury. In other words, the alleged violations by the Defendants must be a direct and identifiable cause of the injury which Plaintiff claims to have sustained.

As to Plaintiff's claims under the Sherman Act, the injury must be the type of injury the antitrust laws were intended to prevent. It frequently occurs in the course of normal, lawful competition that some businesses may suffer economic losses or even go out of business. There is no antitrust violation when a competitor is hurt or injured by healthy competition, for example, when the superior product or marketing skills of one competitor result in lesser profits by another competitor. It is only when such economic losses are caused by unlawful acts which have a substantial adverse impact on competition in the relevant market that the federal antitrust laws are violated.

DAMAGES

If you find that Plaintiff is entitled to recover damages, the law provides that the Plaintiff is to be fairly compensated for all damage, if any, to its business which was proximately caused by the Defendants' unlawful conduct. In arriving at the amount of the award you should include any damages suffered by the Plaintiff because of lost profits; that is to say, profits which the Plaintiff lost as a proximate consequence of the violation by Defendants of the antitrust laws.

If you should find from a preponderance of the evidence that damage to Plaintiff's business, such as a loss in profits, was proximately caused by the Defendants' illegal conduct, then the circumstance that the precise amount of Plaintiff's damages may be difficult to ascertain should not affect Plaintiff's recovery, particularly if the Defendants' wrongdoing has caused the difficulty in determining the precise amount.

On the other hand, the Plaintiff is not to be awarded purely speculative damages. An allowance for lost profits may be included in the damages awarded only when there is some reasonable basis in the evidence for determining that Plaintiff has in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment.

In arriving at the amount of any loss of profits sustained by Plaintiff, the jury may consider the past earnings of the Plaintiff in the business in question, the past earnings of

similar businesses in the same area, projections of sales or net income made by the parties or others for similar businesses, as well as any other evidence in the case bearing upon the issues.

PUNITIVE DAMAGES

Plaintiff also claims that the acts of the Defendants were done willfully, intentionally or with callous and reckless indifference to Plaintiff's rights so as to entitle it to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that any Defendant did act with malice, willfulness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against such Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against any Defendant, you may consider the financial resources of such Defendant in fixing the amount of such damages.

As to the claim of tortious interference, you must find that Defendants acted with ill-will, spite, evil motive, or intentionally injuring another before you may award punitive damages.

You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages--that is, to take advantage of any reasonable opportunity he may have had under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available to him under all the circumstances shown by the evidence, then you should reduce the amount of his damages by the amount he could have reasonably realized if he had taken advantage of such opportunity.

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe the Plaintiff should, or should not, prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times 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.

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

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

4-3-86
Clerk, U. S. District Court
Western District of Texas
By [Signature]
Deputy

POUNDS PHOTOGRAPHIC LABS, INC. §
VS. §
NORITSU AMERICA CORPORATION, §
ET AL §

CIVIL NO. A-83-CA-463

VERDICT

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

POUNDS PHOTOGRAPHIC LABS, INC.

VS.

NORITSU AMERICA CORPORATION,
ET AL

Subpoena

CIVIL NO. A-83-CA-463

VERDICT

We, the jury, have unanimously agreed to the answers to the attached Special Interrogatories and return such answers in open court, and under the instructions of the Court, as our verdict in this cause.

4-3-86
Date

Hoover Alexander
Foreperson

Questions As To Section 2 of the Sherman Act

1. Do you find from a preponderance of the evidence that "minilab" or "one-hour" photofinishing in the Austin Metropolitan Area is a relevant market or submarket?

Yes _____

No _____

If you answered "Yes" to Question 1, answer Questions 2 and 3. If you answer "No" to Question 1, do not answer Questions 2 and 3, and go on to Question 4.

2. Do you find from a preponderance of the evidence that the following Defendants monopolized the relevant submarket in violation of Section 2 of the Sherman Act? Answer as to each:

- | | | |
|----------------------------|-----------|----------|
| a. Back-In-A-Flash, Ltd. | Yes _____ | No _____ |
| b. Hubert H. Ingraham, Jr. | Yes _____ | No _____ |
| c. Gerald L. McNaron | Yes _____ | No _____ |

3. Do you find from a preponderance of the evidence that the following Defendants attempted to monopolize the relevant submarket in violation of Section 2 of the Sherman Act? Answer as to each:

- | | | |
|----------------------------|-----------|----------|
| a. Back-In-A-Flash, Ltd. | Yes _____ | No _____ |
| b. Hubert H. Ingraham, Jr. | Yes _____ | No _____ |
| c. Gerald L. McNaron | Yes _____ | No _____ |

4. Do you find from a preponderance of the evidence that the following Defendants conspired to monopolize the relevant submarket in violation of Section 2 of the Sherman Act? Answer as to each:

- | | | | | | |
|----|-------------------------|-----|-------|----|----------|
| a. | Noritsu America Corp. | Yes | _____ | No | <u>✓</u> |
| b. | Jerry Elwinger | Yes | _____ | No | <u>✓</u> |
| c. | Back-In-A-Flash, Ltd. | Yes | _____ | No | <u>✓</u> |
| d. | Hubert H. Ingraham, Jr. | Yes | _____ | No | <u>✓</u> |
| e. | Gerald L. McNaron | Yes | _____ | No | <u>✓</u> |

Questions As To Section 1 of the Sherman Act

5. Do you find from a preponderance of the evidence that the following Defendants combined or conspired to restrain unreasonably interstate trade or commerce in violation of Section 1 of the Sherman Act? Answer as to each:

- | | | |
|----------------------------|-----------|--|
| a. Noritsu America Corp. | Yes _____ | No <input checked="" type="checkbox"/> |
| b. Jerry Elwinger | Yes _____ | No <input checked="" type="checkbox"/> |
| c. Back-In-A-Flash, Ltd. | Yes _____ | No <input checked="" type="checkbox"/> |
| d. Hubert H. Ingraham, Jr. | Yes _____ | No <input checked="" type="checkbox"/> |
| e. Gerald L. McNaron | Yes _____ | No <input checked="" type="checkbox"/> |

Questions As To Proximate Cause
And Damages on Sherman Act Claims

If you have answered "Yes" to any Defendant in Questions 2, 3, 4, or 5, then answer Question 6. Otherwise, do not answer that question.

6. Do you find from a preponderance of the evidence that Plaintiff sustained injury to its business which was proximately caused by a Sherman Act violation or violations on the part of the Defendants?

Yes _____ No _____

If you have answered Question 6 "Yes," then proceed to answer Question 7. If you have answered Question 6 "No" and only in that event, do not answer Question 7 and proceed to Question 8.

7. What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiff for any damages suffered by it by reason of a Sherman Act injury to its business which you have found was

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proximately caused by such violation or violations found in
answer to Question 6 above?

Answer by inserting the amount, if any: \$

Questions As To Texas Antitrust Laws

8. Do you find from a preponderance of the evidence that the following Defendants entered into a "trust" under the antitrust laws of Texas as defined in the foregoing instructions? Answer as to each:

- | | | | | | |
|----|-------------------------|-----|-------------------------------------|----|-------------------------------------|
| a. | Noritsu America Corp. | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| b. | Jerry Elwinger | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| c. | Back-In-A-Flash, Ltd. | Yes | <input type="checkbox"/> | No | <input checked="" type="checkbox"/> |
| d. | Hubert H. Ingraham, Jr. | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| e. | Gerald L. McNaron | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |

9. Do you find from a preponderance of the evidence that the following Defendants entered into a conspiracy in restraint of trade under the antitrust laws of Texas as defined in the foregoing instructions? Answer as to each:

- | | | | | | |
|----|-------------------------|-----|-------------------------------------|----|-------------------------------------|
| a. | Noritsu America Corp. | Yes | <input type="checkbox"/> | No | <input checked="" type="checkbox"/> |
| b. | Jerry Elwinger | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| c. | Back-In-A-Flash, Ltd. | Yes | <input type="checkbox"/> | No | <input checked="" type="checkbox"/> |
| d. | Hubert H. Ingraham, Jr. | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| e. | Gerald L. McNaron | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |

Questions As To Proximate Cause and Damages on Texas Antitrust Laws

If you have answered "Yes" as to any Defendant in Question 8 or 9, then answer Question 10. Otherwise, do not answer Question 10 and proceed to Question 14.

10. Do you find from a preponderance of the evidence that Plaintiff sustained injury which was proximately caused by a

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Texas antitrust law violation or violations on the part of the Defendants?

Yes ✓ No

If you have answered Question 10 "Yes," then proceed to answer Questions 11-13. If you have answered Question 10 "No" and only in that event, go on to Question 14.

11. What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiff for any damages suffered by it by reason of such injury which you have found was proximately caused by the violation or violations found in answer to Interrogatory 10?

Answer by inserting the amount, if any: \$ 170,000.00

12. Do you find from a preponderance of the evidence that the acts committed by Defendants in furtherance of a trust and/or conspiracy in violation of the Texas antitrust laws, were done by them with malice or intentionally, or with reckless and callous indifference toward the Plaintiff?

Answer as to each Defendant:

a. Noritsu America Corp.	Yes <u> </u>	No <u> ✓ </u>
b. Jerry Elwinger	Yes <u> </u>	No <u> ✓ </u>
c. Back-In-A-Flash, Ltd.	Yes <u> </u>	No <u> ✓ </u>
d. Hubert H. Ingraham, Jr.	Yes <u> </u>	No <u> ✓ </u>
e. Gerald L. McNaron	Yes <u> </u>	No <u> ✓ </u>

If you have answered Question 12 "Yes" as to any Defendant, answer Question 13. If you have answered Question 12 "No" as to all Defendants, go on to Question 14.

13. What sum of money, if any, should be awarded against Defendants as punitive damages?

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Answer as to each Defendant:

- a. Noritsu America Corp. \$ _____
- b. Jerry Elwinger \$ _____
- c. Back-In-A-Flash, Ltd. \$ _____
- d. Hubert H. Ingraham, Jr. \$ _____
- e. Gerald L. McNaron \$ _____

Questions As To Wrongful Interference

14. Do you find from a preponderance of the evidence that the following Defendants wrongfully interfered with Plaintiff's prospective contractual relationship with Noritsu America Corporation?

Answer as to each:

- | | | | | | |
|----|-------------------------|-----|-------|----|--------------|
| a. | Back-In-A-Flash, Ltd. | Yes | _____ | No | <u> ✓ </u> |
| b. | Hubert H. Ingraham, Jr. | Yes | _____ | No | <u> ✓ </u> |
| c. | Gerald L. McNaron | Yes | _____ | No | <u> ✓ </u> |

If you answered Question 14 "Yes" as to one or more of the Defendants, then proceed to answer Question 15. If you have answered Question 14 "No" as to all Defendants, do not answer Questions 15-17.

15. Do you find from a preponderance of the evidence that Plaintiffs sustained injury which was proximately caused by Defendants' wrongful interference?

Yes _____ No _____

If you answered Question 15 "Yes," then proceed to answer Question 16, otherwise stop and return your verdict.

16. What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiff for any damages suffered by it by reason of such wrongful interference?

Answer by inserting the amount, if any: \$ _____

17. Do you find from a preponderance of the evidence that the Defendants named below acted with ill-will, spite, evil motive or intentionally injured Plaintiff in such wrongful interference?

Answer as to each:

- | | | | | |
|----------------------------|-----|-------|----|-------|
| a. Back-In-A-Flash, Ltd. | Yes | _____ | No | _____ |
| b. Hubert H. Ingraham, Jr. | Yes | _____ | No | _____ |
| c. Gerald L. McNaron | Yes | _____ | No | _____ |

If you have answered "Yes," as to any Defendant in Question 17, proceed to answer Question 18, otherwise STOP and return your verdict.

18. What sum of money, if any, should be awarded against Defendants as punitive damages?

Answer as to each:

- | | | |
|----------------------------|----|-------|
| a. Back-In-A-Flash, Ltd. | \$ | _____ |
| b. Hubert H. Ingraham, Jr. | \$ | _____ |
| c. Gerald L. McNaron | \$ | _____ |