IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RRK HOLDING COMPANY, a Wisconsin Corporation, Plaintiff, v. SEARS, ROEBUCK AND CO., a New York Corporation, Defendant.	)	Civil Action No. 04 C 3944 Judge David H. Coar

JURY INSTRUCTIONS

JURY INSTRUCTION NO. 1

FUNCTIONS OF THE COURT AND THE JURY

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

JURY INSTRUCTION NO. 2

JUDGE'S COMMENTS TO LAWYER

I have a duty to caution or warn an attorney who does something that I believe is not in keeping with the rules of evidence or procedure. You are not to draw any inference against the side whom I may caution or warn during the trial.

JURY INSTRUCTION NO. 2.1

NO INFERENCE FROM JUDGE'S QUESTIONS

During this trial, I have asked a witness a question myself. Do not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be.

JURY INSTRUCTION NO. 3

EVIDENCE

The evidence consists of the testimony of the witnesses, exhibits admitted in evidence, and stipulations. A stipulation is an agreement between both sides that certain facts are true.

JURY INSTRUCTION NO. 4

DEPOSITION TESTIMONY

During the trial, certain testimony was presented to you by the reading of depositions. You should give this testimony the same consideration you would give it had the witness appeared and testified here in court.

JURY INSTRUCTION NO. 5

WHAT IS NOT EVIDENCE

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or exhibits or struck any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, Internet or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

JURY INSTRUCTION NO. 6

CONSIDERATION OF ALL EVIDENCE REGARDLESS OF WHO PRODUCED

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

JURY INSTRUCTION NO. 7

LIMITED PURPOSE OF EVIDENCE

You will recall that during the course of this trial I instructed you that I admitted certain evidence for a limited purpose. You must consider this evidence only for the limited purpose for which it was admitted.

JURY INSTRUCTION NO. 8

WEIGHING THE EVIDENCE

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

JURY INSTRUCTION NO. 9

DEFINITION OF "DIRECT" AND "CIRCUMSTANTIAL" EVIDENCE

You may have heard the phrases "direct evidence" and "circumstantial evidence." Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from the witness who says, "I was outside a minute ago and I saw it raining." Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

JURY INSTRUCTION NO. 10

TESTIMONY OF WITNESSES

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, including any party to the case, you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the witness's intelligence;
- the manner of the witness while testifying;
- and the reasonableness of the witness's testimony in light of all the evidence in the case.

JURY INSTRUCTION NO. 11

PRIOR INCONSISTENT STATEMENTS OR ACTS

You may consider statements given by witnesses under oath before trial as evidence of the truth of what he said in the earlier statements, as well as in deciding what weight to give his testimony.

If you decide that, before the trial, one of these witnesses made a statement or acted in a manner that is inconsistent with his testimony here in court, you may consider the earlier statement or conduct only in deciding whether his testimony here in court was true and what weight to give to his testimony here in court.

In considering a prior inconsistent statements, you should consider whether it was simply an innocent error or an intentional falsehood and whether it concerns an important fact or an unimportant detail.

JURY INSTRUCTION NO. 12

NUMBER OF WITNESSES

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

JURY INSTRUCTION NO. 13

EXPERT WITNESSES

You have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

JURY INSTRUCTION NO. 14

SUMMARIES

Certain sales summaries are in evidence. The original materials used to prepare those summaries also are in evidence. It is up to you to decide if the summaries are accurate.

JURY INSTRUCTION NO. 15

BURDEN OF PROOF

When I say a particular party must prove something by "a preponderance of the evidence," or when I use the expression "if you find," or "if you decide," this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

JURY INSTRUCTION NO. 16

DESCRIPTION OF PARTIES' CONTENTIONS

RRK seeks damages from Sears for violating the Illinois Trade Secrets Act and breach of contract. Sears denies that it engaged in any wrongdoing or violated any law.

JURY INSTRUCTION NO. 17

COUNT II -- VIOLATION OF ILLINOIS TRADE SECRETS ACT

DEFINITION OF TRADE SECRET

Regarding RRK's trade secret claim, you must first determine whether a trade secret existed. A trade secret involves information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers. To prove its information is entitled to special protection as a trade secret, RRK must show that:

1. The information is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its use or disclosure; and
2. RRK took reasonable efforts under the circumstances to maintain the secrecy or confidentiality of the information.

I will further explain these two requirements to you in a moment.

In determining whether RRK has proven by a preponderance of the evidence that it possessed a specific, identifiable trade secret, you may consider the following factors:

1. The extent to which the information was known outside of RRK's business;
2. The extent to which it was known by employees and others involved in RRK's business;
3. The extent of measures taken by RRK to guard the secrecy of the information;
4. The value of the information to RRK and to its competitors;
5. The amount of effort or money expended by RRK in developing the information; and
6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

The subject matter of the trade secret must, of course, be secret. RRK must show that the information is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its use or disclosure. This requires proof that the information is sufficiently secret to impart economic value to both RRK and its competitors because of its relative secrecy. The subject matter of the information must not be public knowledge in the trade or business. Trade secret protection is lost if the secret is disclosed to the public.

The secrecy requirement for information to qualify as a trade secret, however, does not mean that absolute secrecy must be maintained in the sense that no one else in the world possesses the information. Rather, RRK must demonstrate that the information was known to it or to a few others to whom it was necessary to confide the information, who have also treated the information as secret.

JURY INSTRUCTION NO. 18

COUNT II – VIOLATION OF ILLINOIS TRADE SECRETS ACT

REASONABLE MEASURES TO PROTECT SECRECY

RRK must prove that it took reasonable measures to protect the secrecy or confidentiality of the information in order for the information to be accorded trade secret protection. There are no absolute requirements that define what measures are "reasonable" in a given situation.

JURY INSTRUCTION NO. 19

COUNT II -- VIOLATION OF ILLINOIS TRADE SECRETS ACT

MISAPPROPRIATION

If you find that RRK has proven by a preponderance of the evidence that a trade secret existed, then you must decide whether that trade secret information was misappropriated by Sears.

To prove that a misappropriation occurred, RRK must prove by a preponderance of the evidence that:

1. Sears acquired RRK's trade secret knowing or having reason to know that the trade secret was acquired by improper means; or
2. Sears disclosed or used RRK's trade secret without RRK's express or implied consent, and Sears:
   a. Used improper means to acquire knowledge of the trade secret; or
   b. At the time of the disclosure or use of the trade secret, knew or had reason to know that knowledge of the trade secret was:
      i. Derived from or through a person who used improper means to acquire it;
      ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
      iii. Derived from or through a person who owed a duty to RRK to maintain its secrecy or limit its use; or
   c. Before a material change of position, Sears knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Misappropriation requires a showing that the trade secret at issue was acquired by improper means. "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a confidential relationship or other duty to maintain secrecy or limit use, or espionage through electronic or other means. Independent development is not an improper means of acquiring a trade secret.

JURY INSTRUCTION NO. 20

DAMAGES

You should not interpret the fact that I am giving instructions about RRK's potential damages as an indication in any way that I believe that RRK should, or should not, prevail on any claim. It is your task to decide first whether Sears is liable. I am instructing you on damages only so that you will have guidance in the event that you decide that Sears is liable and that RRK is entitled to recover money from Sears.

You must assess the amount you find by a preponderance of the evidence is full, just, and reasonable compensation for all of the damages proximately caused by Sears' wrongful conduct. RRK has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proven. Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

JURY INSTRUCTION NO. 21

DAMAGES FOR TRADE SECRET MISAPPROPRIATION

If you find that Sears misappropriated RotoZip's trade secret, RRK is entitled to recover damages. RRK has the burden of proving the amount of the damages by a preponderance of the evidence. Damages can include RotoZip's actual loss caused by Sears' misappropriation and the unjust enrichment caused by the misappropriation that is not taken into account in computing RotoZip's actual loss.

In determining RRK's actual loss, you should determine what profits RRK would have made, if any, had Sears not misappropriated RotoZip's trade secret. In determining unjust enrichment you should determine the amount of money Sears benefited as a result of the misappropriation to the extent it exceeds RRK's actual loss.

Damages need not be calculated to a mathematical certainty nor must there be specific proof of the actual amount of the loss, however there must be a reasonable basis for the computation. You may consider the testimony of the parties' experts in determining damages, but you are not required to rely on their opinions.

JURY INSTRUCTION NO. 22

EXEMPLARY DAMAGES

RRK has asked for exemplary or punitive damages in relation to its claim for violation of the Illinois Trade Secrets Act.

If you believe that Sears misappropriated RRK's trade secret willfully and maliciously, you may, although you are not required to, award RRK punitive damages. Willful and malicious misappropriation includes intentional misappropriation as well as misappropriation resulting from the conscious disregard of the rights of another. However, punitive damages should only be awarded if you determine that Sears' conduct was particularly shocking, outrageous, and offensive. The purpose of punitive damages is to punish a defendant for egregious conduct, and to deter the defendant and others from engaging in similar conduct in the future.

If you decide that punitive damages are appropriate, the award cannot exceed twice the amount of your award for damages for violation of the Illinois Trade Secret Act.

JURY INSTRUCTION NO. 23

BREACH OF CONTRACT

RRK and Sears entered into a contract called a Mutual Nondisclosure Agreement. RRK has the burden of proving each of the following:

First, RRK substantially performed all obligations required of it under the contract.

Second, Sears failed to perform its obligations under the contract and breached the contract.

Third, as a result of the breach of contract, RRK sustained damages.

If you find from your consideration of all of the evidence that each of these propositions required by RRK has been proved, then your verdict should be in favor for the plaintiff.

JURY INSTRUCTION NO. 24

BREACH OF CONTRACT: DAMAGES

If you decide for RRK on its claim for breach of contract, you must determine the amount of money which will reasonably compensate the plaintiff for all loss naturally arising from the breach. In calculating plaintiff's damages, you should determine that sum of money that will put RRK in as good a position as it would have been in if Sears had performed all of its promises under the contract.

JURY INSTRUCTION NO. 25

SELECTION OF PRESIDING JUROR; GENERAL VERDICT

Upon retiring to the jury room, you must select a presiding juror. The presiding juror will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

[Forms of verdict read.]

Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in and date the appropriate form, and all of you will sign it.

JURY INSTRUCTION NO. 26

DISAGREEMENT AMONG JURORS

The verdict must represent the considered judgment of each juror. Your verdict, whether for or against the parties, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts.

JURY INSTRUCTION NO. 27

COMMUNICATION WITH COURT

I do not anticipate that you will need to communicate with me. If you do need to communicate with me, the only proper way is in writing. The writing must be signed by the presiding juror, or, if he or she is unwilling to do so, by some other juror. The writing should be given to the marshal, who will give it to me. I will respond either in writing or by having you return to the courtroom so that I can respond orally. If you do communicate with me, you should not indicate in your note what your numerical division is, if any.