

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**INNOVATION VENTURES, LLC,
d/b/a LIVING ESSENTIALS,**

Plaintiff,

v.

N.V.E., INC.,

Defendant.

**Case No. 08-11867-TGB-RSW
Hon. Terrence G. Berg
Magistrate Judge R. Steven Whalen**

FINAL JURY INSTRUCTIONS

Additional Keyword: Lanham; 1114, 1125(a)

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POST-TRIAL JURY INSTRUCTIONS

Faithful Performance of Duties; Jury to Follow Instructions

Members of the jury, the evidence and argument in this case have been completed and I will now instruct you on the law. That is, I will explain the law that applies to this case.

Faithful performance by you of your duties is vital to the administration of justice.

The law you are to apply in this case is contained in these instructions, and it is your duty to follow them. In other words, you must take the law as I give it to you. You must consider them as a whole and not pick out one or some instructions and disregard others. This includes the instructions that I gave you before and during trial and these instructions.

Following my instructions you will go to the jury room and deliberate and decide on your verdict.

Facts to be Determined From Evidence

It is your duty to determine the facts only from evidence received in open court. You are to apply the law to the facts and in this way decide the case. Sympathy must not influence your decision. Do not let rumors, suspicions or anything else that you may have seen or heard outside of court influence your decision in any way. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

Admission of Evidence

The evidence you are to consider consists of testimony of witnesses and exhibits offered and received. The admission of evidence in court is governed by rules of law. From time to time it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit to which an objection was sustained or any testimony or exhibit which was ordered stricken.

Attorneys' Statements Not Evidence; Admission by Attorney

The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. The lawyers' questions to witnesses, my questions to witnesses, and questions that you have asked the witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. The lawyers' objections and my legal rulings also are not evidence. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

However, an admission of a fact by a lawyer is binding on his client.

Corporations Entitled to Unprejudiced Treatment

The corporate plaintiff and corporate defendant in this case are entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and it is your duty to decide the case with the same impartiality you would use in deciding a case between individuals.

Evidence Introduced for a Limited Purpose

Whenever evidence was received for a limited purpose or limited to one party, you must not consider it for any other purpose or as to any other party.

Jury to Consider All the Evidence

In determining whether any fact has been proved, you shall consider all of the evidence bearing on that fact without regard to which party produced the evidence.

Taking Notes

Remember that if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.

Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

Circumstantial Evidence

Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining.

Facts can also be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside carrying a wet umbrella and wearing a raincoat covered with drops of water, that would be circumstantial evidence that it is raining outside.

Circumstantial evidence by itself, or a combination of circumstantial evidence and direct evidence, can be used to prove or disprove a proposition. You must consider all the evidence, both direct and circumstantial. It is your job to decide how much weight to give the direct and circumstantial evidence.

Jurors May Take into Account Ordinary Experience and Observations

You have a right to consider all the evidence in the light of your own general knowledge and experience in the affairs of life, and to take into account whether any particular evidence seems reasonable and probable. However, if you have personal knowledge of any particular fact in this case such knowledge may not be used as evidence.

Credibility of Witnesses

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

Prior Inconsistent Statement of Witness

If you decide that a witness said something earlier that is not consistent with what the witness said at this trial, you may consider the earlier statement in deciding whether to believe the witness, but you may not consider it as proof of the facts in this case.

However, there are exceptions. You may consider an earlier statement as proof of the facts in this case if:

- a. the statement was made by the plaintiff, the defendant, or an agent or employee of either party; or
- b. the statement was given under oath subject to the penalty of perjury at a trial, hearing, or in a deposition; or
- c. the witness testified during the trial that the earlier statement was true.

Weighing Conflicting Evidence – Number of Witnesses

Although you may consider the number of witnesses testifying on one side or the other when you weigh the evidence as to a particular fact, the number of witnesses alone should not persuade you if the testimony of the lesser number of witnesses is more convincing.

Consideration of Deposition Evidence

During the trial, you heard testimony from depositions. A deposition is the sworn testimony of a party or witness taken before trial. All parties and their lawyers had the right to be present and to ask questions.

You are to give this evidence the same consideration as you would have given it had the witness testified in open court.

Expert Witnesses

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions. Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Meaning of Burden of Proof

I shall now explain to you the burden of proof which the law places on the parties to establish their respective claims. When I say that a party has the burden of proof, I mean the evidence must satisfy you that the proposition on which that party has the burden of proof has been established by evidence which outweighs the evidence against it.

You must consider all the evidence regardless of which party produced it.

Burden of Proof – Preponderance of the Evidence

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more likely true than not true.

Judge's Opinion

Do not interpret my rulings on the objections made by either party as any indication of how I think the case should be decided. I have not meant to indicate any opinion as to the facts by my rulings, conduct or remarks during the trial; but if you think I have, you should disregard it, because you are the sole judges of the facts.

Trademark Infringement – Generally

A trademark, also called a “mark,” is a word, symbol, or combination of words or symbols used by a person to identify his product, to distinguish his product from those manufactured or sold by others, and to indicate the source of his product.

The purpose of trademark law is to prevent confusion among customers about the source, affiliation or sponsorship of products and to permit trademark owners to show ownership of their products and control their product’s reputation.

A person acquires the right to exclude others from using a trademark by being the first to use it in the marketplace, or by using it before the alleged infringer. Rights in a trademark are obtained only through commercial use of the mark.

Living Essentials has rights in the trademark “5-hour ENERGY.” Living Essentials claims that NVE has infringed the 5-hour ENERGY trademark.

In an action for infringement, the owner of a mark may enforce the right to prevent others from using the same or a similar mark that is likely to cause confusion in the marketplace. Anyone who, without the consent of the owner of a mark, uses the same or a similar mark in connection with the sale or offering for sale of goods or services in a manner likely to cause confusion among consumers as to the source, affiliation, or sponsorship of goods or services, infringes the mark.

Trademark Infringement – Elements

Living Essentials claims that NVE infringed Living Essentials' trademark. To succeed on its trademark infringement claim, Living Essentials must prove the following elements by a preponderance of the evidence:

1. Living Essentials owns 5-hour ENERGY as a trademark;
2. 5-hour ENERGY is a valid trademark;
3. Living Essentials began using 5-hour ENERGY trademark before NVE began to use 6 Hour POWER in each geographic area where Living Essentials claims that NVE infringes the 5-hour ENERGY mark; and
4. NVE used 6 Hour POWER without the consent of Living Essentials in a manner that is likely to cause confusion as to the source, sponsorship, affiliation, or approval of the goods.

I will explain what I mean by these terms.

The first and second elements have been decided as a matter of law. You must accept that 5-hour ENERGY is a valid, trademark owned by Living Essentials.

However, Living Essentials must prove the third and fourth, elements by a preponderance of the evidence to prevail on its trademark infringement claim.

If you find that Living Essentials has proven the third and fourth elements by a preponderance of the evidence, then you must find for Living Essentials. However, if Living Essentials did not prove each of those elements by a preponderance of the evidence, then you must find for NVE.

Second Element – Valid Trademark

A valid trademark is a word or phrase that is “distinctive,” which means that the word or phrase is capable of distinguishing Plaintiff’s product from the products of others. As stated above, this element has been decided as a matter of law. You must accept that 5-hour ENERGY is distinctive and, therefore, valid.

Third Element –Priority

As the party asserting a claim of trademark infringement, Living Essentials must prove Living Essentials began using 5 Hour Energy as a trademark before NVE began to use 6 Hour POWER in each geographic area where Living Essentials claims that NVE infringes the 5-hour Energy mark.

Living Essentials is entitled to trademark rights in the geographic areas in which it used the 5-hour ENERGY trademark prior to the alleged infringement by NVE. In addition to geographic areas in which it used the mark, Living Essentials is entitled to its zone of natural expansion, i.e., any area in which it would have expected to expand into.

Fourth Element – Likelihood of Confusion

In order to prove its trademark infringement claim, Living Essentials must prove by a preponderance of the evidence that NVE's use of the trademark "6 Hour POWER" creates a likelihood of confusion regarding the origin, source, or affiliation of the goods offered by Living Essentials and NVE.

There are several factors you should consider in deciding whether the evidence is sufficient to show that NVE's use of the trademark "6 Hour POWER" creates a likelihood of confusion as to whether 6 Hour POWER originates with or is affiliated with Living Essentials, the company that makes 5 Hour ENERGY. While not all of these factors are relevant in every case, the ultimate question remains whether relevant consumers are likely to believe that the products offered by the parties are affiliated in some way. As you consider the likelihood of confusion you should examine the following:

- **Strength of the 5-Hour Energy Trademark:** If you find that 5-hour ENERGY is a relatively strong mark, and you find that 6-hour POWER is confusingly similar, you may consider whether the strength of 5-hour ENERGY's mark makes it more likely that consumers would believe that the two products were affiliated or came from the same source. If you find that 5-hour ENERGY is a relatively weak mark, you may consider whether the weakness of the mark makes it less likely that relevant consumers would confuse the two products as being affiliated or from the same source. Evidence of strong brand name recognition may be considered as evidence of strength of

the trade mark.

- **The Relatedness of the Goods:** If you find that the trademarks are confusingly similar, and the parties both use their marks to market the same, related, or complementary types of products, then the likelihood of confusion is more likely. If the goods are unrelated, then the likelihood of confusion is less likely.
- **Similarity of the Marks:** In evaluating this factor, you should consider the overall impression created by the marks, keeping in mind all the things that the general buying public will likely perceive and remember about the marks, including their similarities in sight, sound, and meaning. In analyzing similarity of the marks, a side-by-side comparison is not appropriate. The relevant question is whether the 6 Hour POWER trademark, when viewed alone, would lead to confusion as to whether it is affiliated with, sponsored by, or made by Living Essentials, the company that makes 5 Hour ENERGY. In considering the similarity of the marks, you may consider whether the 6 Hour POWER trademark is always used in conjunction with a company name and whether that reduces the similarity of the marks.
- **Defendant's Intent:** Whether the evidence shows that NVE intended to pass its product off as that of Living Essentials, or intended to confuse consumers.
- **Likely Degree of Purchaser Care:** The degree of care that purchasers or potential purchasers are likely to exercise in buying or considering whether to buy the product. This may depend on the level of sophistication of potential

buyers of the product and the cost of the product.

- **Marketing Channels Used:** Whether Living Essentials' and NVE's products are likely to be sold in the same or similar stores or outlets, or advertised in similar media.
- **Actual Confusion:** Whether NVE's use of 6 Hour POWER has led to instances of actual confusion among purchasers or potential purchasers or potential purchasers about whether NVE's product, 6 Hour POWER has the same source, sponsorship or approval as Living Essentials' product, 5 Hour ENERGY. However, proof of actual confusion is not required for a finding of a likelihood of confusion.

These factors are helpful guides rather than rigid requirements. You may find that not all of these factors are necessarily helpful or relevant to your decision, and you may give each factor the weight you think it deserves in light of all the evidence. It is not necessary that Living Essentials present proof on all of these factors, but you may consider these factors to see if they help you decide whether Living Essentials has shown by a preponderance of the evidence the NVE's use of the 6 Hour POWER trademark created a likelihood of confusion, that is, that relevant consumers would believe that NVE's product, 6 Hour POWER, is sponsored by, approved by, affiliated with, or made by Living Essentials, the company that makes 5 Hour ENERGY.

Trademark Damages – Actual Damages

If you find for Living Essentials on its claim of trademark infringement, then you must consider what amount of money to award Living Essentials as damages, if any. You are not required to find that Living Essentials has suffered monetary damages.

Damages consist of the amount of money required to compensate Living Essentials for the injury caused by NVE's infringement. Living Essentials must prove its damages by a preponderance of the evidence.

Damages must be proven with a reasonable degree of certainty. Moreover, Living Essentials must prove that the alleged infringement is a direct and proximate cause of the alleged damage. Living Essentials may not recover damages based on mere conjecture or speculation.

You may consider the following types of damages:

Living Essentials' lost profits on lost sales, which consists of the revenue Living Essentials would have earned but for NVE's infringement, less the expenses Living Essentials would have sustained in earning those revenues.

Accordingly, your award of such future costs should not exceed the actual damage to the value of Living Essentials' mark caused by the infringement by NVE.

Trademark Damages

In addition to Living Essentials damages, Living Essentials may recover the profits NVE gained from the trademark infringement. You may not, however, include in any award of profits any amount that you took into account in determining actual damages.

Profit is determined by deducting expenses from gross revenue. Gross revenue is all of the money NVE received due to its use of 6 Hour POWER.

Living Essentials is required only to prove NVE's gross revenue. NVE is required to prove any expenses that it argues should be deducted in determining its profits.

Living Essentials is entitled to recover NVE's total profits from its use of the 6 Hour POWER trademark, unless NVE proves that a portion of the profit is due to factors other than the use of the 6 Hour POWER trademark.

False Advertising – Generally

False advertising law prohibits any person or company from making false or misleading statements in commerce that misrepresent another person or company's goods, services, or commercial activities. Liability arises if the statement is either literally false or so ambiguous as to actually mislead a substantial portion of the intended audience.

The purpose of the law prohibiting false or misleading statements in advertising is to protect consumers and to protect businesses against deceptive practices. Competitors have the greatest interest in stopping misleading advertising, and so the law gives the person or company making the goods that are affected by the advertising the right to enforce the law by bringing a lawsuit.

False Advertising – Elements

NVE claims that Living Essentials engaged in false advertising. To succeed on this claim, NVE must prove the following elements by a preponderance of the evidence:

1. Living Essentials made a misleading statement of fact in a commercial advertisement about NVE's product.
2. The statement actually deceived a substantial portion of the intended audience;
3. The statement was likely to influence the purchasing decisions of the intended audience;
4. Living Essential caused the commercial advertisement containing the statement to enter interstate commerce; and
5. There is some causal link between the challenged statement and harm to NVE.

The fourth element is not disputed by Living Essentials. You must accept that the statement entered interstate commerce. If you find that NVE has proved each of the other elements by a preponderance of the evidence, then you must find for NVE. However, if NVE did not prove each of those elements by a preponderance of the evidence, then you must find for Living Essentials.

False Advertising Damages

If you find for NVE on its claim of false advertising, then you must consider what amount of money to award NVE as damages, if any. You are not required to find that NVE has suffered money damages.

Damages consist of the amount of money required to compensate NVE for the injury caused by Living Essentials' false advertising. NVE must prove its damages were caused by Living Essentials' false advertising, and must prove the amount of such damages, by a preponderance of the evidence.

You may consider the following types of damages:

- A. The injury to NVE's reputation;
- B. The injury to NVE's goodwill, including injury to NVE's general business reputation;
- C. The lost profits that NVE would have earned but for Living Essentials' false advertising. Profit is determined by deducting all expenses from gross revenue;
- D. The expense of preventing customers from being deceived;
- E. The cost of future corrective advertising reasonably required to correct any public confusion caused by the infringement.

When considering prospective costs (for example, the cost of future advertising, or the expense of preventing customers from being deceived), you must not overcompensate. Accordingly, your award of such future costs should not exceed the actual damage to NVE caused by the false advertising by Living Essentials. You may

consider whether any of the lost profits claimed by NVE were caused by other market factors rather than the 'Legal Notice', and if so, to what extent those other market factors caused NVE's lost profits. If you find that any of the lost profits claimed by NVE were caused by other market factors, and not by any false advertising, you should not include those lost profits in any damage award to NVE.

Unclean Hands

NVE contends Living Essentials should not be allowed to enforce its 5-hour ENERGY trademark against NVE because of the doctrine of “unclean hands.” An example of applying the unclean hands doctrine is the rule that a person injured while trespassing on another’s property may be barred from seeking compensation from the property owner for his or her injuries.

As applied in a trademark case, according to the doctrine of unclean hands, the owner of a trademark, such as Living Essentials, may be barred from enforcing the trademark against an alleged infringer, such as NVE, if there is clear, convincing and unequivocal evidence that the owner of the trademark has acted inequitably, unfairly, unconscionable or with fraud and deceit toward the infringer, and did so in a way that has immediate and necessary relation to the relief that the trademark owner seeks in a lawsuit. If you find that NVE infringed the 5 Hour ENERGY trademark, you must then determine whether Living Essentials should be barred from enforcing its trademark against NVE under the doctrine of unclean hands.

To prove its unclean hands defense, NVE must prove the following two elements by clear, unequivocal and convincing evidence:

1. That Living Essentials engaged in conduct involving fraud, deceit, unconscionability or bad faith; and
2. Living Essentials’ conduct was directly related to Living Essentials’ efforts to acquire and protect its rights in the 5 Hour ENERGY trademark.

If you find that the evidence is clear, convincing and unequivocal that NVE has proven these two elements, you may find that Living Essentials is barred from enforcing its trademark under the doctrine of unclean hands.

Keep in mind that unfair, deceitful or fraudulent conduct that is unrelated to the matter at issue in this case should not be considered as unclean hands. While a trademark owner may aggressively promote and protect a trademark, it may not do so by engaging in conduct that is unfair, fraudulent, unconscionable, or deceitful.

You must consider and weigh all the facts and circumstances to determine whether you believe that, on balance, Living Essentials acted in such an unfair way towards NVE in the matters relating to the controversy between Living Essentials and NVE that, in fairness, Living Essentials should be denied the relief it seeks in this lawsuit. Clear, unequivocal and convincing evidence means you must be persuaded by the evidence that NVE's claim that Living Essentials acted with unclean hands is highly probable. This is a higher standard of proof than proof by a preponderance of the evidence.

Deliberations

You will be given a written copy of the final jury instructions for your use in the jury room for deliberation.

When you go to the jury room, your deliberations should be conducted in a businesslike manner. You should first select a foreperson. She or he should see to it that the discussion goes forward in an orderly fashion and that each juror has full opportunity to discuss the issues.

When all of you agree upon a verdict, it will be received as your verdict. In your deliberations, you should weigh the evidence with an open mind and consideration for each other's opinions.

If differences of opinion arise, you should discuss them in a spirit of fairness and frankness. You should express not only your opinion but also the facts and reasons upon which you base it.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced that it is wrong. However, none of you should surrender your honest conviction as to the weight and effect of the evidence or lack of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

During your deliberations, and before you reach a verdict, you must not disclose anything about your discussions to others outside the jury room, not even how your voting stands.

Therefore, until you reach a verdict, do not disclose that information, even in the courtroom.

Non-unanimous verdict – 6 out of 8.

Outside Communications

During your deliberations you may not communicate with persons outside the jury room (other than with Court personnel), or seek information by any means, including cellular telephones or other electronic devices. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. You may not use these electronic means to investigate or communicate about the case because it is important that you decide the case based solely on the evidence presented in the courtroom and my instructions on the law. Information from the Internet or available through social media might be wrong, incomplete, or inaccurate.

If you discover a juror has violated my instructions, you should report it to me right away.

Questions

That concludes my instructions on the law. If you have any questions about these instructions at this point, please write them down and give them to Mr. Darling, who will then give them to me, and after consulting with counsel, I will address your questions.

If you wish to communicate with me or examine the exhibits while you are deliberating, please have your foreperson write a note and give it to Mr. Darling or Ms. Chubb. Any questions or communications with me during your deliberations must be written down and given to Mr. Darling or Ms. Chubb, who will then pass them to me, and I will address the questions or communications with counsel and respond as appropriate.

Verdict Form

A verdict form will be provided for you. You will take this form to the jury room and when you have reached agreement as to the answers, in accordance with these instructions, you will have your foreperson fill in the date and sign the form. You will then notify the Court's staff that you have reached a verdict, and bring the verdict form with you upon your return to the Court.

I will now explain the verdict form to you.

Closing

Finally, you should understand that nothing said in these instructions and nothing in the form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.