IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NEXSTEP, INC., a Delaware Corporation, Plaintiff, v. COMCAST CABLE COMMUNICATIONS, LLC a Delaware Limited Liability Company Defendant.	)	C.A. No. 19-1031-RGA-SRF

PRELIMINARY JURY INSTRUCTIONS

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1. INTRODUCTION

Members of the Jury: Now that you have been sworn, I am now going to give you some preliminary instructions to guide you in your participation in the trial.

2. THE PARTIES AND THEIR CONTENTIONS

Let me begin by giving you an overview of who the parties are and what each contends.

You may recall that during the process that led to your selection as jurors, I advised you that this is a civil action for patent infringement arising under the patent laws of the United States. The parties in this case are the plaintiff, NexStep, and the defendant, Comcast Cable Communications.

The case involves two United States Patents, Numbers: 9,866,697 and 8,280,009; which name Dr. Robert Stepanian as the inventor, and which are assigned to NexStep. I will refer to these patents collectively as the "Asserted Patents." For convenience, the parties and I will often refer to these patents by the last three numbers of the patent.

NexStep filed suit in this court against Comcast for allegedly infringing the Asserted Patents by making, importing, using, selling, and offering for sale in the United States products and services that NexStep argues are covered by Claim 1 of the '697 Patent and Claims 1, 16 and 22 of the '009 Patent. These claims may be referred to as the "Asserted Claims" of the Asserted Patents.

Generally speaking, the products that NexStep alleges infringe include Comcast's applications (or "apps") and systems for providing troubleshooting services.

Comcast denies that it has infringed the Asserted Claims of the Asserted Patents. Comcast also argues that the Asserted Claims are invalid. You will determine the questions of infringement and invalidity for each Asserted Claim.

Your job will be to decide whether or not the Asserted Claims of the Asserted Patents have been infringed and whether or not those claims are invalid. If you decide that any claim of an Asserted Patent has been infringed and is not invalid, you will then need to decide the amount of money damages to be awarded to NexStep to compensate it for the infringement.

3. MEANING OF THE PATENTS AT ISSUE

The patent claims are numbered sentences at the end of the patent that describe the boundaries of the patent's protection. It is my job as judge to explain to you the meaning of any language in the claims that needs interpretation. I have already determined the meaning of certain terms of the Asserted Claims of the Asserted Patents. You will be given a document reflecting those meanings. For a claim term for which I have not provided you with a definition, you should apply the ordinary meaning of that term. You are to apply my definitions of the terms I have construed throughout this case. However, my interpretation of the language of the claims should not be taken as an indication that I have a view regarding issues such as infringement and invalidity. Those issues are yours to decide.

4. DUTIES OF THE JURY

Let me begin with those general rules that will govern the discharge of your duties as jurors in this case.

It will be your duty to find what the facts are from the evidence as presented at the trial. You, and you alone, are the judges of the facts. You will have to apply those facts to the law as I will instruct you both during these preliminary instructions and at the close of the evidence. You must follow that law whether you agree with it or not.

You are bound by your oath as jurors to follow these and all the instructions that I give you, even if you personally disagree with them. All the instructions are important, and you should consider them together as a whole.

You are the judges of the facts. I will decide which rules of law apply to this case.

Perform these duties fairly. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way. Also, do not let anything that I may say or do during the course of the trial influence you. Nothing I say or do during the course of the trial is intended to indicate what your verdict should be.

5. EVIDENCE

The evidence from which you will find the facts will consist, in part, of the testimony of witnesses. The testimony of witnesses consists of the answers of the witnesses to questions posed by the attorneys or the court; you may not ask the witnesses questions. Evidence will also consist of documents and other things received as exhibits, and any facts that the lawyers agree to.

Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by lawyers are not evidence.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction. If this occurs during the trial, I will try to clarify this for you at that time.

3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered.

4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is evidence that does not require an inference, such as the testimony of an eyewitness, which, if you believe it, directly proves a fact. **If a witness testified that she saw it raining, that would be direct evidence that it was raining.**

Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. **If a witness testified that someone walked into the room wearing a raincoat**

covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence that it was raining.

As a general rule, the law makes no distinction between these two types of evidence, nor does it say that one is any better evidence than the other. Rather, the law simply requires that you find facts from all the evidence in the case, whether direct or circumstantial or a combination of the two.

6. CREDIBILITY OF WITNESSES

You are the sole judges of each witness' credibility. You should consider each witness' means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witness' biases, prejudices, or interests; the witness' manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

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

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

If you find testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable. This instruction applies to the testimony of all witnesses.

7. EXPERT WITNESSES

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

In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

8. BURDEN OF PROOF

As plaintiff, NexStep has the burden of proving infringement and damages by what is called a preponderance of the evidence. That means NexStep has to produce evidence which, when considered in the light of all the facts, leads you to believe that what NexStep claims is more likely true than not.

In this case, defendant Comcast is urging that NexStep's patents are invalid. Comcast has the burden of proving that the Asserted Patents are invalid by clear and convincing evidence. Proof by clear and convincing evidence is evidence that is proof that the truth of a factual contention is highly probable.[1] Thus, proof by clear and convincing evidence is a higher burden than proof by a preponderance of the evidence.

[1] Based on ND Cal. Model Patent Jury Instructions, § 4.1a, Oct. 2019 updated ed., at p. 25.

9. GENERAL GUIDANCE REGARDING PATENTS

Before I go any further, we are going to show a video that provide useful background information about patents. This video was prepared by the Federal Judicial Center, not by the parties in this case. During the video, there will be a reference that you have a sample patent, but you do not actually have the sample patent.

[The video will be played.]

10. SUMMARY OF THE PATENT ISSUES

In this case, you must decide several things according to the instructions that I will give you at the end of the trial. In order to help you follow the evidence during the trial, I will now give you a brief summary of the issues. In essence, you must decide:

1. Whether NexStep has proven by a preponderance of the evidence that Comcast has infringed any of the Asserted Claims.

2. Whether Comcast has proven by clear and convincing evidence that any of the infringed Asserted Claims are invalid.

3. **If any patent claims are infringed and not invalid, then for any such patent claims, the amount of damages NexStep has proven by a preponderance of the evidence.**

11. CONDUCT OF THE JURY

Now, a few words about your conduct as jurors. First, I instruct you that during the trial you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case. If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator, or the like, remember it is because they are not supposed to talk with you nor you with them. In this way, any unwarranted and unnecessary suspicion about your fairness can be avoided. If anyone should try to talk to you about it, bring it to the court's attention promptly. There are good reasons for this ban on discussions. The most important is the need for you to keep an open mind throughout the presentation of the evidence.

Second, do not read or listen to anything touching on this case in any way. By that I mean, if there may be a newspaper article or radio or television report relating to this case, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own on matters relating to the case, including using the Internet.

I know that many of you use cell phones, smart phones, tablets, and other portable electronic devices, as well as laptops, netbooks, and other computers. You must not talk to anyone at any time about this case or otherwise use these or other electronic devices to communicate with anyone about the case or, as I noted, get information about the case, the parties or any of the witnesses or lawyers involved in the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, text messaging, social media, Facebook, Snapchat, Twitter, Instagram, or through any blog or website. You may not use any similar technology or social media to get information about this case, even if I have not specifically mentioned it here.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

During the trial, you may, but are not required to, take notes regarding testimony; for example, exhibit numbers, impression of witnesses or other things related to the proceedings. A word of caution is in order. Your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, and are by no means a complete outline of the proceedings or a list of the highlights of the trial. Also, keep in mind that you will not have a transcript of the testimony to review. So, above all, your memory will be your greatest asset when it comes time to deliberate and render a decision in this case.

If you do take notes, you must leave them in the jury deliberation room which is secured at the end of each day. And, remember that they are for your own personal use.

12. COURSE OF THE TRIAL

The trial will now begin. First, each side may make an opening statement. An opening statement is neither evidence nor argument. It is an outline of what that party intends to prove, and is presented to help you follow the evidence as it is offered.

After the opening statements, plaintiff NexStep will present evidence which may include testimony from live witnesses, previously recorded testimony, and documents, and things. Comcast will then present its evidence.

During the trial, it may be necessary for me to talk with the lawyers out of your hearing by having a bench conference, which is also called a sidebar. If that happens, please be patient. We are not trying to keep important information from you. These conferences are necessary for me to fulfill my responsibility to be sure that evidence is presented to you correctly under the law. We will, of course, do what we can to keep the number and length of these conferences to a minimum. While we meet, feel free to stand up and stretch and walk around the jury box, if you wish. I may not always grant an attorney's request for a sidebar. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

After all of the evidence is presented, I will give you instructions on the law. The attorneys will then make their closing arguments to summarize and interpret the evidence for you.

You will then retire to the jury room to deliberate on your verdict.