

XIP, LLC	§	IN THE DISTRICT COURT
	§	
V.	§	
	§	
MICHAEL MCGRAW AND COMMTECH SALES, LLC	§	TARRANT COUNTY, TEXAS
	§	
V.	§	
	§	
ROAM CORPORATION AND J.K. HENDERSON	§	TARRANT COUNTY, TEXAS

FILED  
 TARRANT COUNTY  
 2019 MAY -6 PM 1:02  
 THOMAS A. WILDER  
 DISTRICT CLERK

COURT'S CHARGE

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After



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you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence unless you are told otherwise.

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

A fact may be established by direct evidence or by

circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. Unless otherwise instructed, the answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

## DEFINITIONS AND INSTRUCTIONS

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

"Proximate cause" means a cause that was a substantial factor in bringing about an occurrence, and without which cause such occurrence would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the occurrence, or some similar occurrence, might reasonably result therefrom. There may be more than one proximate cause of an occurrence.

"Plaintiff" means XIP, LLC and its predecessors-in-interest, if any.

"CommTech" means CommTech Sales, LLC.

A "trademark" is any word, name, symbol, designation, or device used by a person or business to identify and distinguish its goods from the goods of others and to identify their source. A trademark can be registered or unregistered. A trademark is sometimes referred to as a mark.

"Trade dress" is the physical detail and design of a product or its packaging that identifies the product's source and distinguishes it from the products of others. Trade dress can be registered or unregistered.

In answering all questions regarding damages, do not add any amount for interest on damages.

QUESTION NO. 1a:

Did CommTech infringe on the "MTC" trademark?

To answer "Yes" you must find that:

- (1) Plaintiff is the owner of the trademark;
- (2) Plaintiff is the senior user of the trademark; and
- (3) CommTech used the same or a deceptively similar mark in a manner that created a likelihood of confusion among relevant consumers as to the source, affiliation, sponsorship, or approval of the goods.

For the definition of a trademark, see page 4.

"Senior use" means that XIP or its predecessors-in-interest, if any, must have made commercial use of the mark before CommTech. Evidence of a predecessor's use may establish the length and exclusivity of XIP's use.

Answer "Yes" or "No."

ANSWER: Yes

If you answered "Yes" to Question 1a, then answer Question 1b. Otherwise, do not answer Question 1b.

QUESTION NO. 1b:

Did CommTech willfully use Plaintiff's trademark?

"Willfully" means voluntarily with the intent to confuse or deceive relevant consumers.

Answer "Yes" or "No."

ANSWER: Yes

QUESTION NO. 2a:

Did CommTech infringe on trade dress, if any, owned by Plaintiff?

To answer "Yes" you must find that:

- (1) Plaintiff is the owner of trade dress;
- (2) Plaintiff is the senior user of the trade dress;
- (3) the trade dress is primarily non-functional;
- (4) the trade dress has acquired secondary meaning; and
- (5) CommTech used the same or a deceptively similar trade dress in a manner that created a likelihood of confusion among relevant consumers.

"Senior use" means that XIP or its predecessors-in-interest, if any, must have made commercial use of the trade dress before CommTech. Evidence of a predecessor's use may establish the length and exclusivity of XIP's use.

For the definition of a trade dress, see page 4.

Trade dress is "non-functional" if its features are not essential to the use or purpose of the product and do not affect the cost or quality of the product. If the trade dress consists of individual features, some of which are functional, the trade dress may be considered "non-functional" if the combination of these individual features is arbitrary or distinctive.

Trade dress acquires "secondary meaning" when, in the minds of relevant consumers, it is associated with a specific source and identifies the source of the product rather than the product itself. In answering this question, you may consider the following factors and you should weigh all of the relevant evidence:

- length and manner of use of the trade dress;
- volume of sales;
- amount and manner of advertising;
- nature of use of the trade dress in newspapers and magazines;
- consumer-survey evidence;
- direct consumer testimony; and

- the defendant's intent in copying the trade dress

While none of these factors alone will prove secondary meaning, in combination they may establish the necessary link in the minds of relevant consumers between goods and their source.

Answer "Yes" or "No."

ANSWER: Yes

If you answered "Yes" to Question 2a, then answer Question 2b. Otherwise, do not answer Question 2b.

QUESTION NO. 2b:

Did CommTech willfully use Plaintiff's trade dress?

"Willfully" means voluntarily with the intent to confuse or deceive relevant consumers.

Answer "Yes" or "No."

ANSWER: Yes

QUESTION NO. 3a:

Did CommTech engage in "passing off" or "reverse passing-off" its goods in question in a manner likely to cause confusion among relevant consumers?

"Passing off" occurs when a producer misrepresents its own goods as someone else's.

"Reverse passing-off" occurs when a producer misrepresents someone else's goods as its own or by selling or offering for sale another's goods that have been modified slightly and then labeled with a different name.

It is not necessary that one intended to deceive relevant consumers. However, either actual or probable deception must be shown, and a mere possibility of deception is not enough.

Answer "Yes" or "No" for each of the following:

(i) "passing off"

ANSWER: Yes

(ii) "reverse passing-off"

ANSWER: Yes

If you answered "Yes" to any part of Question 3a, then answer Question 3b. Otherwise, do not answer Question 3b.

QUESTION NO. 3b:

Did CommTech willfully engage in "passing off" or "reverse passing-off" such goods?

"Willfully" means voluntarily with the intent to confuse or deceive relevant consumers.

Answer "Yes" or "No."

ANSWER: Yes

If you answered "Yes" to any part of Questions 1a through 3b, then answer Question 4. Otherwise, do not answer Question 4.

QUESTION NO. 4:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for its damages, if any, that were proximately caused by the wrongful conduct you found in Question 1, 2, or 3?

Consider the following elements of damages, if any, and none other.

Answer in dollars and cents, if any:

the value of a reasonable royalty on CommTech's sales of infringing products, measured by what a willing licensor and a willing licensee would have agreed to in a hypothetical negotiation at the beginning of the infringement.

ANSWER: 2,018,595.3

If you answered "Yes" to any part of Question 1, then answer Questions 5 and 6. Otherwise, do not answer Questions 5 and 6.

QUESTION NO. 5:

What were CommTech's gross sales attributable to its use of Plaintiff's "MTC" trademark?

"Gross sales" are all monies CommTech received from using Plaintiff's trademark in the sale of such goods. In answering this question, do not reduce CommTech's gross sales by any elements of cost or deduction claimed by CommTech.

Answer in dollars and cents, if any.

ANSWER: 20,185,953,0

QUESTION NO. 6:

What were CommTech's total costs and deductions with respect to its gross sales attributable to its use of Plaintiff's "MTC" trademark?

CommTech has the burden to prove by a preponderance of the evidence the costs or deductions it claims should be subtracted from its gross sales. "Costs or deductions" are expenses actually related to the infringing products. Expenses attributable to other products or services should not be included.

Answer in dollars and cents, if any.

ANSWER: 8,000,000.0

If you answered "Yes" to any part of Question 2, then answer Questions 7 and 8. Otherwise, do not answer Questions 7 and 8.

QUESTION NO. 7:

What were CommTech's gross sales attributable to its use of Plaintiff's trade dress?

"Gross sales" are all monies CommTech received from using Plaintiff's trade dress in the sale of such products. In answering this question, do not reduce CommTech's gross sales by any elements of cost or deduction claimed by CommTech.

Answer in dollars and cents, if any.

ANSWER: 20,185,953.00

QUESTION NO. 8:

What were CommTech's total costs and deductions with respect to its gross sales attributable to its use of Plaintiff's trade dress?

CommTech has the burden to prove by a preponderance of the evidence the costs or deductions it claims should be subtracted from its gross sales. "Costs or deductions" are expenses actually related to the infringing products. Expenses attributable to other products or services should not be included.

Answer in dollars and cents, if any.

ANSWER: 8,000,000.00

If you answered "Yes" to any part of Question 3, then answer Questions 9 and 10. Otherwise, do not answer Questions 9 and 10.

QUESTION NO. 9:

What were CommTech's gross sales attributable to its "passing off" or "reverse passing off"?

"Gross sales" are all monies CommTech received from the sale of such products by "passing off" or "reverse passing off." In answering this question, do not reduce CommTech's gross sales by any elements of cost or deduction claimed by CommTech.

Answer in dollars and cents, if any.

ANSWER: 20,185,953.00

QUESTION NO. 10:

What were CommTech's total costs and deductions with respect to its gross sales attributable to its "passing off" or "reverse passing off"?

CommTech has the burden to prove by a preponderance of the evidence the costs or deductions it claims should be subtracted from its gross sales. "Costs or deductions" are expenses actually related to the infringing products. Expenses attributable to other products or services should not be included.

Answer in dollars and cents, if any.

ANSWER: 8,000,000.00

QUESTION NO. 11a:

Did any of the defendants named below misappropriate Plaintiff's trade secrets?

To answer "Yes" you must find that:

- (1) Plaintiff owned a trade secret; and
- (2) the defendant used or disclosed that trade secret—
  - (a) after acquiring the trade secret through improper means, or
  - (b) after acquiring the trade secret with knowledge that the trade secret had been disclosed through improper means.

A "trade secret" is any formula, design, pattern, device, or compilation of information that gives the owner of the information an advantage over competitors who do not know or use it. In order to be a "trade secret" there must be a substantial element of secrecy and the owner must take reasonable measures to protect the secrecy of its trade secrets. The fact that a trade secret can be discovered by inspection or experimentation does not deprive its owner of protection from those acquiring it by improper means.

"Improper means" are means that fall below the generally accepted standards of commercial morality and reasonable conduct, including by theft, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

Answer "Yes" or "No" for each of the following:

- (i) CommTech Yes
- (ii) Michael McGraw Yes

If you answered "Yes" to Question 11a, then answer Question 11b. Otherwise, do not answer Question 11b.

QUESTION NO. 11b:

Did CommTech willfully misappropriate Plaintiff's trade secrets?

"Willfully" means voluntarily and intentionally, but not necessarily maliciously.

Answer "Yes" or "No."

ANSWER: Yes

If you answered "Yes" to any part of Question 11, then answer Question 12. Otherwise, do not answer Question 12.

QUESTION NO. 12:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for its damages, if any, proximately caused by the misappropriation of its trade secrets?

In answering questions about damages, answer each question separately. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of judgment.

Consider the following elements of damages, if any, and none other.

Answer separately in dollars and cents, if any:

- (1) the value of a reasonable royalty, measured by what a willing buyer and a willing seller would have agreed on, at the time of the misappropriation, as a fair price for CommTech's use of the trade secrets.

1,757,752.50

- (2) the reasonable and necessary development costs that CommTech avoided by the misappropriation.

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If you answered "Yes" for CommTech in any part of Question 11, then answer Questions 13 and 14. Otherwise, do not answer Questions 13 and 14.

QUESTION NO. 13:

What were CommTech's gross sales attributable to its use of Plaintiff's trade secrets?

"Gross sales" are all monies CommTech received from the sale of products using Plaintiff's trade secrets. In answering this question, do not reduce CommTech's gross sales by any elements of cost or deduction claimed by CommTech.

Answer in dollars and cents, if any.

Answer: 29,628,050.00

QUESTION NO. 14:

What were CommTech's total costs and deductions with respect to its gross sales attributable to its use of Plaintiff's trade secrets?

CommTech has the burden to prove by a preponderance of the evidence the costs or deductions it claims should be subtracted from its gross sales. "Costs or deductions" are expenses actually related to the infringing products. Expenses attributable to other products or services should not be included.

Answer in dollars and cents, if any.

Answer: 8,000,000.00

If you unanimously answered "Yes" for CommTech in Questions 1a, 2a, 3a(i), 3(a)(ii), or 11a(i), then answer Question 15. Otherwise, do not answer Question 15.

To answer "Yes" to Question 15, your answer must be unanimous.

QUESTION NO. 15:

Do you find by clear and convincing evidence that the harm to Plaintiff resulted from malice or gross negligence by CommTech?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means a specific intent by CommTech to cause substantial injury or harm to Plaintiff.

"Gross negligence" means an act or omission (i) which, when viewed objectively from the standpoint of CommTech at the time of its occurrence involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (ii) of which CommTech had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

You are instructed that Michael McGraw's conduct may be attributed to CommTech if—

1. CommTech authorized the doing and the manner of the act, or
2. CommTech ratified or approved the act, or
3. Michael McGraw was employed in a managerial capacity and was acting in the scope of employment.

A person is "employed in a managerial capacity" if—

- (a) that person is a corporate officer; or
- (b) that person has authority to employ, direct, and discharge an employee of CommTech; or
- (c) CommTech has confided to that person the

management of the whole or a department or  
division of the business of CommTech.

Answer "Yes" or "No."

ANSWER: Yes

**Presiding Juror:**

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.
2. The presiding juror has these duties:
  - a. have the complete charge read aloud if it will be helpful to your deliberations;
  - b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
  - c. give written questions or comments to the bailiff who will give them to the judge;
  - d. write down the answers you agree on;
  - e. get the signatures for the verdict certificate; and
  - f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

**Instructions for Signing the Verdict Certificate:**

1. Unless otherwise instructed, you may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you may not have one group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.

2. If 10 jurors agree on every answer, those 10 jurors sign the verdict.

If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when you sign the verdict, only those 10 who agree on every answer will sign the

verdict.

Do you understand these instructions? If you do not, please tell me now.



MIKE WALLACH  
JUDGE PRESIDING

DATE: MAY 3, 2019

TIME: 12:02 PM

Verdict Certificate

Check one:

Our verdict is unanimous. All 12 of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 of us.

*Henry A. [Signature]*      Danny L. Ervin  
Signature of Presiding Juror      Printed Name of Presiding Juror

Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

Jurors' Signatures

Jurors' Printed Names

- 1. \_\_\_\_\_
- 2. \_\_\_\_\_
- 3. \_\_\_\_\_
- 4. \_\_\_\_\_
- 5. \_\_\_\_\_
- 6. \_\_\_\_\_
- 7. \_\_\_\_\_
- 8. \_\_\_\_\_
- 9. \_\_\_\_\_
- 10. \_\_\_\_\_
- 11. \_\_\_\_\_

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ADDITIONAL CERTIFICATE

I certify that the jury was unanimous in answering the following questions. All 12 of us agreed to each answer checked. The presiding juror has signed the certificate for all 12 of us.

CHECK ALL THAT APPLY:

- Question No. 1a
- Question No. 2a
- Question No. 3a(i)
- Question No. 3a(ii)
- Question No. 11a(i)
- Question No. 15

(The jury was not unanimous in those questions which were not checked above.)

  
Signature of Presiding Juror

*Danny L. Ervin*  
Printed Name of Presiding Juror

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COURT'S CHARGE II

MEMBERS OF THE JURY:

In discharging your responsibility on this jury, you will observe all the instructions that have been previously given you. I shall now give you additional instructions that you should carefully and strictly follow during your deliberations.

You must unanimously agree on the amount of any award of exemplary damages. Otherwise, you must not answer the following question.

Answer the following question only if you unanimously answered "Yes" to Question No. 15. Otherwise, do not answer the following question.

QUESTION NO. 16:

What sum of money, if any, if paid now in cash, should be assessed against CommTech and awarded to Plaintiff as exemplary damages, if any?

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment. Factors to consider in awarding exemplary damages, if any, are-

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of CommTech.
4. The situation and sensibilities of the parties concerned.

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5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of CommTech.

Answer in dollars and cents, if any:

8,074,380.00



MIKE WALLACH  
JUDGE PRESIDING

DATE: 5-6-19

TIME: 0947

