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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Skydive Arizona, Inc.,  
Plaintiff,  
vs.  
Cary Quattrochi, et al.,  
Defendants.

No. CV 05-2656-PHX-MHM  
**JURY INSTRUCTIONS**

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**INSTRUCTIONS AS GIVEN BY THE COURT**

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Dated this 1<sup>st</sup> day of October, 2009.

  
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 Mary H. Murguia  
 United States District Judge

### **Duty of Jury to Find Facts and Follow Law**

Members of the Jury:

Now that you have heard all of the evidence and the arguments of the attorneys, it is my duty to instruct you as to the law of the case. A copy of these instructions will be sent with you to the jury room when you deliberate.

You must not infer from these instructions or from anything I may say or do – or have said or done – as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

### **Stipulations of Fact**

The parties have agreed to certain facts that will be read to you. You should therefore treat these facts as having been proved. The agreed facts are:

1. The trademark, "Skydive Arizona," was registered with the United States Patent and Trademark Office on June 6, 2006 to Skydive Arizona, Inc.
2. The trademark "Skydive Arizona" was published on March 14, 2006.
3. Plaintiff hosts national skydiving competitions and has been featured on various television programs.
4. Plaintiff advertises on the Internet and in, among other things, national and international skydiving magazines, Phoenix hotels, the Yellow Pages, and in the University of Arizona and Arizona State University's college newspapers.
5. Individual Defendants Butler and Quattrocchi opened the Atlanta Skydiving Center in Cedartown, Georgia in 1997.
6. The Atlanta Skydiving Center is owned by Defendant Atlanta SC, Inc., a Georgia corporation that was jointly owned and operated by Individual Defendants Butler and Quattrocchi until May 2007; it is now solely owned by Defendant Quattrocchi.

7. In 2000, Quattrocchi and Butler expanded their operations and opened the Alabama Skydiving Center in Pell City, Alabama (the Center is now located in Prattville, Alabama).
8. The Alabama Skydiving Center is owned by Defendant CASC, Inc., a Georgia corporation that was jointly owned and operated by Butler and Quattrocchi until May 2007; it is now solely owned by Defendant Quattrocchi.
9. In 2002, Quattrocchi and Butler created Defendant USSO LLC, which did business as "1800Skyride" (also referred to as "1800SKYRIDE") until May 2007.
10. In May 2007, USSO LLC sold its assets to Defendant IGOVincent, Inc.; Quattrocchi is the only shareholder of IGOVincent.
11. Although USSO still exists as a legal entity, IGOVincent has assumed at least some of USSO's business operations and is currently doing business as 1800SKYRIDE.
12. Defendants make skydiving arrangements for consumers and issue them certificates that may be redeemed at various locations within a "national network of drop zones," referred to as the "1800Skyride Adventure Sports Network."

13. Defendant IGOVincent (and formerly Defendant USSO LLC) owns and operates numerous websites describing “skydiving opportunities generally in multiple, geographical locations,” and specifically in Arizona, websites named “PhoenixSkydiving, ScottsdaleSkydiving, TempeSkydiving, ChandlerSkydiving, MesaSkydiving, GlendaleSkydiving, GilbertSkydiving, PeoriaSkydiving, TucsonSkydiving, YumaSkydiving, and FlagstaffSkydiving.”
14. The IGOVincent websites advertise that customers may contact 1800Skyride by email or telephone to make reservations to skydive at drop zones in the customer’s preferred geographic location.
15. Defendant Butler periodically accessed the 1-800-SKYRIDE websites using various search engines to review content and determine how the web pages were ranked.
16. IGOVincent maintains a number of websites that target consumers in the State of Arizona, such as “PhoenixSkydiving, ScottsdaleSkydiving, TempeSkydiving, ChanderSkydiving, MesaSkydiving, GlendaleSkydiving, GilbertSkydiving, PeoriaSkydiving, TucsonSkydiving, YumaSkydiving, and FlagstaffSkydiving.

### **Preponderance of 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 probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

### **Clear and Convincing Evidence**

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means you must be persuaded by the evidence that the claim or defense is highly probable. This is a higher standard of proof than proof by a preponderance of the evidence.

You should base your decision on all of the evidence, regardless of which party presented it.

**Two or More Parties - Different Legal Rights**

You should decide the case as to each party separately. Unless otherwise stated, the instructions apply to all parties.



### **What Is Evidence**

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits which are received into evidence; and
3. any facts to which the lawyers have agreed.

### **What Is Not Evidence**

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition sometimes testimony and exhibits are received only for a limited purpose; when I have given a limiting instruction, you must follow it.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

### **Direct and Circumstantial Evidence**

Evidence may be direct or circumstantial.

Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did.

Circumstantial evidence is proof of one or more facts from which you could find another fact. By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may explain the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

### **Credibility of Witnesses**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case and any bias or prejudice;

(5) whether other evidence contradicted the witness's testimony;

(6) the reasonableness of the witness's testimony in light of all the evidence; and

(7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

### **Deposition in Lieu of Live Testimony**

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.

You should consider deposition testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same way as if the witness had been present to testify.

Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.

### **Expert Opinion**

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.

**Corporations and Partnerships - Fair Treatment**

All parties are equal before the law and a corporation is entitled to the same fair and conscientious consideration by you as any party.

### **Liability of Corporations**

Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.



### **Agent and Principal - Definition**

An agent is a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal. One may be an agent without receiving compensation for services. The agency agreement may be oral or written.

**Agent - Scope of Authority Defined**

An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

**Act of Agent is Act of Principal**

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

### **Prior Determinations**

Prior to this trial, the Court has found Defendants liable for false designation of origin and unfair competition, a type of false advertising claim. As a result, the following elements have already been established: (1) Defendants made false statements of fact in commercial advertisements on the 1-800-Skyride websites; (2) the statements actually deceived or had the tendency to deceive a substantial segment of their audience; (3) the deception was material, in that it was likely to influence purchasing decisions, (4) the Defendants caused the false statements to enter interstate commerce; and (5) Plaintiff has been or is likely to be injured as a result of the false statements, either by diversion of sales from itself to Defendants or by the lessening of the goodwill associated with Plaintiff's skydiving services.

You are bound by the determinations of this Court concerning false designation of origin and unfair competition and must accept them as true.

### **Definition of Trademark**

A trademark is any word, name, symbol, device, or any combination thereof, used by a person to identify and distinguish that person's services from those of others and to indicate the source of the services, even if that source is generally unknown.

A person who uses the trademark of another may be liable for damages.

### **Theories and Policies of Trademark Liability**

The trademark laws balance three often-conflicting goals: 1) protecting the public from being misled about the nature and source of goods and services, so that the consumer is not confused or misled in the market; 2) protecting the rights of a business to identify itself to the public and its reputation in offering goods and services to the public; and 3) protecting the public interest in fair competition in the market.

The balance of these policy objectives vary from case to case, because they may often conflict. Accordingly, each case must be decided by examining its specific facts and circumstances, of which you are to judge.

In my instructions, I will identify types of facts you are to consider in deciding if the Defendants are liable to the Plaintiff for violating the trademark law. These facts are relevant to whether the Defendants are liable for:

1. infringing Plaintiff's trademark rights, by using a trademark in a manner likely to cause confusion among consumers;
2. infringing Plaintiff's trademark by using in bad faith domain names identical to or confusingly similar to Plaintiff's "Skydive Arizona" trademark.

### **Elements and Burden of Proof for Trademark Infringement**

On the Plaintiff's claim for trademark infringement, the Plaintiff has the burden of proving each of the following elements by a preponderance of the evidence that:

1. Skydive Arizona is a valid, protectable trademark;
2. the Plaintiff owns Skydive Arizona as a trademark; and
3. the Defendants used a mark similar to Skydive Arizona without the consent of the Plaintiff in a manner that is likely to cause confusion among ordinary purchasers as to the source of the goods or services.

If you find that each of the elements on which the Plaintiff has the burden of proof has been proved, your verdict should be for the Plaintiff. If, on the other hand, the Plaintiff has failed to prove any of these elements, your verdict should be for the Defendants.

### **Validity of Unregistered Mark**

Instruction “Elements and Burden of Proof for Trademark Infringement” requires the Plaintiff to prove by a preponderance of the evidence that Skydive Arizona is a valid trademark. A valid trademark is a word, symbol, or device that is either:

1. inherently distinctive
2. descriptive, but has acquired secondary meaning

Only a valid trademark can be infringed. Only if you determine Plaintiff proved by a preponderance of the evidence that the Skydive Arizona is a valid trademark should you consider whether Plaintiff owns it or whether Defendants’ actions infringed it. Only if you determine that Skydive Arizona is not inherently distinctive should you consider whether it is descriptive but became distinctive through the development of secondary meaning, as I will direct in Instruction “Secondary Meaning”.



### **Unregistered Mark Distinctiveness**

How distinctively or strongly a trademark indicates that a good or service comes from a particular source even if unknown is an important factor to consider in assessing its validity and for determining, per Instruction "Likelihood of Confusion" whether the trademark used by the Defendants creates for consumers a likelihood of confusion with the Plaintiff's trademark.

The Plaintiff asserts Skydive Arizona is a valid and protectable trademark for its skydiving and instructional services. The Plaintiff contends that the Defendants' use of Skydive Arizona or similar phrases in connection with the Defendants' skydiving business in Arizona infringes Plaintiff's trademark and is likely to cause confusion about the skydiving or instructional services associated with that trademark. In order to determine if the Plaintiff has met its burden of showing that Skydive Arizona is a valid trademark, you should classify it on the spectrum of trademark distinctiveness that I will explain in this instruction.

An inherently distinctive trademark is a word, symbol or device, or combination of them, which intrinsically identifies a particular source of a good or service in the market. The law assumes that an inherently distinctive trademark is one that almost automatically tells a consumer that it refers to a brand or a source for a product, and that consumers will be predisposed to equate the trademark with the source of a product or service.

### **Spectrum of Marks**

Trademark law provides protection to distinctive or strong trademarks. Conversely, trademarks that are not as distinctive or strong are called "weak" trademarks and receive less protection from infringing uses. Trademarks that are not distinctive are not entitled to

any trademark protection. For deciding trademark protectability you must consider whether a trademark is inherently distinctive. Trademarks are grouped into four categories according to their relative strength or distinctiveness. These four categories are, in order of strength or distinctiveness: arbitrary (which is inherently distinctive), suggestive (which also is inherently distinctive), descriptive (which is protected only if it acquires in consumers' minds a "secondary meaning," which I explain in Instruction "Secondary Meaning," and generic trademarks (which are entitled to no protection).

**Arbitrary Trademarks.** The first category is "inherently distinctive" trademarks. They are considered strong marks and are clearly protectable. They involve the arbitrary, fanciful or fictitious use of a word to designate the source of a service. Such a trademark is a word that in no way describes or has any relevance to the particular service it is meant to identify. It may be a common word used in an unfamiliar way. It may be a newly created (coined) word or parts of common words which are applied in a fanciful, fictitious or unfamiliar way, solely as a trademark.

For instance, the common word "apple" became a strong and inherently distinctive trademark when used by a company to identify the personal computers that company sold. The company's use of the word "apple" was arbitrary or fanciful because "apple" did not describe and was not related to what the computer was, its components, ingredients, quality, or characteristics. "Apple" was being used in an arbitrary way to designate for consumers that the computer comes from a particular manufacturer or source.

**Suggestive Trademarks.** The next category of marks is suggestive trademarks. These trademarks are also inherently distinctive but are considered weaker than arbitrary trademarks. Unlike arbitrary trademarks, which are in no way related to what the product or service is or its components, quality, or characteristics, suggestive trademarks imply

some characteristic or quality of the product or service to which they are attached. If the consumer must use imagination or any type of multi-stage reasoning to understand the trademark's significance, then the trademark does not describe the product's features, but suggests them.

A suggestive use of a word involves consumers associating the qualities the word suggests to the product or service to which the word is attached. For example, when "apple" is used not to indicate a certain company's computers, but rather "Apple-A-Day" Vitamins, it is being used as a suggestive trademark. "Apple" does not describe what the vitamins are. However, consumers may come to associate the healthfulness of "an apple a day keeping the doctor away" with the supposed benefits of taking "Apple-A-Day" Vitamins.

**Descriptive Trademarks.** The third category of marks is descriptive trademarks. These trademarks directly identify or describe some aspect, characteristic, or quality of the product or service to which they are affixed in a straightforward way that requires no exercise of imagination to be understood.

For instance, the word "apple" is descriptive when used in the trademark "CranApple" to designate a cranberry-apple juice. It directly describes ingredients of the juice. Other common types of descriptive trademarks identify where a product or service comes from, or the name of the person who makes or sells the product or service. Thus, the words "Apple Valley Juice" affixed to cider from the California town of Apple Valley is a descriptive trademark because it geographically describes where the cider comes from. Similarly, a descriptive trademark can be the personal name of the person who makes or sells the product. So, if a farmer in Apple Valley, Judy Brown, sold her cider under the label "Judy's Juice" (rather than Cran Apple) she is making a descriptive use of

her personal name to indicate and describe who produced the apple cider and she is using her first name as a descriptive trademark.

**Generic Trademarks.** The fourth category of trademarks is entitled to no protection at all. They are called generic trademarks and they give the general name of the product or service of the Plaintiff. They are part of our common language which we need to identify all such similar services. They are the common name for the product or service to which they are affixed. It is the general name for which the particular product or service is an example.

It is generic if the term answers the question "what is the product or service being sold?" If the average relevant consumer would identify the term with all such similar services, regardless of the provider, the term is generic and not entitled to protection as a trademark.

Clearly, the word apple can be used in a generic way and not be entitled to any trademark protection. This occurs when the word is used to identify the fleshy, red fruit from any apple tree. The computer maker who uses that same word to identify the personal computer, or the vitamin maker who uses that word on vitamins, has no claim for trademark infringement against the grocer who used that same word to indicate the fruit sold in a store. As used by the grocer, the word is generic and does not indicate any particular source of the product. As applied to the fruit, "apple" is simply the common name for what is being sold.

### **Mark Distinctiveness and Validity**

If you decide that Skydive Arizona is arbitrary or suggestive, it is considered to be inherently distinctive. An inherently distinctive trademark is valid and protectable.

On the other hand, if you determine that Skydive Arizona is generic, it cannot be distinctive and therefore is not valid nor protectable. You must render a verdict for the Defendants on the charge of trademark infringement.

If you decide that Skydive Arizona is descriptive, you will not know if the trademark is valid or invalid until you consider if it has gained distinctiveness by the acquisition of secondary meaning, which will be explained in Instruction "Secondary Meaning."

### **Secondary Meaning**

If you determined in Instruction “Unregistered Mark Distinctiveness” that Skydive Arizona is descriptive, you must consider the recognition that the mark has among prospective purchasers. This market recognition is called the trademark’s “secondary meaning.”

Only if a descriptive word acquires secondary meaning will the law protect it as a trademark. A word, symbol, or term acquires a secondary meaning when it has been used in such a way that its primary significance in the minds of the prospective purchasers is not the product or service itself, but the identification of the product or service with a single source, regardless of whether consumers know who or what that source is. For instance, the words a business might use for its special oil change service, “10-Minute Oil Change,” are descriptive when used in connection with this service because it literally describes a feature or attribute of the product or service available there. However, over time, the consuming public may come to associate those four words with a service offered only by that particular garage. The words would no longer designate their original ordinary, descriptive meaning. Instead the words have taken on a new, “secondary” meaning to identify the particular garage that performs the oil change.

You must find that the preponderance of the evidence shows that a significant number of the consuming public associates the Skydive Arizona with a single source, in order to find that it has acquired secondary meaning.

You may consider the following factors when you determine whether Skydive Arizona has acquired a secondary meaning:

1. **Purchaser Perception.** Whether the people who purchase the skydiving or

instructional services that bear the claimed trademark associate the trademark with the owner;

2. **Advertisement.** To what degree and in what manner the owner may have advertised under the claimed trademark;
3. **Demonstrated Utility.** Whether the owner successfully used this trademark to increase the sales of its services;
4. **Extent of Use.** The length of time and manner in which the owner used the claimed trademark;
5. **Exclusivity.** Whether the owner's use of the claimed trademark was exclusive;
6. **Copying.** Whether the Defendant intentionally copied the owner's trademark; and
7. **Actual Confusion.** Whether the Defendants' use of the Plaintiff's trademark has led to actual confusion; and

Descriptive marks are protectable only to the extent you find they acquired distinctiveness through secondary meaning by the public coming to associate the mark with the owner of the mark or a particular source. Descriptive marks are entitled to protection only as broad as the secondary meaning they have acquired, if any. If they have acquired no secondary meaning, they are entitled to no protection and cannot be considered a valid mark.