

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CHOOSECO LLC, :
Plaintiff, : Civil No. 1:07-CV-159
v. :
LEAN FORWARD MEDIA LLC, :
Defendant. :

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to instruct you as to the applicable law.

It is your duty as jurors to follow the law, and not question it, and to apply that law to the facts as you find them from the evidence in the case.

The lawyers may have referred to some of the rules of law in their arguments. If, however, any difference appears between the law as stated by the lawyers and the law stated by the Court in these instructions, you are to follow the Court's instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice to any party. Sympathy and emotion should play no part in your deliberations. Your deliberations should be well-reasoned, impartial and unemotional. You must decide

this case by applying the principles of law, which this Court defines for you, to the facts of this particular case as you objectively find them.

All parties expect that you will carefully and impartially consider all of the evidence, follow the law, and reach a just verdict, regardless of the consequences.

Corporations

As you know, the plaintiff and defendant are corporations. You should consider this case, however, as an action between persons. A corporation is entitled to the same treatment as a private individual. All persons, including corporations, stand equal before the law.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact proved.

The evidence in the case consists of the sworn testimony of the witnesses, admitted exhibits, and any stipulated facts.

Any evidence to which an objection was sustained or stricken by the Court must be disregarded.

Evidence - Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence - such as the testimony of an eyewitness. The other is indirect or circumstantial evidence - the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

There is no distinction between direct or circumstantial evidence. You may find the facts by a preponderance of all the evidence in the case, both direct and circumstantial.

Deposition Testimony

During the trial of this matter, certain testimony has been read to you by the way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in the form of a deposition. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way as if the witness had been present and had testified from the witness stand.

Credibility of Witnesses - Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, the manner in which the witness testifies, by the character of the testimony given, or by contrary evidence.

You should carefully scrutinize all the testimony, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is believable. Consider each witness' intelligence, motive and state of mind, and demeanor or manner. Consider the witness' ability to observe the matters to which the witness testifies, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, which is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

You may give the testimony of each witness such weight, if any, you think it deserves, and accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses to the contrary.

Expert Witnesses

You have heard expert witnesses express their opinions. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, 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. You should not, however, accept opinion testimony merely because the witness was allowed to testify concerning his or her judgment, nor should you substitute it for your own reason, judgment and common sense. The determination of the facts rests solely with you.

Verdict - Unanimous - Duty to Deliberate

The verdict must represent the considered judgment of each juror. All of you must agree with the verdict. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, without violence to individual judgment. You must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges of the facts.

INSTRUCTIONS OF LAW

Now I will give you instructions concerning the law that applies to this case. You must follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

You determine the facts in this case. By these instructions, I am not indicating how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

In this case, both the plaintiff and defendant have claims. The burden is on the party making the claim to prove every essential element of its claim by a preponderance of the evidence. To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of witnesses, regardless of who may have called them, and relevant exhibits in evidence, regardless of who may have produced them.

Chooseco's Breach of Contract Claim

Chooseco claims LFM breached the Option and License Agreement (the Contract). A party claiming breach of contract must prove the following elements by a preponderance of the evidence:

- (1) that a contract existed between Chooseco and LFM;
- (2) the terms of the contract;
- (3) that a material breach of the contract occurred.

In this case, Chooseco and LFM agree that they entered into the Option and License Agreement and that they are bound by that contract, so the first element is already proved.

The terms of the License Agreement have been discussed during the course of this trial, and you have been given the License Agreement as an exhibit. In interpreting the meaning of the terms of the License Agreement, you should look to the language of the License Agreement itself. The words of a contract are generally given their plain and ordinary meaning, unless it is apparent that the term was intended to have a technical meaning. You must also give effect to all material parts of the contract. These separate parts must be read together as a harmonious whole. That is, you should interpret the individual provisions in a way that prevents them from conflicting with each other.

Sometimes the meaning of a contract term or provision is

ambiguous. By ambiguous, I mean that two people could reasonably differ as to the meaning of the term or provision. If you find that a term or provision of the License Agreement is ambiguous, you may look to extrinsic evidence to assist you in determining its meaning. Extrinsic evidence is evidence beyond the written terms of a contract. This may include the meaning the parties themselves gave to the term. The meaning the parties attributed to a term may be revealed by the parties' statements, as well as by their conduct or dealings in rendering or receiving performance under the contract.

Once you have determined the terms of the License Agreement, you must determine whether Chooseco has proved by a preponderance of the evidence that LFM breached the License Agreement. A person or corporation breaches a contract when the conduct of that person or corporation does not comply with the terms of the contract as agreed to by the parties.

Chooseco claims LFM breached the License Agreement because LFM failed to satisfy the minimum payment requirements under Paragraph 6.e. Chooseco argues the \$200,000 due under Paragraph 6.e. had to consist of royalties on revenues or advances paid in \$50,000 increments at the start of new projects. Chooseco seeks a declaration that it lawfully terminated the License Agreement with LFM because

LFM failed to meet its obligations under Paragraph 6.e.

LFM, in contrast, contends the money due to Chooseco under Paragraph 6.e. did not have to be earmarked in any particular way, and there was no reason the \$150,000 lump sum LFM tendered to Chooseco on June 28, 2007 could not be characterized as an advance. LFM claims it did not breach the License Agreement and the payment it tendered to Chooseco satisfied its obligation under Paragraph 6.e.

If you find Chooseco proved its breach of contract claim against LFM by a preponderance of the evidence, you must find for Chooseco. If you find Chooseco has not proved its breach of contract claim by a preponderance of the evidence, you must find for LFM on this claim.

LFM's Breach of Contract Claim

LFM's first counterclaim is for breach of contract. LFM claims Chooseco breached the Option and License Agreement by wrongfully terminating LFM's rights under the Agreement. To prevail on its breach of contract claim, LFM must prove by a preponderance of the evidence each of the following essential elements:

- a. that there was a valid, binding agreement between the parties;
- b. that the contract had definite terms;
- c. that Chooseco breached the contract; and
- d. that LFM suffered damages in a quantifiable amount as a result of the breach.

The parties agree the Option and License Agreement constituted a valid, binding agreement between them. Next you must determine the terms of that contract, taking into consideration the instructions given to you in the previous section. LFM must also prove by a preponderance of the evidence that Chooseco breached the contract because its conduct did not comply with the terms of the contract as agreed to by the parties.

Next, LFM must prove by a preponderance of the evidence that it has suffered damages as a proximate result of Chooseco's breach. Proximate cause is shown when you can find LFM's damages were either a direct result or a reasonably probable consequence of Chooseco's breach of contract.

Lastly, LFM must prove the amount of its damages by a preponderance of the evidence. I will give you further instructions on assessing damages.

If you find that LFM has proved each of these elements, then you may find Chooseco is liable for breach of contract and assess damages in the amount proved. If, however, you find LFM has failed to prove any one of these elements, then you should enter a verdict for Chooseco on LFM's breach of contract claim.

Good Faith and Fair Dealing

LFM also claims Chooseco breached the covenant of good faith and fair dealing. Again, to prevail, LFM must prove its claim by a preponderance of the evidence.

Under Vermont law, every contract contains an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other party to receive the benefits of the contract. You must decide whether Chooseco fulfilled this obligation.

The concept of "good faith and fair dealing" emphasizes faithfulness to an agreed common purpose and consistency with the justified expectation of the other party. In other words, good faith and fair dealing means an attitude or state of mind denoting honesty of purpose and freedom from intention to defraud.

Good faith may also be thought of as the opposite of bad faith. Generally speaking, bad faith implies a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake. Bad faith is not simply bad judgment or negligence; instead, it contemplates a state of mind affirmatively operating with furtive design or ill will.

There are no hard-and-fast rules about what conduct constitutes bad faith. Whether a party has acted in bad

faith depends on the particular facts and circumstances of the case. However, some examples include: evading the spirit of the bargain, interfering with or failing to cooperate in the other party's performance; engaging in subterfuge or evasion; or treating the other party in an arbitrary, capricious or harassing manner.

If you find Chooseco violated its duty of good faith and fair dealing, you must determine what, if any, damages flowed from Chooseco's conduct. It is LFM's burden to prove its damages by a preponderance of the evidence. I will give you further instructions on assessing damages.

General Instructions on Awarding Damages

The fact that I am about to instruct you as to the proper measure of damages should not be considered as my opinion as to liability.

Chooseco seeks a declaration that it properly terminated the License Agreement with LFM and that LFM has no further rights to develop products under the License Agreement. Chooseco is not seeking an award of money damages.

LFM seeks an award of money damages. The following instructions as to the measure of damages are given for your guidance in the event you find LFM has proven one or more of its claims by a preponderance of the evidence.

LFM must prove its damages by a preponderance of the evidence. LFM must also prove by a preponderance of evidence that its damages are a proximate result of Chooseco's conduct. This means LFM's damages were either a direct result or a reasonably probable consequence of Chooseco's conduct.

LFM claims it lost money and is seeking to recoup that loss. Because LFM's damages are economic, it must prove them to your satisfaction in dollars and cents. You may not award damages that are speculative in nature.

Damages for Breach of Contract

LFM seeks to recover as damages for Chooseco's breach of the License Agreement the market value of its lost asset: namely, the rights it licensed from Chooseco. To collect these damages, LFM must demonstrate two things. First, LFM must prove that liability for the loss of the rights under the License Agreement was contemplated by the parties at the time the License Agreement was made. Next, LFM must prove with reasonable certainty the fair market value of the rights at the time the License Agreement was canceled. Fair market value means the price at which a willing buyer could obtain the asset from a willing seller, with neither under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. LFM may prove fair market value in the following ways: If the asset has a sales history, that history may be introduced as evidence of the what a willing buyer would pay for the asset. If there is no sales history, experts may give their opinion of the asset's value, and evidence of sales of comparable assets may be introduced.

Damages for Breach of the Covenant of Good Faith and
Fair Dealing

In the alternative, LFM seeks damages for Chooseco's breach of the covenant of good faith and fair dealing. Reliance damages will reimburse LFM for loss caused by LFM's reliance on the contract with Chooseco and return LFM to the position it held before the parties' contract. These damages include expenditures made in preparation for performance or in performance of the contract. LFM must establish the fair and reasonable value of its losses by a preponderance of the evidence.

Any award of reliance damages to LFM must be offset by any amount of losses Chooseco proves that LFM would have suffered with reasonable certainty. Reliance damages are not available to LFM if you find Chooseco has proved with reasonable certainty that full performance of the contract would have resulted in a net loss to LFM.

Duplication Of Damages Must Be Avoided

You have been instructed on the two theories of damages asserted by LFM. You should be careful not to award damages for one item which duplicates an award for another item. Your award in all respects must be fair and reasonable in light of all the evidence that you find worthy of belief and all the reasonable inferences to be drawn from such evidence.

Court Costs, Attorney's Fees and Interest

If you find LFM is entitled to any damages, you may not include in your award any sum for court costs or attorney's fees. Furthermore, you are not to include any amount for interest.

Election of a Foreperson

I will select _____ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A verdict form has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the verdict form.

Your foreperson will indicate the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign it.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. He will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CHOOSECO LLC, :
Plaintiff, : Civil No. 1:07-CV-159
v. :
LEARN FORWARD MEDIA LLC, :
Defendant. :
:

Judge Murtha, we have reached a verdict.

Foreperson

Date

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CHOOSECO LLC, :
Plaintiff, : Civil No. 1:07-CV-159
v. :
LEAF FORWARD MEDIA LLC, :
Defendant. :

VERDICT OF THE JURY

Question 1.

Do you find Chooseco, LLC ("Chooseco") has proved by a preponderance of the evidence that Lean Forward Media, LLC ("LFM") failed to comply with the License Agreement and that Chooseco, LLC ("Chooseco") therefore properly terminated the License Agreement with LFM?

Answer: Yes ____ No ____

If you have answered Question 1 "Yes," stop here and do not answer the following questions. Otherwise, proceed to Question 2.

Question 2.

Do you find LFM has proved by a preponderance of the evidence that Chooseco wrongfully terminated the License Agreement with LFM?

Answer: Yes ____ No ____

If you have answered Question 2 "Yes," you must answer Question 3. If you answered Question 2 "No," you should skip Question 3 and proceed to Question 4.

Question 3.

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate LFM for the lost market value of LFM's rights under the License Agreement with Chooseco?

Answer in dollars and cents, or "None".

Proceed to Question 4.

Question 4.

Do you find LFM has proved by a preponderance of the evidence that Chooseco breached the covenant of good faith and fair dealing?

Answer: Yes _____ No _____

If you have answered Question 4 "Yes," you must answer Question 5. If you answered Question 4 "No," stop here and do not answer Question 5.

Question 5.

In the alternative to damages awarded in Question 3, what sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably reimburse LFM for what it expended in reliance on the contract with Chooseco? You may not duplicate any damages awarded under Question 3.

Answer in dollars and cents, or "None".

Foreperson

Date