

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ROLICO AVIATION LIMITED,)
Plaintiff,)
)
v.) Case No. 5:08-cv-71
)
MANSFIELD HELIFLIGHT, INC.,)
Defendant.)

JURY CHARGE

General Instructions:

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

It is your duty as jurors to follow the law, and to apply it to the facts as you find them from the evidence presented in the courtroom. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence presented during the trial.

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

Our judicial system requires you to carefully and impartially consider all of the evidence, follow the law, and reach a just verdict, regardless of the consequences.

Jurors as Finders of Fact/Rulings of the Court

You and you alone, are the triers of the facts. Each of you, as jurors, must determine the facts for yourselves in reaching a verdict. By the rulings which I made during the course of the trial, I did not intend to indicate to you or to express my own

views about this case.

Sympathy/Prejudice

Neither sympathy nor prejudice, for or against the parties, or any other person involved with this case, should influence you in any manner in reaching your verdict. Your deliberations should be well reasoned and impartial.

Important Case

This is an important case to the parties and the court. You should give it serious and fair consideration.

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

The evidence in the case consists of the sworn testimony of the witnesses, the exhibits admitted into evidence, and any stipulated facts. 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 as proved. You may give the stipulated fact, like any other evidence, the weight that you think it deserves.

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

Arguments/Statements/Objections of the Attorneys

The opening statements and closing arguments of the attorneys, their questions and objections, and all other statements which they made during the course of the trial, are not evidence. The attorneys have a duty to object to evidence which they believe is not admissible. You may not hold it against either side if any attorney feels it is necessary to make an objection.

Evidence – Direct or Circumstantial

There are two types of evidence from which you may find the facts of this case: direct and circumstantial evidence. Direct evidence is the testimony of someone who

asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances tending to prove or disprove an issue in the case.

For example, if a witness were to testify that he or she had seen cows in a field, that would be an example of direct evidence that there were cows in a field. On the other hand, if a witness were to testify that he or she had seen fresh cow tracks in the field, that would be an example of circumstantial evidence that there had been cows in the field.

The law does not require a party to prove its claims or defenses by direct evidence alone, that is, by testimony of an eyewitness. One or more of the essential elements, or all of the essential elements, may be established by reasonable inference from other facts which are established by direct testimony. Circumstantial evidence alone may be sufficient proof.

The law makes no distinction between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should consider all the evidence in the case and give it such weight as you think it deserves.

Credibility of Witnesses

You are the sole judges of the credibility of the witnesses, and the weight to give their testimony is up to you. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; his or her demeanor while testifying; any interest or bias he or she may have; and the reasonableness of his or her testimony, considered in light of all of the evidence in the case. 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 a witness's testimony. Two or more persons witnessing an incident or transaction may see or hear it differently.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to 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. You may believe all of the testimony of any witness, you may believe it in part and disbelieve it in part, or you may reject it altogether. You do not have to accept the

testimony of any witness, even if it is uncontradicted. It is for you to say what you will believe and what you will disbelieve.

Number of Witnesses

The fact that one side may have called more witnesses than the other side is of no significance. Your task is to evaluate the credibility of the witnesses, and to weigh all of the evidence.

Personal Knowledge and Experience of Jurors

In deliberating upon your verdict, you are not expected to put aside your common sense or your own observations or experience of the general affairs of life. However, a juror having special knowledge of a subject may neither state this knowledge to fellow jurors nor act upon it himself or herself in arriving at a verdict. You must not tell your fellow jurors about matters which are based on special knowledge concerning an issue in the case which did not come from the evidence received in the courtroom.

Burden of Proof/Preponderance of the Evidence

In this case, both the plaintiff and defendant have claims. Except for the claim of fraud which I will explain in a moment, the burden is on the party making the claim to prove each essential element of its claims by a preponderance of the evidence. To "establish by a preponderance of the evidence" means to prove that something is more likely than not. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds a belief that what is sought to be proved is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. In determining whether a fact, claim, or defense has been proven by a preponderance of the evidence, you may consider the testimony of witnesses, regardless of who may have called them, and the exhibits in evidence, regardless of who may have produced or introduced them.

I. Rolico's & Mansfield's Breach of Contract Claims

This is a dispute regarding the purchase and sale of a Bell 230 Helicopter. The parties have asserted competing breach of contract claims.

A party claiming a breach of contract must prove the following elements by a preponderance of the evidence:

1. that a contract existed;

2. the terms of the contract;
3. that a material breach of the contract occurred; and
4. damages in a quantifiable amount as a result of the breach.

In this case, there is no dispute that Mansfield agreed to sell and Rolico agreed to buy the Bell 230 Helicopter. However, the parties dispute the terms of the contract and whether the terms of the contract were reduced to writing. Mansfield maintains that the parties entered into a written contract which expresses the terms of that contract, whereas Rolico maintains that the contract was never properly reduced to writing. Generally, a party is presumed to have read and is bound by an agreement that it signs, except if its signature is obtained by fraud, bad faith, or misrepresentation.

The parties also dispute whether the other committed a material breach of the parties' contract. Each party claims that the other suffered damages as a result of the other party's breach of contract.

You may find that Rolico, Mansfield, neither of them, or both of them have established a breach of contract claim.

Contract Terms/Meeting of the Minds

It is for you to decide what the terms of the parties' contract were and whether the material terms were breached. In order to create an agreement, there must be a meeting of the minds between the parties. A meeting of the minds occurs when two or more parties reach an agreement upon a particular issue under negotiation between them.

To determine whether a written contract exists, you must consider whether a written document or documents reflect the parties' meeting of the minds on all of the essential terms of the contract. 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. The separate parts of a contract must be read together as a harmonious whole. That is, you should try to interpret the individual provisions in a way that prevents them from conflicting with each other. If you cannot reconcile the conflicting terms of an agreement, then you must find that the parties did not reach an agreement on those terms and they cannot form the basis of a breach of contract claim. In other words, you must find the parties agreed to a contract term before you may enforce it.

The parties dispute certain terms of their agreement. These disputed terms include the agreed purchase price, the closing date, the time for delivery of the

Helicopter, whether Rolico had the right to inspect the Helicopter before closing, and whether the parties agreed to a set amount of damages, known as liquidated damages, in the event one party breached the agreement. You must determine these terms, if you can, based on the parties' oral and written communications and course of conduct with respect to the transaction in dispute.

For example, a closing date may be determined by the express terms of the parties' agreement or, in the alternative, by what is reasonable in light of the parties' communications. The purchase price may also be determined by the parties' oral and written communications and course of conduct.

As stated above, if you find that there is no meeting of the minds as to the essential terms of a contract, you must find that a particular breach of contract claim has not been established. Of course, this does not prevent you from finding that another disputed contract term has been established and from finding a breach of contract based on that contract term.

Determination of Breach

Once you have decided the terms of the parties' agreement, you must determine whether either party breached the agreement and whether that breach was "material." 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. A breach is "material" if it involves a term important to the parties' agreement.

Rolico claims that Mansfield breached the agreement to sell the Helicopter to it because Mansfield sold the Helicopter to a third party after Rolico tendered the purchase price. Rolico maintains that once it lodged the funds with the escrow agent, then Mansfield was required to carry out its obligations and transfer the Helicopter to Rolico. If you find that Rolico has proved by a preponderance of the evidence that there was a contract with agreed upon terms and that Mansfield did not comply with those terms, you must return a verdict for Rolico on its breach of contract claim. If you find that Rolico has not established a breach of contract by Mansfield, you must return a verdict for Mansfield on Rolico's breach of contract claim.

Mansfield has asserted a breach of contract claim against Rolico. It claims that Rolico failed to close on the Helicopter at the time and in the manner to which the parties agreed. Mansfield further claims that it justifiably cancelled the agreement after Rolico breached the agreement. If a party justifiably cancels a contract, it has no further obligation to perform under the contract.

In order to prove its claim of justifiable cancellation, Mansfield must prove by a preponderance of the evidence the following:

1. the parties had a contract;
2. the terms of the contract, taking into consideration the instructions previously given to you; and
3. that Rolico breached the parties' contract.

In this case, Mansfield asserts that Rolico breached the parties' agreement by failing to close on the Helicopter by the agreed deadline, by failing to pay amounts due under their agreement, and by conditioning its release of funds for the purchase of the Helicopter upon new and material contract terms, thereby repudiating the parties' original agreement.

Failure to Timely Close

Mansfield claims that Rolico breached the parties' agreement by failing to timely close on the Helicopter. Parties to a contract may fix any time for performance, including the time for payment and/or delivery, by agreement so long as such time is not "manifestly unreasonable." An agreement to fix the time for performance need not be part of the parties' main agreement, but may occur separately.

The existence of an agreement for the time for performance may be established or shown to exist by an express contract term, as well as by the parties' conduct, the contractual circumstances, usage of trade, course of dealing, or performance.

Where the parties have not otherwise agreed to a time for delivery and a time for payment, delivery must occur within a "reasonable time" and payment is due at the time and place at which the buyer is to receive the goods. What constitutes a "reasonable time" for delivery depends upon what constitutes acceptable commercial conduct in view of the nature, purpose, and circumstances of the action to be taken.

Mansfield contends that Rolico agreed to close by December 10, 2006. It also contends that even if the December 10, 2006 date is not controlling, Rolico delayed the closing until February 22, 2007. Mansfield claims that Rolico's alleged delay was unreasonable in light of the nature, purpose, and circumstances of the transaction. Rolico claims that it did not delay the closing and that it acted diligently in moving towards closing once it received the written document from Mansfield. Rolico further claims that problems beyond Rolico's control emerged during the title search that prohibited Rolico from being able to close until February 22, 2007.

You must determine whether Rolico breached the terms of the parties' agreement by failing to timely close on the Helicopter.

Failure to Pay Carrying Costs

Mansfield asserts that Rolico was required to pay carrying costs due under paragraph 21 on page 3 of the contract Mansfield alleges the parties agreed to. Rolico does not dispute that it failed to close on or before December 10, 2006, but claims that it had no duty to do so. Accordingly, if you conclude that Rolico is bound by the terms of paragraph 21 and failed to pay carrying costs for the Helicopter when due under the terms of paragraph 21, you must conclude that Rolico breached the parties' agreement. Rolico claims that it is not bound by paragraph 21, and that even if it is, it actually paid those costs on February 16, 2007.

If you find that paragraph 21 is not controlling, you must determine if the parties otherwise reached an agreement concerning payment of carrying costs.

A contracting party's failure to timely make payments due under a contract is generally deemed to constitute a material breach.

Repudiation of Agreement

As stated above, a party breaches a contract when its conduct does not comply with the terms of the contract as agreed. A party also breaches a contract by anticipatorily repudiating the contract.

A party repudiates a contract when that party expressly or implicitly represents an intention not to perform or to perform only on conditions that go beyond the original agreed upon contract terms, and such nonperformance substantially impairs the value of the contract.

Here, Mansfield claims that Rolico repudiated (and therefore breached) the parties' original agreement by conditioning its release of funds for the purchase of the Helicopter upon Mansfield's agreement to new and material contract terms. Rolico denies that it conditioned the release of funds on new contract terms, and asserts that it attempted to negotiate new contract terms since Mansfield was not in a position to deliver the Helicopter at the time of closing.

Rolico claims that Mansfield was the party that repudiated the agreement because Mansfield could not deliver the Helicopter prior to closing, did not permit inspection of the Helicopter prior to closing, and, finally, sold the Helicopter to a third party. You must find whether Rolico or Mansfield, either of them, or both of them, repudiated the parties' agreement.

Excusal of Breach

A contracting party may be excused from performance under a contract if the other party commits a "material" breach of the contract. A material breach is one that goes to the root or essence of the agreement between the parties.

Here, Rolico claims that if it did breach, its alleged breach was excused because Mansfield itself breached the agreement by failing to: (a) deliver the Helicopter at the time of closing; (b) complete Rolico's requested modifications to the Helicopter in advance of closing; and (c) provide Rolico with the opportunity to inspect the Helicopter in advance of closing. Rolico has the burden of proving the elements of this claim by a preponderance of the evidence.

You must decide whether Rolico's breach, if any, was excused by a material breach of the parties' agreement by Mansfield. In reaching this conclusion, you must decide: (i) whether Rolico was entitled to inspect the Helicopter prior to closing; (ii) whether Mansfield was required to deliver the modified Helicopter simultaneously with closing; or (iii) whether Mansfield was required to complete Rolico's requested modifications in advance of closing. If you conclude that Mansfield was obligated to, but failed to fulfill, any of these provisions, you must then determine whether this failure was material – in other words, whether the failure was important to the parties' agreement. If you decide that none of these issues were material, individually or collectively, then Rolico's breach was not excused. If you find these failures individually or collectively were material, Rolico was excused from any breach you find it committed. On the other hand, you may find Mansfield's obligation to complete the requested modifications was suspended if you find Rolico expressed an intention that it would not timely close on the Helicopter or that Rolico failed to provide adequate assurances of its ability to close on the Helicopter in a timely fashion.

Cure of Breach

Rolico asserts that even if it breached the parties' agreement by not timely closing on the Helicopter or paying carrying costs, it cured the breach when it deposited all funds due into escrow pursuant to Mansfield's February 14, 2007 notice of default letter. Mansfield claims that Rolico failed to cure its default because it did not timely authorize the release of funds held in escrow to Mansfield, but instead withheld its authorization for the release of funds and conditioned the release of funds upon Mansfield's agreement to materially new contract terms. If you find that Rolico breached the parties' agreement, you must determine whether Rolico cured its breach under the circumstances presented.

Summary of Breach of Contract Claims

Each party has asserted a breach of contract claim and each party has presented

you with its theory or theories of how and when an alleged contract was breached. You must consider each party's claims and make a determination with regard to them that will be reflected on your verdict form. As noted previously, you may find that both parties, one of them, or neither of them have established a breach of contract claim.

II. Rolico's and Mansfield's Breach of the Duty of Good Faith and Fair Dealing Claims.

Both parties claim that the other breached a duty of good faith and fair dealing. Parties in a contractual relationship have an obligation to treat each other in good faith and deal with each other fairly. This is known as the covenant of good faith and fair dealing and it is implied in every contract. You need not address this claim if you find that the parties did not enter into an agreement.

The definition of the "covenant of good faith and fair dealing" is broad. It is an underlying principle implied in every contract that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement. The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistently with the justified expectations of the other party. The factual question in this case was whether each party acted in good faith and dealt fairly and consistently with the justified expectations of the other in the performance of their alleged agreement.

The covenant of good faith and fair dealing protects against a variety of conduct that violates community standards of decency, fairness, or reasonableness. A complete catalogue of types of bad faith conduct is impossible, but the following types of conduct are among those which may violate the covenant: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. Further, bad faith may be found in harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of the power to determine compliance or to terminate the contract. Additionally, subterfuges and evasions may constitute bad faith even though the actor believes his conduct to be justified. Finally, the covenant also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party.

In the end, it is your obligation as jurors to judge the context of the alleged bad faith conduct to determine if either party violated the covenant of good faith and fair dealing. You should consider the totality of the facts and circumstances, including the terms of any agreement between the parties in making this determination.

Again, you may find that one party, both parties, or neither party has established a breach of the covenant of good faith and fair dealing.

III. Rolico's Consumer Fraud Act Claim

Rolico alleges that Mansfield violated Vermont's Consumer Fraud Act by carrying out unfair practices in selling the Helicopter to Rolico. The parties agree that the purchase and sale of the Helicopter was a transaction that falls within Vermont's Consumer Fraud Act. They do not, however, agree that Rolico has proven the other elements of a Consumer Fraud Act claim. Here, Rolico claims that Mansfield breached the Consumer Fraud Act by deceptively inserting material and onerous terms in the contract and, later, by falsely telling Rolico that it would sell the Helicopter to it if Rolico deposited sufficient funds with the escrow agent, and then selling the Helicopter to a third party.

To establish a Consumer Fraud Act claim, Rolico must prove by a preponderance of the evidence that Mansfield engaged in unfair or deceptive practices in commerce, because:

1. Mansfield said or did something that an ordinary, reasonable person would conclude was misleading; and
2. Rolico reasonably relied upon what Mansfield did or said or failed to do or say; and
3. Mansfield's misleading statements, actions or omissions were "material," that is, would be likely to affect Rolico's purchasing decision.

In considering whether any representation or omission was likely to mislead consumers, you must apply an objective standard, which requires you to decide whether the representation or omission had the capacity or tendency to deceive an ordinary, reasonable consumer in light of all of the facts and circumstances. It is not necessary for Rolico to prove that Mansfield intended to mislead it; rather, Rolico must only show that Mansfield intended to make the representation or omission at issue.

Similarly, in determining whether Rolico reasonably interpreted the representation or omission, you should ask yourself, in light of all of the facts and circumstances, how an ordinary, reasonable consumer would have interpreted the representation or omission.

When considering Rolico's consumer fraud claim, you must ask yourself whether a reasonable person would have acted as Rolico did in interpreting Mansfield's acts, statements or omissions and whether Mansfield's conduct was material to the transaction. You may determine what a reasonable person would do by examining the totality of the

facts and circumstances.

The failure to sell any goods or services in the manner and of the nature advertised or offered, or the refusal or inability to sell any goods or services at the price advertised or offered in accordance with other terms or conditions of the advertisement or offer, creates a rebuttable presumption of an intent to violate the Consumer Fraud Act.

If you determine that Mansfield has violated the Consumer Fraud Act in the manner alleged by Rolico, you must determine Rolico's actual damages for the violation. Of course, you need not consider damages for this claim if you conclude that damages have not been established.

Actual damages for a violation of the Consumer Fraud Act consist of the amount of money paid minus the value of what Rolico received. If you find that no value was received, you may award damages for the amount of money Rolico paid as a result of Mansfield's alleged violation.

IV. Mansfield's Fraud Claim

Mansfield claims that Rolico falsely and intentionally represented to Mansfield that it could close on the purchase of the Helicopter in eight to ten weeks and that it relied upon this false representation to its detriment. In order to prove fraud, Mansfield must persuade you, by clear and convincing evidence, of each of the following essential elements:

1. that Rolico misrepresented an existing fact to affect the essence of the transaction with Mansfield;
2. that Rolico did so intentionally;
3. that the misrepresentation was false when made and known at the time to be false by Rolico;
4. that the correct information was not available to Mansfield;
5. that Mansfield relied on the misrepresentation to its detriment; and
6. that the fraudulent misrepresentation was the proximate cause of Mansfield's monetary loss.

Clear and convincing evidence represents a very demanding measure of proof. Although it is something less than proof beyond a reasonable doubt, it is substantially more rigorous than the preponderance of the evidence standard. It requires proof that the

existence of a contested fact is highly probable, rather than merely more probable than not.

If Mansfield fails to prove any one of the elements of its fraud claim by clear and convincing evidence, then you must return a verdict for Rolico on this claim. Conversely, if you find that Mansfield has proved these essential elements by clear and convincing evidence, you must return a verdict for Mansfield on its fraud claim.

If you determine that Mansfield has established its fraud claim, you must determine its damages. Of course, you need not consider damages if you find that Mansfield has not established this claim.

A party that has established fraud is entitled to recover the net amount of money that it has actually lost as a result of the fraud. The net amount lost should result from the natural and proximate consequences of the fraud to the extent such damages are clearly defined and ascertainable.

V. Mansfield's Negligent Misrepresentation Claim.

Mansfield claims that Rolico negligently made misrepresentations to Mansfield about the length of time it would take to obtain financing to purchase the Helicopter. Someone who, in the course of a business transaction, supplies false information for the guidance of others is subject to liability for any monetary loss caused by them as a result of the other party's reliance on such information, so long as such reliance is reasonable and justified.

Thus, you must decide the following elements in order to hold Rolico liable for negligent misrepresentation:

1. That Rolico made a representation or representations about how long it would take to close that were false;
2. That Rolico knew or should have known the representation(s) was false at the time it made it;
3. That Mansfield was justified in relying on the representation(s) because it was not obviously false and the truth of the representation was not within the knowledge of Mansfield; and
4. That the negligent misrepresentation was the proximate cause of Mansfield's monetary loss.

If you find that Rolico made negligent misrepresentations to Mansfield, you must

return a verdict for Mansfield on this claim and proceed to consider damages. If, however, you determine that Mansfield has not established this claim, you must return a verdict in favor of Rolico on this claim and you need not determine damages.

A party that has established a claim of negligent misrepresentation may recover those damages necessary to compensate the party for the monetary loss to it caused by the misrepresentation. This amount includes the difference between the value of what the party received in the transaction and its purchase price or other value given for it, and the monetary loss suffered as a consequence of the party's reliance upon the misrepresentation.

General Instructions on Awarding Damages

The fact that I have instructed you on the issue of damages should not be considered as the Court's opinion that any party has established any of its claims or defenses.

Rolico claims it suffered actual damages of \$200,700.00. Mansfield claims it suffered actual damages of \$435,389.99.

Each party claiming damages must prove by a preponderance of the evidence that it actually sustained damages and that its damages were proximately caused by the other's conduct. This means that its damages were either a direct result or a reasonably probable consequence of the other's conduct.

Liquidated Damages/Non-Duplicative Incidental Damages

You must determine whether the parties had a meeting of the minds regarding liquidated damages. On the other hand, if you do not find the parties agreed on a liquidated damages provision, then you cannot award such damages.

Mansfield claims it is entitled to liquidated damages. If you find that the parties did not agree to a liquidated damages provision, you may not award them. If you find that the parties did agree to a liquidated damages provision, you may award them, and you may also award Mansfield additional non-duplicative damages. This means damages not covered by the liquidated damages clause.

Mansfield also seeks to recover all incidental damages resulting from Rolico's breach of the agreement. Mansfield claims the following incidental damages: (a) the cost of modifying the Helicopter to meet the needs of Rolico and the subsequent buyer upon resale; (b) insurance on the Helicopter; (c) commission paid in connection with the Helicopter; and (d) interest/finance charges resulting from Rolico's breach.

Mansfield has the burden of proving such damages with reasonable certainty and must demonstrate that they were commercially reasonable.

Speculative Damages Not Permitted

Because each party's claim for damages are economic, it must prove them to your satisfaction in dollars and cents. You may not award damages that are speculative in nature.

Duplication of Damages Must Be Avoided

You have been instructed on several theories of damages asserted by the parties. You should be careful not to award damages for one item which duplicates an award for another item. In other words, a party is only entitled to one recovery for its actual damages. It may assert several claims to establish its entitlement to such damages and you may conclude that a party has established more than one of its claims, but this does not change the principle that a party may only recover once for its actual damages.

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.

Mitigation of Damages

Under the law, a party seeking an award of damages must make reasonable attempts to minimize or eliminate those damages. If you find that either party has failed to mitigate its damages, your award must not include compensation for any such failure.

Punitive Damages

There are three claims in this case for which you may potentially make an award of punitive damages: (1) Both parties' breach of the implied covenant of good faith and fair dealing; (2) Rolico's Consumer Fraud Act; and (3) Mansfield's fraud claim. Because Rolico's Consumer Fraud Act claim requires you to address punitive damages differently, I will instruct you first on the general rules governing punitive damages. The fact that I have instructed you on the issue of punitive damages does not reflect the court's opinion that any party has established its entitlement to such damages.

Punitive damages may be awarded where a party acts with actual malice toward another. Actual malice may be shown by conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of the rights of the party claiming punitive damages rights. Punitive damages are meant to punish a party for its behavior and to deter others from acting similarly in the future. Where the

party is a corporation, as is the case here, in order to find that a corporation must pay punitive damages, you must find that the behavior justifying punitive damages were corporate acts. Generally, where responsible management of the corporation has knowledge of the wrongdoing on the part of lower-level employees or was involved in the acts itself, the corporation will be determined to have permitted the act. In determining the amount of punitive damages, you should consider the character and standing of the party against which such damages may be awarded, its financial status, and the degree of malice or wantonness in its acts.

You may find that more than one act by a party warrants punitive damages but you must not award punitive damages twice for the same wrongdoing.

Punitive Damages for Rolico's Consumer Fraud Act Claim

As I noted previously, punitive damages are treated differently under the law for a Consumer Fraud Act claim. If you find (1) that Mansfield breached Vermont's Consumer Fraud Act and (2) acted with actual malice toward Rolico, you must award punitive damages. However, that punitive damages award cannot exceed three times the value of the actual damages, if any, you find Rolico suffered as a consequence of Mansfield's violation of the Consumer Fraud Act.

Court Costs, Attorney's Fees and Interest

If you find Mansfield and/or Rolico are entitled to any damages, you may not include in your award any sum for costs or attorney's fees. Furthermore, you are not to include any amount for interest. These are matters for the court.

Jury Deliberations/Unanimous Verdict

The verdict must represent the considered judgment of each juror. In order to return a verdict, you must all agree. Your verdict must be unanimous.

You must consult with one another. You must try to reach an agreement if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. Do not hesitate to re-examine your views and change your opinions if you are convinced they are wrong. But do not surrender your honest opinion as to the weight or effect of evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

If you need to communicate with me, you should send a note through the Court Officer, signed by your foreperson. You must not discuss with the court or with any other person what is said in deliberations, and any note you send to the court must not

include this information. In other words, you may ask the court questions but, in doing so, you must not reveal what the jurors are thinking or saying. You must not tell anyone how the jury stands numerically or otherwise until after you have reached a unanimous verdict and you have been discharged. Even then you need not speak to anyone about this case unless you want to.

When you have reached a verdict, tell the Court Officer that you have reached a verdict, but do not tell the Officer what the verdict is. You will then be brought into the courtroom where I shall ask you if you have reached a verdict, and, if you have, what it is.

CONCLUDING INSTRUCTIONS

Juror Note Taking

During the trial, you have been provided with pencil and paper, and some of you have taken notes. As I have explained at the beginning of the trial, all jurors should be given equal attention during the deliberations regardless of whether or not they have taken notes. Any notes you have taken may only be used to refresh your memory during deliberations. You may not use your notes as authority to persuade your fellow jurors as to what a witness did or did not say. In your deliberations you must rely upon your collective memory of the evidence in deciding the facts of the case. If there is any difference between your memory of the evidence and your notes, you may ask that the record of the proceedings be read back. If a difference still exists, the record must prevail over your notes. I will now describe the process for a read back.

Recollection of Evidence

If, during your deliberations, you are unable to recall with any degree of accuracy, a particular part of the testimony, or part of these instructions, you may do the following:

1. write out your question, and have the foreperson sign it;
2. knock on the door of the jury room; and
3. deliver your note to the Court Officer, to give to me.

After the attorneys have been consulted, and the record has been reviewed, I shall decide what action to take. I will tell you my ruling.

Election of a Foreperson

I will select _____ to act as your foreperson. The foreperson acts

as a chairperson or moderator. It is your duty to see that discussions are carried out in a sensible and orderly manner and to see that the issues submitted for the jury's decision are fully and fairly discussed, and that every juror has a chance to say what he or she thinks upon every question.

When ballots should be taken, you will see that it is done. You will act as the jury's spokesperson in the courtroom. In all other respects, the foreperson is the same as every other juror. His or her votes or opinions do not count more or less than those of his or her fellow jurors.

Ladies and gentlemen of the jury, you may now take the case and retire to begin your deliberations.

Dated at Burlington, in the District of Vermont, this 23rd day of July, 2010.

Christina Reiss
United States District Court Judge