

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

MOUNT SNOW LTD.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	File No. 1:12-CV-22
	:	
ALLI, THE ALLIANCE OF ACTION SPORTS,	:	
NBC UNIVERSAL MEDIA, LLC,	:	
NBC SPORTS VENTURES LLC,	:	
	:	
Defendants.	:	

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 me 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 as to any party. You are not to be governed by sympathy, prejudice or public opinion. 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.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the internet, any internet service, any text or instant messaging service, any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom.

Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

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 as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as 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. Lawyers have the right to object to questions or answers which they believe are not admissible. You must not draw any inferences from the fact that a lawyer feels it is necessary to make objections.

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.

Evidence--Charts and Summaries

Charts and summaries have been used to help explain the facts disclosed by the records and other documents which are in evidence. Such charts or summaries are not evidence or proof of any facts. They are used only used as a matter of convenience. If you find the charts or summaries do not accurately reflect the facts or figures shown by the evidence in this case, you should disregard them entirely.

Bias--Corporate Party

As you know, the parties in this case are corporations. You should consider this case, however, as an action between persons. The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. Do not let bias, prejudice or sympathy play any part in your deliberations. A corporation is entitled to the same treatment as is a private individual. All persons, including corporations, stand equal before the law.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees. In general, agents or employees of a corporation may bind the corporation by their acts and declarations made while acting within the scope of authority delegated to them by the corporation, or within the scope of their duties as employees of the corporation.

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's intelligence, motive and state of mind, and demeanor or manner. Consider the witness's 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's qualifications, his 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's 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 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 -- 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.

Overview of the Claims and Defenses in this Case

In this case, the plaintiff is Mount Snow Ltd. Mount Snow brings claims under the legal theory of breach of contract, specifically, claims for breach of express contract, breach of implied contract, and breach of the implied covenant of good faith and fair dealing. Defendants, The Alliance of Action Sports, NBC Universal Media, LLC, and NBC Sports Ventures LLC, deny the claims. For ease of reference, the Court will refer to the defendants collectively as "Alli." Alli raises defenses against these claims of termination of contract, waiver and material breach of contract by Mount Snow.

You will have to decide whether the parties entered into an express contract or if the parties' conduct created an implied in fact contract and, if so, whether that contract was breached and caused damage to Mount Snow. You may also have to decide whether Alli breached the implied covenant of good faith and fair dealing in the parties' contract, if you found that a contract existed. You may also have to decide if one or more of Alli's defenses defeat Mount Snow's claims.

Burden of Proof and Preponderance of the Evidence

The burden is on the plaintiff in a civil action to prove every essential element of the claim by a preponderance of the evidence. In this case, it is Mount Snow's burden of proof to prove every essential element of its breach of contract and breach of the implied covenant of good faith and fair dealing claims 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 or claim 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.

Breach of Express Contract

Mount Snow claims it and Alli entered into an express contract that Alli breached. Mount Snow asserts Alli breached the contract by failing to hold a Dew Tour event at Mount Snow in 2011.

To prevail on this claim, Mount Snow must prove the following elements by a preponderance of the evidence:

- (1) a contract or agreement existed between the parties;
- (2) the terms of the contract;
- (3) Alli breached a term of the contract;
- (4) Mount Snow suffered damages as a result of the breach;
and
- (5) the amount of the damages.

Mount Snow must first establish that a contract existed between the parties. It must prove both that there was a meeting of the minds, i.e., mutual assent, between Mount Snow and Alli and that there was consideration for the contract.

Mount Snow must prove that both parties to the contract understood what was being negotiated and assented to it. Parties may enter a binding contract without a signed document if both parties intended to be bound. To determine whether the parties intended to be bound, you must consider their words and actions and focus on objective signs of the parties' intent. You may consider the following factors: (1) whether either party expressly reserved the right not to be bound before the agreement was fully executed; (2) whether either party partially performed

the contract; (3) whether all substantive terms were agreed upon; and (4) whether the agreement is of the type typically committed to writing. If you find Mount Snow and Alli intended to be bound by an agreement, you will find there was a meeting of the minds.

Consideration, the other prerequisite of a valid contract, is simply another way of saying "value." Mount Snow must show that the parties to the contract each exchanged something of value in return for what they planned to receive. The consideration exchanged between the parties need not, in your opinion, be equal. Your job here is not to weigh whether one side or the other got the better of the deal, but instead is to determine whether any deal existed. Thus, although the particular form and amount of the consideration exchanged is not important, plaintiff Mount Snow does have the burden of proving that some consideration was exchanged.

If you find that a contract existed between the parties, then your next task is to determine the terms of the contract. Again, the burden is on Mount Snow to prove by a preponderance of the evidence each of the terms on which it relies.

After determining the terms, you must determine whether Mount Snow has proven by a preponderance of the evidence that Alli breached one or more of the terms of the contract 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.

Next, a party claiming breach of contract must prove by a preponderance of the evidence that its damages are the proximate result of the other party's breach. This element is proved if you find damages to Mount Snow that were either a direct result or a reasonably probable consequence of Alli's conduct.

Lastly, a party claiming breach of contract must prove by a preponderance of the evidence the amount of its damages. I will instruct you further on assessing damages, if necessary, below.

Breach of Contract Implied in Fact

If you find there was not a binding express contract, alternatively Mount Snow claims that the parties' conduct formed an implied in fact contract that Alli breached. You will consider this claim only if you find that Mount Snow has not proven the parties entered into an express contract.

To establish an implied in fact contract, the same elements required to prove an express contract must be present. The only difference between the two forms of contracts, express and implied, is the way in which mutual assent is manifested. An implied contract arises where there is an agreement implied or presumed from the parties' conduct or where the circumstances and/or course of dealings between the parties establish a mutual intent to contract. It is essential that the acceptance of the offer be manifested by conduct that indicates assent to the proposed bargain.

If you find that Mount Snow has not established that the parties entered into an implied in fact contract, or any one of the other elements of this claim, you will enter a verdict for Alli on the claim of breach of contract.

If you find that Mount Snow has established an implied in fact contract, you will consider the other elements of this claim including whether Mount Snow has proven by a preponderance of the evidence it suffered damages as a proximate result of Alli's breach and the proven amount of any such damages.

Affirmative Defenses

Next, I will instruct you on the affirmative defenses raised by Alli. These are defenses to Mount Snow's breach of contract claim that, if proven by Alli, will absolve Alli from liability even if Mount Snow proves its claim. If you do not find for Mount Snow on its breach of contract claim, you will not consider whether Alli has proven any affirmative defense. A defendant asserting an affirmative defense must prove the essential elements of that defense by a preponderance of the evidence. If you should find for Alli on any one of the affirmative defenses it raises, you will not consider the amount of damage Mount Snow may have suffered.

Affirmative Defense--Termination of Contract

Alli claims that even if a contract existed between the parties, Alli properly terminated the contract by notifying Mount Snow within 60 days after the completion of the 2010 Winter Dew event at Mount Snow. Again, the burden is on Alli to prove this affirmative defense by a preponderance of the evidence. If you find that Alli notified Mount Snow within 60 days after the completion of the 2010 event that it was terminating the contract, then you should enter a verdict for Alli on Mount Snow's breach of contract claim and you will not consider the amount of Mount Snow's damages, if any.

Affirmative Defense--Waiver

Alli also asserts Mount Snow waived the 60 day termination deadline. Waiver is the intentional and voluntary relinquishment or abandonment of a known legal right. A waiver may be expressly made or implied from conduct or other evidence, including its words and actions. The party alleged to have waived the right must have known about the right and intended to give it up.

If you find that Alli has proven by a preponderance of the evidence that Mount Snow, by words, conduct or acquiescence, knowingly or intentionally relinquished or abandoned its right to enforce the 60-day termination provision, then you should enter a verdict for Alli on Mount Snow's breach of contract claim and you will not consider the amount of Mount Snow's damages, if any.

Affirmative Defense--Material Breach of Contract by Mount Snow

Alli also raises the affirmative defense of material breach of contract by Mount Snow. Alli claims that, if there was a contract, Alli properly terminated the contract for material breach by Mount Snow.

Alli must prove Mount Snow breached the contract and that the breach was material. As I have instructed, a material breach occurs when there is a breach of an essential feature or term of the contract, in other words, when the breach goes to the heart of the agreement.

If you find that Alli has proven by a preponderance of the evidence that it properly terminated the contract, then you should enter a verdict for Alli on Mount Snow's breach of contract claim and you will not consider the amount of Mount Snow's damages, if any.

Good Faith and Fair Dealing

Mount Snow also claims Alli violated the covenant of good faith and fair dealing. You may only consider this claim if you find there was a binding contract between Mount Snow and Alli. Again, to prevail, Mount Snow must prove its claim by a preponderance of the evidence.

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

To prevail on this claim, Mount Snow must prove the following elements by a preponderance of the evidence:

- (1) the parties entered into a binding, enforceable contract, either express or implied; and
- (2) Alli acted in bad faith, unreasonably and with ill will towards Mount Snow while the contract was in effect; and
- (3) Alli's conduct that allegedly violated the covenant was distinct from any conduct that you find breached the contract; and
- (4) Alli's breach of the covenant harmed Mount Snow.

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.

Damages

I instruct you as to the proper measure of damages, but you should not consider this instruction as an indication of whether you should award damages. The instructions are given only for your guidance. If you decide in favor of Alli, you will not consider this instruction on the issue of Mount Snow's damages. If you decide for Mount Snow, you must consider the issue of damages.

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

If you decide that Mount Snow is entitled to damages arising from either Alli's breach of contract or its duty of good faith and fair dealing, it is your duty to determine the amount of money that reasonably, fairly and adequately compensates Mount Snow. You should not be deterred by the fact that damages are not susceptible of reduction to an exact money standard. Evidence allowing estimation of an amount with reasonable certainty is sufficient; you may not, however, award damages that are speculative in nature. If the amount of damages is not measurable, Mount Snow is limited to the recovery of nominal damages. Nominal damages are a trifling sum awarded for the infraction of a legal right where the extent of the loss is not

shown. The measure of damages is intended to compensate Mount Snow, and not to punish Alli.

Mount Snow has the burden of proving its damages were sustained as a direct result of Alli's actions and the damages directly flowed from the breach of contract or covenant. Any damages you may award for breach of contract would be measured by the loss in value to Mount Snow of Alli's performance caused by Alli's failure to perform the contract plus any other reasonably foreseeable loss caused by the breach. That amount must be reduced by any cost you find Mount Snow avoided by not having to perform. You may award damages for breach of the covenant of good faith and fair dealing in an amount sufficient to put Mount Snow, as nearly as possible, in the position it would have occupied if the covenant was not breached.

Duplication Of Damages Must Be Avoided

You have been instructed on two claims under which Mount Snow seeks damages: breach of contract, either express or implied, and breach of the covenant of good faith and fair dealing. You should be careful not to award damages for one claim which duplicates an award for another claim. 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.

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.

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 :
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 :
 _____ :
 :

Judge Murtha, we have reached a verdict.

Foreperson

Date

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NBC SPORTS VENTURES LLC,	:	
	:	
Defendants.	:	

Verdict Form

1. Do you find Mount Snow has proven that Mount Snow and Alli made an express contract regarding the 2011 Winter Dew Tour event?

Yes _____ No _____

If your answer is "no," then your verdict is for Alli on Plaintiff's breach of express contract claim. Please proceed to question 2.

If your answer is "yes," then proceed to question 3, which is a special factual question the Court needs you to answer.

2. Do you find Mount Snow has proven that Mount Snow and Alli made an implied in fact contract regarding the 2011 Winter Dew Tour event?

Yes _____ No _____

If your answer is "no," then your verdict is for Alli on all of Mount Snow's claims and your deliberations are complete.

If your answer is "yes," then proceed to question 3, which is a special factual question the Court needs you to answer.

3. On what specific date do you find Mount Snow and Alli mutually assented, or had the meeting of the minds, that made the contract?

Proceed to question 4.

4. Do you find Alli has proven that Alli properly terminated the contract by notifying Mount Snow within 60 days after the completion of the 2010 event?

Yes _____ No _____

If your answer is "yes," then your verdict is for Alli on Mount Snow's breach of contract claim. Proceed to question 10.

If your answer is "no," then proceed to question 5.

5. Do you find Alli has proven that Mount Snow waived its right to enforce the 60-day termination provision?

Yes _____ No _____

If your answer is "yes," then your verdict is for Alli on Mount Snow's breach of contract claim. Proceed to question 10.

If your answer is "no," then proceed to question 6.

6. Do you find Alli has proven that Alli properly terminated the contract due to a material breach by Mount Snow?

Yes _____ No _____

If your answer is "yes," then your verdict is for Alli on Mount Snow's breach of contract claim. Proceed to question 10.

If your answer is "no," then proceed to question 7.

7. Do you find Mount Snow has proven that Alli breached a term of the contract?

Yes _____ No _____

If your answer is "no," then your verdict is for Alli on Mount Snow's breach of contract claim. Proceed to question 10.

If your answer is "yes," then proceed to question 8.

8. Do you find Mount Snow has proven that Alli's breach of contract caused damages to Mount Snow?

Yes _____ No _____

If your answer is "no," then your verdict is for Alli on Mount Snow's breach of contract claim. Proceed to question 10.

If your answer is "yes," then proceed to question 9.

9. What amount of damages do you find Mount Snow has proven that are attributable to the breach of the contract?

Answer in dollars and cents: _____

Proceed to question 10.

10. Do you find Mount Snow has proven that Alli breached the covenant of good faith and fair dealing?

Yes _____ No _____

If your answer is "no," then your verdict is for Alli on Mount Snow's breach of the covenant of good faith and fair dealing claim and your deliberations are complete.

If your answer is "yes," then proceed to question 11.

11. Do you find Mount Snow has proven that Alli's breach of the covenant of good faith and fair dealing caused damages to Mount Snow?

Yes _____ No _____

If your answer is "no," then your verdict is for Alli on Mount Snow's breach of the covenant of good faith and fair dealing claim and your deliberations are complete.

If your answer is "yes," then proceed to question 12.

12. What amount of damages do you find Mount Snow has proven that are attributable to the breach of the covenant? You may not duplicate any damages awarded under question 9.

Answer in dollars and cents: _____

Your deliberations are complete.

Foreperson

Date