

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

OKEMO MOUNTAIN, INC., :
Plaintiff and :
Counter-Defendant, :
 :
v. :
 :
PATRICK J. SIKORSKI, : File No. 1:93-CV-22
Defendant, Counter-Claimant. :
 :
_____ :

JURY CHARGE

Now that you have heard the evidence and arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

The Plaintiff in this case is Okemo Mountain, Inc., represented by Michael Hanley. The Defendant is Patrick J. Sikorski, represented by Bradford Fawley. Mr. Sikorski also has filed a complaint against Okemo.

Overview of Claims and Issues

This case concerns Okemo's action seeking to renew a Judgment for \$453,478.86 rendered after a trial in 1995 against defendant Mr. Sikorski for fraudulent inducement, double billing, and violation of an agreement not to compete. Mr. Sikorski has asserted several defenses to Okemo's action to renew the 1995 Judgment. Mr. Sikorski also has alleged claims against Okemo.

Mr. Sikorski's theory is that Okemo's concealment of a release that would have provided Mr. Sikorski with a defense against the fraudulent inducement claim at the 1995 trial constitutes a fraud upon the court, fraudulent concealment, and fraudulent misrepresentation, as well as abuse of process in obtaining and pursuing the 1995 Judgment. Mr. Sikorski also claims Okemo is liable to him for intentional infliction of emotional distress. Mr. Sikorski additionally argues that Okemo should be estopped from bringing its action to renew the 1995 Judgment. On these claims and defenses, Mr. Sikorski seeks both relief from the 1995 Judgment and recovery of damages from Okemo. Okemo maintains that the Judgment is valid and deny any wrongdoing.

It is your duty to determine from the evidence what was the intention of Okemo and the United States Sporting Clays Association (USSCA) at the time the General Release was executed on February 23, 1995. In determining the intention and meaning

of the Release, you must determine specifically whether it had the effect of releasing Mr. Sikorski from Okemo's fraudulent inducement claim which resulted in the 1995 Judgment against him by Judge Billings. You must then determine whether Mr. Sikorski has proved that Okemo is liable to him on his claims, and what damages, if any, should be awarded to Mr. Sikorski. Based on your answers to the questions posed to you on a verdict form that I will give you, I will then make the ultimate legal decisions regarding the 1995 Judgment.

To make these determinations, you are to consider the evidence in light of the explanations of law that I provide in these instructions.

Role of the Court, the Jury, and Counsel

Now that you have listened carefully to the testimony that has been presented to you, you must consider and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You weigh the evidence, you determine the credibility of the witnesses, you resolve the conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. Shortly, I will define "evidence" for you and tell you how to weigh it, including how to evaluate the credibility, or to put it another way, the believability of the witnesses.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions I am about to give you.

Nothing I say in these instructions should be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts; rather, that is your function.

You are to discharge your duty as jurors fairly and impartially. You should evaluate the evidence deliberately and without the slightest trace of sympathy, bias, or prejudice for

or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Evidence in the Case

The evidence includes any stipulated facts, the sworn testimony of the witnesses, contents of documents read into the record, and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be disregarded.

Statements and arguments of counsel are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. But it is your own recollection and interpretation of the evidence that controls in the case. When, however, the attorneys on both sides stipulate, or agree, to the existence of a fact, you must, unless otherwise instructed, consider that fact as proved.

There are certain guidelines by which you are to evaluate evidence. There are two types of evidence -- direct and circumstantial. An example of direct evidence is a witness testifying about something he or she has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. For instance, you may infer, on the basis of reason, experience, and common sense, from one established fact the existence or non-existence of some other

fact. Circumstantial evidence is of no less value than direct evidence.

While you should consider only the evidence in the case, you may make deductions and reach conclusions which reason and common sense lead you to draw.

Use of Deposition Testimony

During this trial, some testimony has been presented to you by deposition. A deposition consists of sworn recorded answers to questions asked of the deposed witness, in advance of trial, by one or more of the attorneys from each side. You are to give this deposition testimony the same consideration you would give to the testimony of a witness who takes the witness stand and testifies in your presence.

Demonstrative Evidence

During the course of this trial, you may have seen graphs, charts, timelines, or diagrams prepared or drawn by counsel. You are permitted to have these materials in the jury room during your deliberations. However, these materials are admitted only for convenience in assisting your deliberations and are not a substitute for admitted exhibits or witness testimony.

Credibility of Witnesses

You as jurors are the sole judges of the credibility, or believability, of the witnesses and the weight their testimony deserves. You do not have to accept all the evidence presented in this case as true or accurate. You do not have to give the same weight to the testimony of every witness. You should consider the witness's interest, if any, in the outcome of the case; their demeanor and manner of testifying; their candor and accuracy; their bias or prejudice, if any; the extent to which other evidence supports or contradicts their testimony; and the reasonableness of their testimony.

The weight of the evidence is not determined by the number of witnesses testifying or the amount of evidence introduced by a party. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most evidence.

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 occurrence. It is for you to weigh the effect of any discrepancies, considering whether they pertain to matters of importance or unimportant details, and

whether the discrepancy results from innocent error or intentional falsehood.

In short, you may give the testimony of each witness such weight, if any, as you think it deserves. You may believe as much or as little of the testimony of each witness as you think proper.

Expert Witnesses

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. This testimony is presented to you because a person who is experienced and knowledgeable in a particular matter can assist you in understanding the evidence.

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

Burden of Proof

This is a civil case and as such, parties generally have the burden of proving every element of their claims and defenses by a "preponderance of the evidence," or for certain claims, by "clear and convincing evidence." To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. It means the evidence of greater weight, logic, and persuasive force. It is a matter of quality, not quantity. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, convinces you that what is sought to be proved is more likely so than not so. 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 and exhibits received in evidence.

In comparison, it is important to your deliberations to note that fraud requires proof by "clear and convincing evidence." "Clear and convincing evidence" is a higher standard of proof than "preponderance of the evidence" but not as high as the standard used in criminal cases, which is proof "beyond a reasonable doubt." Clear and convincing evidence leaves no substantial doubt in your mind, which is a more exacting standard than proof by a preponderance of the evidence, where you need to believe only that a party's claim is more likely true than not

true. Clear and convincing evidence must be clear in the sense that it is not ambiguous, equivocal, or contradictory. It is proof that establishes in your mind not only that the proposition at issue is probable but that it is highly probable.

Unanimous Verdict

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. 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. You must each 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 as to the weight or effect of evidence 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. Your sole interest is to seek the truth from the evidence in the case.

SCOPE OF THE RELEASE

You have heard evidence concerning the facts and circumstances surrounding the signing of a General Release agreement in 1995 between Okemo and USSCA. Mr. Sikorski has argued that the General Release released Okemo's claim against him for fraudulent inducement at the 1995 trial. To succeed on his defense that the Release released Okemo's claim for fraudulent inducement against him, Mr. Sikorski must prove by a preponderance of the evidence that he is included within that class of persons released.

In Vermont, a release agreement is a bar to recovery against the persons released on the claims released in the agreement. The scope of a release is determined by the intention of the parties as expressed in the terms of a particular release contract, when considered in the light of all the facts and circumstances -- that is, by consideration of what was within the contemplation of the parties when the release was executed.

In interpreting the General Release to determine whether the parties intended that a particular person or claim has been discharged, you will consider what was within the contemplation of Okemo and USSCA when the Release was executed, which in turn is to be resolved in the light of the surrounding facts and circumstances under which all the parties acted.

FRAUD ON THE COURT

Mr. Sikorski has alleged fraud on the Court as an defense to the Okemo's action to renew the 1995 Judgment against him. Fraud upon the court must be established by Mr. Sikorski by clear and convincing evidence.

Fraud upon the court refers to unusual cases involving that type of fraud perpetrated by officers of the court, including attorneys, such that the court cannot perform its usual, impartial task of adjudication. Not all fraud is fraud on the court. Fraud on the court is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged. A fraud on the court must be such an intentional and successful deception concerning a matter in court that it results in a perversion and obstruction of justice.

To meet the standard of proof for fraud upon the court, Mr. Sikorski must convince you by clear and convincing evidence that Okemo's attorney, acting under Okemo's authority, made a statement to the court which was intentionally false or concealed facts he was under a duty to disclose, that the averment or concealment was intended to deceive the court, and that the court was in fact deceived in that it relied on the averment or concealment in issuing the 1995 Judgment against Mr. Sikorski.

Duties of Attorneys Before the Court

_____Parties before the Court typically speak through attorneys, and Mr. Sikorski has alleged that Okemo's attorneys committed a fraud upon the court. As previously noted, Mr. Sikorski bears the burden of proof on this claim by clear and convincing evidence. Mr. Sikorski brings this allegation against lawyers with the law firm of Salmon & Nostrand, including Richard Coutant, who at all times during the events of this case were admitted to practice before this Court and in the State of Vermont.

Attorneys are professionals in the regulated practice of law. Before an attorney practices in front of this Court, he or she must take an oath, which reads:

You solemnly swear, that you will do no falsehood, nor consent that any be done in Court, and if you know of any, you will give knowledge thereof to the Judges of the Court or some of them, that it may be reformed; you shall not willingly or knowingly promote, sue, or procure to be sued any false or unlawful suit, or give aid or consent to the same; you shall delay no person for lucre or malice, but shall act in the office of attorney within the court to your best learning and discretion, with all good fidelity as well to the Court as to your client; and you will at all times support the Constitution of the United States. SO HELP YOU GOD.

There are additional rules and requirements attorneys representing clients in this Court must follow. These are the Vermont Rules of Professional Conduct. A lawyer shall not knowingly fail to disclose a material fact to the Court when

disclosure is necessary to avoid assisting a fraudulent act by a client. A lawyer shall not obstruct another party's access to important evidence when it is requested. Regardless of duties owed to a client, a lawyer may not, under any circumstances, practice, or permit to be practiced, a fraud on the court.

A lawyer also shall not counsel a client to engage in fraud; must reveal information relating to representation of a client when the lawyer reasonably believes that failure to disclose a material fact to a third person will assist a fraudulent act by a client; and a lawyer has a duty of candor toward the Court and shall not fail to disclose a material fact to a Court when disclosure is necessary to avoid assisting a fraudulent act by the client. Further, a lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and later learns it is false, the lawyer shall take reasonable remedial measures.

The oath and rules, viewed together, represent the standards by which Mr. Coutant was required to conduct himself, on behalf of his clients, at all times before this Court. Unless fraud is perpetrated by the attorney without the consent of the client, that client is also bound by the appearance, admissions, and actions of counsel acting on the behalf of his client. A lawyer and his client may not present false or misleading testimony before the Court. I instruct you that, should you find

that Mr. Coutant did so, based on a standard of clear and convincing evidence, it would constitute fraud on the Court.

ESTOPPEL

Mr. Sikorski argues the defense of estoppel to Okemo's action to renew the 1995 Judgment against him. Mr. Sikorski must prove the defense of estoppel by a preponderance of the evidence. Estoppel prevents a person from adopting a new position that contradicts a previous position maintained by words, silence, or actions when allowing the new position to be adopted would unfairly harm another person. The elements of the defense of estoppel here are (1) ignorance on the part of Mr. Sikorski, (2) a misleading representation or concealment by Okemo, and (3) an innocent and detrimental change of position by Mr. Sikorski in reliance on Okemo's representation.

You should decide whether the position Okemo has taken before this Court is different from earlier positions it has taken before this or other courts and, if they are, you should determine whether the effect of Okemo's new position would be harmful to Mr. Sikorski because he had innocently and detrimentally relied on Okemo's earlier representation. In deciding the question of estoppel, you will have to consider, among other things, the scope of the Release between Okemo and USSCA.

Liability Of Principal and Agent

Agency is defined under Vermont law as a relationship where one party -- the principal -- delegates to another party -- the agent -- the management of some business to be transacted on behalf of the principal. A typical example of an agency relationship is that of a real estate agent. In that situation, the seller of a home -- the principal -- delegates authority to a real estate agent -- the agent -- to advertise, promote, show, and attempt to sell a home for the homeowner's benefit. Principals are responsible for the actions and representations of their agents if the agent is (1) acting on behalf of the principal, and (2) acting within or making representations concerning a matter that is within the scope of the agency.

The test that you must apply in considering the agency claims in this case is this: Was the act in question performed by the agent for its principal with the principal's knowledge and assent? If you find by a preponderance of the evidence that a person was acting as agent for a principal, you may consider all of the actions of the agent within the scope of his agency as being those of the principal.

An action taken within the agency relationship but benefitting both the agent and principal is still considered an action within the agency relationship. For example, a real estate agent who is trying to sell a home for her principal and

who will receive a commission for doing so will be benefitting both herself and her principal -- the seller. However, the fact that the agent may benefit from her activities does not take the agent's attempts to sell the home out of the agency relationship. Thus, a principal is still responsible for his agent's actions and representations if the agent is trying to some extent to serve the principal's business even if the primary motive of the agent was to benefit himself/herself or a third person. Similarly, an agent's willful or malicious act or representation may be within the scope of agency if it is done in any part for the benefit of the principal.

Conversely, there may be times when an agent is acting outside the scope of agency. At those times, the agent may be personally liable for his or her wrongful actions if he or she took those actions separate and apart from his position as agent. In that case, his principal will not be liable.

Corporate or Association Entity

One reason we talk about agency is that corporations and associations are not natural persons, and under the law of Vermont, a corporation or association may only act through its agents, including its officers and employees. A corporation or association is liable for the acts and the omissions of an employee or agent who is acting within the scope of his employment or agency. For the purposes of your deliberations, you should consider the act or omission of an employee or agent of Okemo or USSCA, taken within the scope of his employment, to be the act or omission of Okemo or USSCA itself.

FRAUDULENT CONCEALMENT

In addition to his claim of fraud upon the court, Mr. Sikorski has alleged that Okemo is liable to him personally for fraudulent concealment. Mr. Sikorski's burden of proof on this claim is again by clear and convincing evidence.

To find Okemo liable for fraudulent concealment, you must find by clear and convincing evidence that (1) Okemo, acting through its agents, failed to disclose material facts of which it had superior knowledge or the means of knowledge, (2) Okemo had a duty to disclose this information to Mr. Sikorski, (3) Okemo intended to mislead or defraud when it concealed such material facts, and (4) Mr. Sikorski justifiably relied on Okemo's incomplete information provided to him.

A "material fact" is one of importance to a person in Mr. Sikorski's position, and by which such person reasonably would be expected to be influenced. Material facts are not matters of judgment or opinion, nor future facts or promises; they refer to matters existing at the time they are conveyed. It is up to you to determine whether the existence and contents of the General Release agreement between USSCA and Okemo were material facts.

You must also find that Okemo had a duty to disclose the material facts. Silence does not constitute fraud unless there is a duty to disclose. A duty to disclose arises when there is superior knowledge or means of knowledge by one party as compared

to the other party. If you find that material facts were available to Okemo, and Okemo knew that those facts were not within the reach of Mr. Sikorski's diligent attention, observation, and judgment, then you may find that Okemo had a duty to disclose those facts.

Next, you must also find by clear and convincing evidence that Okemo had an intention to mislead or defraud Mr. Sikorski. This element of fraudulent concealment is satisfied if you determine by clear and convincing evidence that Okemo intended to obtain a judgment against Mr. Sikorski based on actions for which they knew he was released.

Lastly, you must find that Mr. Sikorski justifiably relied on Okemo's incomplete information. Whether Mr. Sikorski's reliance on Okemo's incomplete information was justifiable must be determined based upon the facts and circumstances at the time.

FRAUDULENT MISREPRESENTATION

Mr. Sikorski also has alleged a claim of fraudulent misrepresentation against Okemo. Fraudulent misrepresentation also requires proof by clear and convincing evidence.

To find for Mr. Sikorski on his claim of an fraudulent misrepresentation, you must find: (1) that Okemo, acting through its agents, intentionally misrepresented an existing material fact, (2) the "fact" Okemo conveyed was false when made and Okemo knew the fact was false, (3) Mr. Sikorski did not know of the "fact," (4) Mr. Sikorski relied on the misrepresentation and suffered an economic loss, and (5) Mr. Sikorski's reliance was justifiable.

You must first find by clear and convincing evidence that an intentional misrepresentation of an existing material fact was made by Okemo to Mr. Sikorski. I have already instructed you on what is a "material fact" in the previous instruction so you should refer to it again.

Next, you must find that the misrepresented fact was false, and Okemo knew this at the time it was made. Okemo need not have known or even considered that Mr. Sikorski was without knowledge as to the fact; rather, Okemo need only have known in their own estimation that the representation they made to Mr. Sikorski was false.

You must also find by clear and convincing evidence that the

"fact" was not known or available to Mr. Sikorski. Okemo cannot escape liability based solely on the defense that Mr. Sikorski, but for his own silence or neglect, might have discovered the existence and contents of the General Release. Mr. Sikorski had a duty to inquire into the fact before relying upon it only if it was clear from the full text of the representation made by Okemo's agents to Mr. Sikorski, or from facts about the relationship of the parties, that reliance only should have followed an independent inquiry. Otherwise, Mr. Sikorski had no duty to inquire into the statements made by Okemo.

Finally, you must find by clear and convincing evidence that Mr. Sikorski justifiably relied on the misrepresentation and suffered an economic loss, such as expenses, loss of income, business, clients, or profits or the imposition of a financial debt.

ABUSE OF PROCESS

Mr. Sikorski has alleged a claim of abuse of process. To find that Okemo abused process, you must find that (1) Okemo, acting through its agents, made an improper, illegal, or unwarranted use of court processes, (2) with an ulterior motive or for an ulterior purpose, (3) which caused damage to Mr. Sikorski. Mr. Sikorski must prove each of these three elements by a preponderance of the evidence.

The first element that you must determine is whether Okemo made an improper, illegal, or unwarranted use of court processes. Filing claims, making representations to the Court, presenting evidence at trial, trying a case and obtaining, maintaining, renewing, or executing a final judgment from a court are all uses of "court process." In addition, you must find that the court process was used in an improper, illegal, or unwarranted manner. The proper use of legal process even though used for a bad intention and to satisfy malicious intentions does not constitute abuse of process. In determining whether the use of court process was proper, you may consider all of the acts by Okemo's agents, including their attorneys. If you conclude that Okemo had no legal right to obtain, maintain, renew or execute the 1995 final judgment against Mr. Sikorski, that would serve as the basis for a finding of improper, illegal, or unwarranted use of court process.

To find for Mr. Sikorski on the claim of abuse of process, you must also find that Okemo acted with ulterior motive or for an ulterior purpose. If you find that the improper or illegal use of process was done by Okemo as a means to threaten, impose an unwarranted burden upon, or improperly intimidate Mr. Sikorski, you may find that they acted with an ulterior motive or an ulterior purpose. Mere ill will against an adverse party in a court proceeding does not constitute an ulterior or improper motive. Lastly, to find for Mr. Sikorski on the claim of abuse of process, you must find by a preponderance of the evidence that the improper use of process damaged Mr. Sikorski.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Mr. Sikorski also has claimed that Okemo is liable to him for intentional infliction of emotional distress. This claim requires Mr. Sikorski to prove by a preponderance of the evidence that (1) Okemo's conduct, acting through its agents, was extreme and outrageous, (2) Okemo's conduct was intentional or taken in reckless disregard of the probability of causing emotional distress to Mr. Sikorski, (3) Mr. Sikorski suffered extreme emotional distress, and (4) the outrageous conduct by Okemo proximately caused Mr. Sikorski's emotional distress.

Mr. Sikorski first must establish that Okemo's actions were extreme and outrageous. In order to meet this burden, Mr. Sikorski must show that Okemo's conduct exceeded the bounds of decent and tolerable conduct. The alleged conduct must be such that the average member of the community would regard it as intolerable in a civilized community. Mere insults, threats, or trivial oppressions do not amount to outrageous conduct. Rather, outrageous conduct is the kind of conduct that no reasonable person should be expected to endure.

In considering whether Okemo's alleged conduct in this case was extreme and outrageous, you may consider the complete factual setting in which it occurred, including Mr. Sikorski's physical and mental condition at the time of Okemo's conduct, Mr. Sikorski's economic needs, the relative economic power as between

Mr. Sikorski and Okemo, and the extent to which Okemo was aware of these matters at the time. The test of whether conduct is extreme and outrageous is an objective one; it is whether a reasonable person, in Mr. Sikorski's position, would be expected to endure the conduct without extreme emotional distress.

If you decide that the conduct by Okemo was outrageous, you must next decide whether the defendants acted either intentionally or recklessly. To prove that Okemo acted recklessly, Mr. Sikorski need only show that Okemo consciously disregarded a substantial and unjustifiable risk that certain circumstances existed or that a certain result would follow, and that conscious disregard was a gross departure from the care that a reasonable person would exercise in the same or similar circumstances. Alternatively, to prove that Okemo acted intentionally, Mr. Sikorski must show that Okemo, acting through its agents, intended to engage in the harmful conduct, acted with that specific intent, and that it is what Okemo meant to do.

The outrageous conduct, of course, must be directed at the intended victim, here, Mr. Sikorski. Mr. Sikorski must have been present and must be the object of the outrageous conduct or be positioned in such a way that extreme emotional distress was highly probable.

If you find that Okemo's outrageous conduct was either intentional or reckless, you must then determine whether Mr.

Sikorski suffered from severe emotional distress. The term "severe emotional distress" means any emotional or mental disorder, such as chronic depression, neurosis, psychosis, phobia, or any other type of severe and disabling emotional or mental condition that may be generally recognized and diagnosed by professionals trained to do so. Emotional distress includes all highly unpleasant mental reactions, such as shame, humiliation, embarrassment, anger, chagrin, disappointment and worry. While some of Mr. Sikorski's reactions may have physical components, I instruct you that Mr. Sikorski is not required to show that he suffered any physical injury in order to recover from Okemo for intentional infliction of emotional distress.

Lastly, Mr. Sikorski must prove that Okemo's conduct was a substantial cause of severe emotional distress. Okemo's conduct is a substantial cause of severe emotional distress if that distress was either a direct result or a reasonably probable consequence of the conduct complained of by Mr. Sikorski. Mr. Sikorski's response must have been reasonable and justified under the circumstances; Okemo is not legally at fault for any exaggerated and unreasonable emotional distress felt by Mr. Sikorski.

Effect of Instructions as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages -- both compensatory and punitive damages -- are give for your guidance, in the event you should find in favor of Mr. Sikorski in accordance with the other instructions.

Compensatory Damages

Mr. Sikorski seeks compensatory damages from Okemo. If you find that Okemo is liable to Mr. Sikorski, then you may award Mr. Sikorski compensatory damages. The purpose of compensatory damages is to put Mr. Sikorski in the same position he was in prior to the injury or harm to him. There is no exact standard for measuring such damage. The amount should be fair and just in light of the evidence. These damages may include:

1. Lost earnings and benefits: You may award any earnings and benefits Mr. Sikorski has lost up to the date of this trial.
2. Past and future pain and suffering, discomfort, fears, anxiety, mental anguish, loss of capacity for the enjoyment of life experienced in the past, and emotional distress arising out of his experiences since February 23, 1995.

In determining the amount of damages, you may consider the duration of that suffering, or its expected duration. You may also consider Mr. Sikorski's age, habits, employment history, past earnings record, business and professional experience, his skill or ability in his work or profession, and the health and condition of Mr. Sikorski before the harm to him as compared with his condition afterward. Difficulty in computing damages does not preclude you from making an assessment if there is evidence from which an estimation may be made with reasonable certainty.

If you should award damages for pain and suffering to Mr. Sikorski, you should know that there would not be any state or federal taxes due to the government. Therefore, you should not include any amount in your damages figure to compensate for taxes.

Finally, it is important to your deliberations regarding damages to know that if you should find that Okemo committed a fraud upon the court, you should not consider that finding in determining damages. If you find fraud upon the court occurred, I alone will determine the proper remedy.

Punitive Damages

Mr. Sikorski is also seeking punitive damages from Okemo. Whereas compensatory damages are designed to make the injured party whole, the underlying premise of punitive damages is to punish the wrongdoer, and deter the wrongdoer and others from committing the same conduct in the future. The purpose of punitive damages is to punish conduct that is morally culpable and truly reprehensible, when a defendant's wrongdoing was intentional and deliberate, and has the character of outrage frequently associated with crime.

You may award Mr. Sikorski punitive damages only if Okemo acted maliciously. Actual malice may be shown by conduct by Okemo manifesting personal ill will against Mr. Sikorski or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of Mr. Sikorski's rights.

Election of a Foreperson

I have selected _____ 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 and attached below. You will take this form to the jury room. I direct your attention to the form of the verdict.

[Verdict form is read.]

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question and will date and sign the special verdict when completed.

Verdict Form

Nothing I say in these instructions or in the verdict form prepared for your convenience is meant to suggest or convey that I have an opinion about the facts of the case, or what that opinion is. What the verdict shall be is your sole and exclusive duty and responsibility.

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. The foreperson should then alert the Clerk of Court that you have reached a verdict, and bring the verdict form to the courtroom.

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

OKEMO MOUNTAIN, INC.,	:	
Plaintiff and	:	
Counter-Defendant,	:	
	:	
v.	:	
	:	
PATRICK J. SIKORSKI,	:	File No. 1:93-CV-22
Defendant, Counter-Claimant.	:	
	:	
	:	

Judge Murtha, we have reached a verdict.

Foreperson

Date

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

OKEMO MOUNTAIN, INC., :
Plaintiff and :
Counter-Defendant, :
 :
v. :
 :
PATRICK J. SIKORSKI, : File No. 1:93-CV-22
Defendant, Counter-Claimant. :
 :
 :
_____ :

VERDICT FORM

1. Considering all the facts and circumstances surrounding its execution, do you find that the February 23, 1995 General Release was intended to release the fraudulent inducement claim by Okemo against Mr. Sikorski?

Yes _____ No _____

2. Do you find that Mr. Sikorski has proved by clear and convincing evidence that Okemo, through its attorney, committed fraud upon the court in seeking, obtaining, maintaining, executing, or renewing the 1995 Judgment against Mr. Sikorski?

Yes _____ No _____

3. Was Okemo estopped from seeking, obtaining, maintaining, or executing the 1995 Judgment, and is Okemo estopped from renewing the Judgment against Mr. Sikorski?

Yes _____ No _____

If you answered "Yes" to any of Questions 1, 2, and 3, please proceed to Questions 4 and 5. If you answered "No" to all of Questions 1, 2, and 3, leave Question 4 blank and proceed to Question 5.

4. a. Do you find that Mr. Sikorski has proved by clear and convincing evidence that Okemo is liable to Mr. Sikorski for the following claims:

Fraudulent Concealment?

Yes _____ No _____

Fraudulent Misrepresentation?

Yes _____ No _____

- b. Do you find that Mr. Sikorski has proved by a preponderance of the evidence that Okemo is liable to Mr. Sikorski for:

Abuse of Process?

Yes _____ No _____

5. Do you find that Mr. Sikorski has proved by a preponderance of the evidence that Okemo is liable to Mr. Sikorski for intentional infliction of emotional distress?

Yes _____ No _____

If you answered "No" to all parts of Questions 4 and 5, stop here. Your deliberations are done; please sign and date the verdict form at bottom.

If you answered "Yes" to any part of Questions 4 and 5, please proceed to Questions 6.

6. Do you find that Mr. Sikorski has proved by a preponderance of the evidence that he should be awarded compensatory damages for any effects he suffered because of Okemo's wrongdoing?

Yes _____ No _____

If your answer is "yes," in what amount? \$ _____

Please proceed to Question 7.

7. Do you find Okemo liable to Mr. Sikorski for punitive damages?

Yes _____

No _____

Foreperson

Date