UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

TOP RIDGE INVESTMENTS, LLC Plaintiff, v. ANICHINI, INC., ANICHINI HOSPITALITY, INC., and SUSAN DOLLENMAIER, Defendants, and ROYAL HERITAGE HOME, LLC and JEFFREY TAUBER, Defendants-in-Counterclaim.	)	Case No. 5:16-cv-76

JURY CHARGE

Members of the Jury:

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

My instructions come in two parts. The first part consists of general instructions about the task of the jury and about the rules and principles which should guide you in your deliberations. The second part consists of instructions which apply to the specific claims and defenses in this case. I ask that you pay equal attention to both parts.

ROLE OF THE COURT

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and to apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, you must follow my instructions.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law should be, it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

ROLE OF THE JURY

As members of the jury, you are the sole and exclusive judges of the facts. You make decisions based upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence. You are to perform the duty of finding the facts without bias towards any party.

In deciding the facts, no one may invade your function as jurors. In order for you to determine the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing arguments, in the objections, or in their

questions is not evidence. Nor should you consider as evidence anything I may have said—or what I may say in these instructions—about a fact in issue.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not the Anichini companies and Ms. Dollenmaier have proven their case.

You should reach your judgment impartially and fairly, without prejudice or sympathy, solely upon the evidence in the case and without regard to the consequences of your decision. If you let sympathy or prejudice interfere with your clear thinking, there is a risk that you will not arrive at a just verdict. All parties to a civil lawsuit are entitled to a fair trial. You must make a fair and impartial decision so that you will arrive at a just verdict.

JURORS' EXPERIENCE OR SPECIALIZED KNOWLEDGE

Anything you have seen or heard outside the courtroom is not evidence and must be disregarded entirely. It would be a violation of your oath as jurors to consider anything outside the courtroom in your deliberations. But in your consideration of the evidence, you do not leave behind your common sense and life experiences. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of the evidence. However, if any juror has specialized knowledge, expertise, or information with regard to the facts and circumstances of this case, he or she may not rely upon it in deliberations or communicate it to other jurors.

ALL PERSONS EQUAL BEFORE THE LAW

Your verdict must be based solely upon the evidence developed at this trial, or lack of evidence. This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals in a court of justice.

EVIDENCE

The evidence in this case consists of the sworn testimony of the witnesses, the exhibits admitted into evidence, any stipulations submitted by the parties, and judicially noted facts. Testimony that has been stricken or excluded is not evidence and you may not consider it in rendering your verdict. Also, if certain testimony was received for a limited purpose—such as for the purpose of assessing a witness's credibility—you must follow the limiting instructions I have given.

There are two types of evidence that you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses—something she or he has seen, felt, touched or heard. Direct evidence may also be in the form of an exhibit such as a document or photograph.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. 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. For example, if you were to see cow tracks in a pasture, that would be circumstantial evidence that there are or were cows in the pasture.

Circumstantial evidence is of no less value than direct evidence; generally, the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict be based on a preponderance of all the evidence presented.

OBJECTIONS

From time to time the Court has been called upon to determine the admissibility of certain evidence following objections from the attorneys. It is part of the attorneys' duty to make objections, and you should not draw any conclusions or make any judgment from the fact that an attorney has objected to evidence. In the same fashion, you should not concern yourself with the reason for any rulings on objections by the Court.

Whether offered evidence is admissible is purely a question of law for the Court and outside the province or concerns of the jury. In admitting evidence to which objections have been made, the Court does not determine what weight should be given to such evidence, nor does it assess the credibility of the evidence. Of course, you will dismiss from your mind completely and entirely any offered evidence which has been ruled out of the case by the Court, and you will refrain from speculation about the nature of any exchange between the Court and counsel held out of your hearing.

CREDIBILITY OF WITNESSES

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

You are being called upon to resolve various factual issues raised by the parties in the face of very different pictures painted by both sides. In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you decide the truth and importance of each witness's testimony.

How do you determine the credibility of the witnesses? You watched each witness testify. Everything each witness said or did on the witness stand counts in your determination.

How did the witness impress you? Did he or she appear to be frank, forthright and candid, or evasive and edgy as if hiding something? How did the witness appear; what was his or her demeanor—that is, his or her carriage, behavior, bearing, manner and appearance while testifying? Often it is not what a person says but how he says it that moves us.

You should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he or she testified, the accuracy of his or her memory, his or her candor or lack of candor, his or her intelligence, the reasonableness and probability of his or her testimony and its consistency or lack of consistency, and its corroboration or lack of corroboration with other credible testimony.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment and your own life experience.

IMPEACHMENT OF A WITNESS

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a matter, or by evidence that at some other time the witness said or did something inconsistent with the witness's present testimony. It is your exclusive province to give the testimony of each witness such credibility or weight that you think it deserves.

If you find that a witness testified untruthfully in some respect, you may consider that fact in deciding what credence you will attach to that witness's testimony. Considering that fact and all other relevant evidence, you may accept or reject the testimony of such a witness, in whole or in part.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; and whether the witness had an explanation for the inconsistency, and whether that explanation made sense to you.

INFERENCES

In their arguments, the parties may have asked you to infer, on the basis of your reason, experience and common sense, from one or more established facts, the existence of some other fact. An inference is not a suspicion, guess, speculation or conjecture. It is a reasoned, logical conclusion that a disputed fact exists on the basis of another fact that has been shown to exist.

There are times when different inferences may be drawn from facts, whether those facts are proven by direct or circumstantial evidence. One party asks you to draw one set of inferences, while the other asks you to draw another. It is a deduction or conclusion which you, the jury, are permitted to draw, but are not required to draw, from the facts which have been established by either direct or circumstantial evidence. It is for you, and you alone to decide what inferences you will draw. In drawing inferences, you should exercise your common sense.

Some claims may require a jury to determine whether the party has proven a particular state of mind or purpose on the part of a person. Direct proof of a person's state of mind or purpose is not always available and is not required. Instead, you are permitted, but not required,

to infer that a person acted with a particular state of mind or purpose based on circumstantial evidence.

BURDEN OF PROOF

This is a civil case and as such the party who alleges a claim has the burden of proving the allegations of that claim by a preponderance of the evidence. In this case, each side has made claims against the other. Each side has the burden of proof on the claims it presents.

To establish a fact by preponderance of the evidence means to prove that the fact is more likely true than not. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and the persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proven by a preponderance of the evidence, you may consider the relevant testimony of all the witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

If you find that the credible evidence on a given issue is evenly divided between the parties then you must decide that issue against the party having the burden of proof. That rule follows from the fact that the party bearing this burden must prove more than simple equality of evidence – he or she must prove the element at issue by a preponderance of the evidence. On the other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof, then that element will have been proven by a preponderance of the evidence.

If after considering all of the testimony and other evidence, you are satisfied that the claimant on a particular issue has carried its burden on each essential point as to which it has the burden of proof, then you must find for that party on that claim. If after such consideration, you

find the evidence to be in balance or equally probable – or if you find that the evidence tips in favor of the other side – then the claimant has failed to sustain its burden and you must find for the other side on that claim.

In this case, there is an exception to the rule that the burden of proof is by a preponderance of the evidence. As you have heard, one of the claims by the Anichini parties against RHH and Mr. Tauber is the claim of misrepresentation. The claimants (the Anichini parties) bear the burden of proof on this claim by clear and convincing evidence, not by a preponderance of the evidence. I will discuss this higher standard further when I instruct you regarding the misrepresentation claim.

INSTRUCTIONS ON THE SPECIFIC CLAIMS OF THE PARTIES

I turn now to the instructions which govern the specific claims in this case. Both parties have made several claims. Each has different elements and requires the jury to make different factual decisions. I will discuss each claim separately.

For ease of reference, I will shorten the parties' names. I will refer to Top Ridge Investments, LLC as "Top Ridge." I will refer to Royal Heritage Home LLC as "RHH." ." From time to time, I will refer to RHH and Jeffrey Tauber as "the RHH parties."

Similarly, I will refer to Anichini, Inc. and Anichini Hospitality, Inc. as "the Anichini companies." I will refer to the Anichini companies and Ms. Dollenmaier together as the "Anichini parties."

1. Claim by Top Ridge on the promissory note

There is no dispute between the parties about the amount due under the promissory note. The promissory note is the loan document originally signed by the Anichini companies in March 2005. The original lender was Chittenden Bank which was merged into People's United Bank.

There is also no dispute that Top Ridge replaced People's United Bank as the lender on July 28, 2015. The parties agree that at that time, the Anichini companies owed a total of $453,269.16 in principal. There is no dispute that the loan is in default for reason of non-payment. The parties also agree that an additional amount is owed for interest and late fees. The parties have agreed that the court will compute interest and late fees after the conclusion of the trial.

There is also no dispute that Susan Dollenmaier signed a personal guarantee for all amounts due under the promissory note at the time of the original borrowing in 2005 and that this personal guarantee remains in effect.

There are no factual issues for you to decide concerning the promissory note. The court will enter judgment in favor of Top Ridge on the note and the personal guaranty. In the event that you find in favor of the Anichini parties on one or more of their claims, I will adjust the amounts due between the parties after the conclusion of the trial.

2. Claim by the Anichini parties that RHH is liable for breach of contract

The Anichini companies and Susan Dollenmaier claim that RHH violated the terms of a contract which required it to acquire the Anichini companies from Ms. Dollenmaier, invest additional money to improve the financial condition of the companies, purchase a portion of the Anichini companies' inventory, pay certain royalty amounts, and hire Ms. Dollenmaier as a senior executive in the newly constituted enterprise. RHH denies that the parties agreed on the terms of such a contract. In its view, the only contract between the parties is the promissory note and personal guaranty which I have already discussed.

In order to prevail on this claim of breach of contract, the Anichini parties must prove the following essential elements by a preponderance of the evidence:

a. that a contract existed with RHH;

b. the terms of the contract;

c. that RHH breached the contract;

d. the amount of any damages resulting from the breach by RHH.

I will discuss the first four issues with you now. I will discuss the issue of the amount of damages at the end of these instructions.

A. Existence of a contract

The evidence in this case is undisputed that no formal written contract, signed by both parties, exists. Instead, the Anichini parties claim that an enforceable contract was formed through the exchange of emails and other communications which governed the terms under which RHH agreed to acquire the Anichini companies and provide additional financing and the employment of Ms. Dollenmaier. RHH claims that while the parties engaged in negotiations on these subjects, they did not reach a binding agreement.

The first question for you to decide regarding the claim by the Anichini parties of breach of contract is whether both sides formed an intent to bind themselves to the terms of a contract governing the acquisition of the Anichini business by RHH. This question requires you to distinguish between negotiations directed at a potential future agreement and the expression of the parties' present intent to enter into an enforceable contract. An agreement to agree in the future on the material terms of the contract is unenforceable. On the other hand, parties may be bound by an agreement which covers all material terms even though minor terms, not material to the contract, remain unresolved or have not been discussed.

A material term is a term is one which a reasonable person would give weight to in deciding whether to enter into the transaction. It is a term which may reasonably be determined to be of substantial significance to the parties.

You must decide whether there is sufficient evidence of a "meeting of the minds" of the two sides. There must be a "meeting of the minds" of the parties on all material terms of the contract before the contract is binding on the parties and enforceable by the court. This concept is called "mutual assent." Mutual assent must be sufficiently definite to assure that the parties are in agreement with respect to all material terms.

You must answer this question on the basis of an objective standard which means that as you consider the statements and communications exchanged between the parties, you must decide whether a reasonable person would believe that the parties both intended to be bound to an enforceable contract. A subjective or privately-held belief by one party that it reached a binding agreement is irrelevant. You must determine the parties' intent based on what each side actually said and did, not on what they may have thought or believed.

The law provides four factors to guide you in deciding whether the parties reached agreement on an enforceable contract or merely engaged in non-binding negotiations.

The first factor is whether there has been an express reservation of the right not to be bound. Such a reservation may be explicit as in a statement like "for purposes of discussion only" or "subject to final agreement." Or it may be inferred from a party's reference to future agreements or terms not yet decided. A reservation of the right not to be bound weighs against the formation of an intent by both parties to enter into a contract.

The second factor is whether there has been partial performance of one or more of the terms of the contract. If one or more of the terms of the contract have actually been carried out by one party or both, that fact weighs in favor of the parties' formation of an intent to enter into a contract.

The third factor is whether all the material terms have been agreed on. A material term is one which is sufficiently significant that it forms an essential part of the parties' agreement. Price, for example, is an example of a material term in a case involving the sale of an item. In contrast to a material term, an agreement may be enforceable even though minor terms remain undecided. The exact time of day when an item is delivered by the seller is an example of what might well be considered a minor term which would not affect enforceability. The lack of agreement on a material term of the contract weighs against the formation of an intent by the parties to enter into a contract.

The fourth factor is whether the agreement at issue is the type of contract that is usually committed to writing. This factor has two aspects. First, whether a transaction of this nature is customarily set out in a written document and second, whether the agreement is so complex that the parties could not reasonably have expected to be bound without a writing. This is a factor which weighs against the formation of an intent by the parties.

No one of these four factors is dispositive of the case. You should consider all four in deciding whether there is objective evidence that the parties intended to enter into a binding agreement under which RHH would acquire the Anichini companies on terms agreed to by both sides.

B. What are the terms of the contract?

If you decide that there was no agreement between the parties, you do not need to answer further questions about the claim of breach of contract. If you decide that there was such an agreement, then you must consider the questions of its terms.

The Anichini parties claim that they entered into an agreement with RHH to acquire the assets of the Anichini companies and that in return, the Anichini parties would be relieved of

their obligations to repay the promissory note and RHH would infuse new capital into the enterprise, acquire all assets of the Anichini companies, enter into a sub-license permitting RHH to sell certain lines of Anichini products, and employ Ms. Dollenmaier as a senior executive in the new enterprise. RHH denies entering into a contract containing any of these terms. In addition to these terms, you must also decide whether the parties intended to include Ms. Dollenmaier as a party to the contract. Ms. Dollenmaier cannot recover for breach of contract unless she herself is found to be a party.

As jurors you must determine what terms, if any, were agreed to by the parties.

C. Breach of Contract

You must next decide whether RHH breached the terms of the contract. A breach of contract means a violation of a material term through failure to perform the action required by the contract. All of the breaches alleged by the Anichini parties concern material terms.

As jurors, you must determine whether RHH breached one or more material terms of the contract (if you found one is present).

D. Damages

If you decide that a breach occurred, then you must consider whether the Anichini parties sustained damages and in what amount. I will discuss that issue after reviewing the law which governs the other claim of misrepresentation. .

3. Misrepresentation

The Anichini parties claim that the RHH parties made fraudulent misrepresentations about their intentions and promises to acquire and fund the Anichini companies, relieve the Anichini parties of their obligations on their bank loan, and hire Ms. Dollenmaier as an employee in the new

venture. In order to prove misrepresentation, Anichini and Ms. Dollenmaier must prove, by clear and convincing evidence, each of the following elements:

(1) that the RHH parties misrepresented an existing fact to affect the essence of the transaction with the Anichini parties;

(2) that the RHH parties did so intentionally;

(3) that the misrepresentation was false when made and known at the time to be false by the RHH parties;

(4) that the correct information was not available to the Anichini parties;

(5) that the Anichini parties relied on the misrepresentation to their detriment; and

(6) that the fraudulent misrepresentation was the proximate cause of the Anichini companies and/or Ms. Dollenmaier's monetary loss.

I will now provide further instructions as to some of these elements.

With respect to the second element – whether the misrepresentation was made intentionally –if you find that Mr. Tauber and RHH misrepresented a material fact, you may not conclude, solely on that basis, that Mr. Tauber and RHH knew at the time of the statement that it was false or that they misrepresented it intentionally. A false statement made inadvertently and in good faith or by mistake does not constitute misrepesentation. The misrepresentation must occur with knowledge of its falsity. Materiality has the same meaning in the case of misrepresentation as it does in the case of breach of contract. A material term is a term is one which a reasonable person would give weight to in deciding whether to enter into the transaction. It is a term which may reasonably be determined to be of substantial significance to the parties.

Similarly, with respect to the third element –that the misrepresentation was made with knowledge that it was false – you should consider whether the alleged misrepresentations were known to be false at the time they were stated.

With respect to the fourth element –whether the correct information was available to the Anichini parties – you should consider the duty of independent inquiry. An element of a misrepresentation claim is that a misrepresentation be made as to a material fact, knowledge of which would be otherwise unavailable to the other party in the exercise of due diligence.

With respect to the fifth element of justifiable reliance, you must consider whether the Anichini parties have established that they actually relied on Mr.Tauber and RHH's alleged misrepresentations and whether such reliance was reasonable. Reliance may be reasonable when the statement is not obviously false and the truth or falsity of the representation is not otherwise known to the deceived party. You should consider whether the Anichini parties had reason not to rely on the alleged statement or to question its truth and whether such reliance should only follow an independent inquiry.

The Anichini parties have the burden of proving these elements of misrepresentation by clear and convincing evidence. Clear and convincing evidence is a substantially more rigorous standard 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 you find that the Anichini parties have proven each of the essential elements by clear and convincing evidence, you must proceed to consider the question of whether the alleged misrepresentation caused damages to the Anichini parties.

DAMAGES

The word "damages" refers to an award of compensation in money for losses. In general, the award of damages is intended to place the injured claimant in the same position, as nearly as possible, that he or she would have occupied if there had been no wrongful conduct. Damages are not intended as a reward or punishment. They serve only to compensate for the effect of wrongful conduct.

I have already advised you that I will award damages to Top Ridge for the amount borrowed under the promissory note. This damage award will compensate Top Ridge for the default on the promissory note by the Anichini defendants.

I turn now to the issue of damages on the claims by the Anichini parties against RHH and Jeffrey Tauber. The Anichini parties have the burden of proving the amount of any damages they have sustained.

In the case of the claim for breach of contract, the Anichini parties bear the burden of proving the amount of economic loss caused by the breach. The purpose of the award of damages is to restore to the injured party the gain or benefit which she expected to receive through her bargain. This harm may be measured as the loss in value to the Anichini parties which resulted from RHH's breach plus any other loss, including incidental or consequential loss, caused by the breach, less any cost or other loss that they avoided by not having to perform themselves. If the party receiving damages experienced a savings or benefit through the breach, that savings must reduce the total damage award.

Damages for breach of contract are limited to losses which were reasonably forseeable at the time of the breach. These may include direct damages that naturally and usually flow from the breach itself and consequential damages which are forseeable, reasonably certain in amount,

and proximately caused by the breach. By proximate cause, I mean that the causal connection between the breach and the damage is clear and unbroken by other intervening causes or events. In some cases, the damages caused by the breach are relatively simple to compute. For example, the damages for breach of an employment contract by the employer are frequently calculated as lost wages or income. In other cases, the damages are more difficult to determine. Since only damages which were reasonably forseeable at the time of breach may be considered, you must determine what consequences a reasonable person who was informed of the nature of Anichini's business would expect to occur as a result of the breach.

Damages for misrepresentation are similar in scope. If you find that the RHH parties engaged in fraudulent misrepresentation, you should award damages sufficient to compensate the Anichini parties for the net amount of money they lost as a natural and proximate consequence of the false statement. The causal connection must be clear and unbroken by other intervening causes or events. Any damages must be of the type which can be clearly defined and ascertained.

If you found that the Anichini parties met their burden of proof of either a breach of contract or a fraudulent misrepresentation, then you should award damages in an amount sufficient to compensate them for the losses they sustained as a result of wrongful conduct. Damages for breach of contract must be proved by a preponderance of the evidence. Damages for misrepresentation must be proved by clear and convincing evidence. If you decided both of these claims in favor of the RHH parties, then you will not consider this instruction on the issue of damages.

Any damage award to the Anichini companies can only be for a nominal amount and may not exceed $1.00. With respect to Ms. Dollenmaier, her claim is for loss of income only.

You should not award damages more than once for the same injury. For example, if Ms. Dollenmaier were to prevail on both the breach of contract and the misrepresentation claims and prove damages for the same injury under both claims, you should not award her damages twice. She would be entitled to made whole on her claim for lost income, but she would not entitled to recover more than she lost.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

FINAL INSTRUCTIONS

This completes my instructions to the jury. You will retire now to the jury room to deliberate in privacy about the issues in the case. I will provide a verdict form to guide you in your deliberations. You will also receive the exhibits which were admitted into evidence. I will also provide eight copies of these instructions.

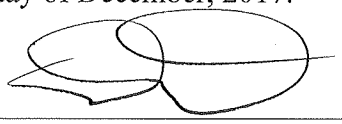
I appoint _____ as your foreperson. She shall be responsible for making sure that the deliberations occur in an orderly fashion and that every juror has an opportunity to participate.

Any verdict which you return must be unanimous. This means that you cannot answer a question on the verdict form unless and until all jurors agree on the answer.

If you need to communicate with the Court, please do so in writing. I will confer with the lawyers about your written question and send back a written response. Please advise the court

officer after you reach a verdict but do not tell him or her or anyone else what the verdict is until you return to the courtroom at which time I will receive the verdict form from your foreperson.

Dated at Rutland, in the District of Vermont, this 7th day of December, 2017.



Geoffrey W. Crawford, U.S. District Judge