

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello**

Civil Action No. ___-cv ____-CMA

Plaintiff,

v.

Defendant.

JURY INSTRUCTIONS

INSTRUCTION NO. 1
INTRODUCTION TO FINAL INSTRUCTIONS

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges, you are the other. I am the judge of the law. You, as jurors, are the judges of the facts. I presided over the trial and decided what evidence was proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

In explaining the rules of law that you must follow, first, I will give you some general instructions which apply in every civil case – for example, instructions about burden of proof and insights that may help you to judge the believability of witnesses. Then I will give you some specific rules of law that apply to this particular case. Finally, I will explain the procedures you should follow in your deliberations and the possible verdicts you may return. You will be allowed to take these instructions with you to the jury deliberation room, so you need not take notes as I read them to you.

INSTRUCTION NO. 2
PURPOSE OF JURY AND DUTY TO FOLLOW INSTRUCTIONS

You are here to decide whether the Plaintiff has proved its claim(s) against the Defendant by a preponderance of the evidence. These instructions contain the law that you must use in deciding this case.

You, as jurors, are the judges of the facts. But in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you.

The Court does not, by these instructions, express any opinions as to what has or has not been proved in the case, or to what are or are not the facts of the case, except for the stipulations agreed to by the parties and facts of which I have taken judicial notice.

INSTRUCTION NO. 3 BURDEN OF PROOF

This is a civil case. Therefore, Plaintiff has the burden of proving each of its/her/his claim(s) by what is called a preponderance of the evidence. This means that no matter who produces the evidence, when you consider each of Plaintiff's claim(s) in light of all the facts, you must believe each claim is more likely true than not true. To put it differently, with respect to each claim, if you were to put all the evidence in favor of Plaintiff and all the evidence in favor of Defendant on opposite sides of the scale, Plaintiff would have to make the scale tip to its/her/his side. If Plaintiff fails to meet this burden, your verdict must be for Defendant on that claim.

[Similarly, Defendant has asserted claims against Plaintiff, which are called "counterclaims." Defendant has the burden of proving its/her/his counterclaims by a preponderance of the evidence. Again, this means that no matter who produces the evidence, when you consider each of Defendant's counterclaim(s) in light of all the facts, you must believe that counterclaim is more likely true than not true. To put it differently, if you were to put all the evidence in favor of Defendant and all the evidence in favor of Plaintiff on opposite sides of the scale, Defendant would have to make the scale tip to its/her/his side. If Defendant fails to meet this burden, your verdict on that counterclaim must be for Plaintiff.]

Both Plaintiff and Defendant have asserted failure to mitigate defenses, which will be described to you more fully later. An affirmative defense is more than a denial of the claim(s). In terms of applying the burden of proof, you should treat the affirmative defense of each party in the same way that you treat their claims. In other words, the asserting party has the burden of proving that an affirmative defense is more likely true than not true.

In evaluating whether Plaintiff and Defendant have met their respective burdens on their claims and defenses, you should also know that the law does not require parties to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matter in issue at this trial. Nor does the law require parties to produce as exhibits all papers or other things mentioned in the evidence in the case.

**INSTRUCTION NO. 4
EVIDENCE – GENERAL**

You must make your decision based only on the evidence that the parties have presented to you during the trial. That evidence consists of:

1. the sworn testimony of witnesses on both direct and cross-examination, regardless of who called the witness;
2. documents and other things received into evidence as exhibits; and
3. any facts on which the lawyers agree or which I instruct you to accept as true.

Nothing else is evidence. The following things are not evidence and you must not consider them as evidence in deciding the facts of this case:

1. Statements and arguments by lawyers are not evidence. The lawyers are not witnesses. What they said in their opening statements, closing arguments, and at other times was intended to help you interpret the evidence, but it was not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of the facts controls.
2. Questions and objections by the lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.
4. Anything you may see or hear when court was not in session is not evidence, even if what you saw or heard was done or said by one of the parties or by one of the witnesses. In addition, as I have previously told you, you are not allowed to look at, read, consult, or use any material of any kind, including any dictionaries or medical, scientific, technical, religious, or law books, the Internet, or any material of any type or description in connection with your jury service.

Although you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits; inferences you feel are justified in the light of common experience. Inferences are conclusions that reason and common sense lead you to draw from the facts established by the evidence in the case.

INSTRUCTION NO. 5
EVIDENCE – DIRECT AND CIRCUMSTANTIAL

There are, generally speaking, two types of evidence from which a jury may properly determine the facts of a case. One is direct evidence and the other is circumstantial evidence. Direct evidence is testimony by a witness about what that witness personally saw, heard, or did. Circumstantial evidence is indirect evidence; that is, it is proof of a chain of facts which point to the existence or non-existence of certain other facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that, in determining the facts, you consider all the evidence in the case, both direct and circumstantial. It is for you to decide how much weight to give to any evidence, regardless of whether it is direct or circumstantial.

INSTRUCTION NO. 6 CREDIBILITY OF WITNESSES AND SINGLE WITNESS

You are the sole judges of the credibility or “believability” of each witness and the weight to be given to the witness’s testimony. An important part of your job will be making judgments about which witnesses to believe and which witnesses not to believe. You may believe everything a witness says, only part of it, or none of it.

You should think about the testimony of each witness you have heard and decide whether you believe all or any part of what each witness had to say, and how important that testimony was.

In considering the testimony of any witness, you may consider:

1. The witness’s opportunity and ability to see, hear, or know the things to which the witness testified;
2. The quality of the witness’s memory;
3. The witness’s manner while taking the oath and testifying;
4. Whether the witness had an interest in the outcome of the case or any motive, bias, or prejudice;
5. Whether the witness’s testimony was contradicted by anything the witness said or did another time, by the testimony of other witnesses, or by other evidence;
6. How reasonable the witness’s testimony was in light of all the evidence; and
7. Any other facts that bear on believability.

When weighing conflicting testimony, you should consider whether the discrepancy has to do with a material fact or with an unimportant detail. And you should keep in mind that innocent misrecollection—like failure of recollection—is not uncommon.

If you believe a witness has willfully lied regarding any fact, you have the right to disregard all or any part of that witness’s testimony.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify to that fact. Even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of that one witness’s testimony, that testimony is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony.

**INSTRUCTION NO. 7
STIPULATED FACTS**

The parties have stipulated to certain facts and agree that these facts can be taken as true without further proof. The stipulated facts are as follows:

INSERT STIPULATED FACTS

Because the parties have stipulated to these facts and do not dispute them, you are to take these facts as true for purposes of this case.

**INSTRUCTION NO. 8
PRETRIAL PUBLICITY**

There may have been some publicity about this case in the newspapers and on radio and television. Some of this publicity may have come to the attention of some of you. You must disregard anything that you may have heard about this case outside the courtroom. Your verdict must be based solely on evidence admitted during the trial.

INSTRUCTION NO. 9
ALL PERSONS EQUAL BEFORE THE LAW—ORGANIZATIONS—IMPLICIT BIAS

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Corporations and governmental agencies are entitled to the same fair trial as a private individual. All persons, including corporations, governmental agencies, and other organizations stand equal before the law, and are to be treated as equals. You should not be influenced by who the parties are, or who the witnesses are, i.e., whether they are rich or poor, young or old, well-educated or not.

You also should be aware of the natural human tendency to look at others, and to filter what they have to say, through the lens of our own personal experience and background. Because we all do this, we often see life – and evaluate evidence – in a way that tends to favor people who are like ourselves or who have had life experiences like our own. In deciding this case, I urge you to be aware of this natural human tendency to stereotype other people and to make assumptions about them based on the stereotypes, and I urge you to avoid such stereotyping.

INSTRUCTION NO. 10
CORPORATE PARTY'S AGENTS AND EMPLOYEES

A corporation or governmental agency may act only through natural persons who are its agents or employees. Generally, any agents or employees of a corporation or governmental agency may bind the corporation by their acts and declarations made while acting within the scope of their authority delegated to them by the corporation or governmental agency, or within the scope of their duties as employees of the corporation or governmental agency.

INSTRUCTION NO. 11
EXPERT WITNESS

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. There is an exception to this rule for “expert witnesses.” An expert witness is a person who by education and experience has become expert in some art, science, profession, or calling. Expert witnesses give their opinions as to matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude the reasons given in support of the opinion are not sound, or if you feel the expert’s opinion is outweighed by other evidence, you may disregard the opinion in part or entirely.

INSTRUCTION NO. 12
CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been received into evidence to illustrate information brought out in the trial. The Court has admitted these charts and summaries in place of the underlying documents they represent in order to save time and avoid unnecessary inconvenience.

INSTRUCTION NO. 13
CLAIM ___ - _____ — ELEMENTS

That concludes the part of my instructions explaining your duties and the general rules that apply in every civil case. I will now instruct you on the law relating to Plaintiff's Claim for Relief for _____.

For Plaintiff to recover from Defendant on its Claim for Relief for _____, you must find the following # elements have been proved by a preponderance of the evidence:

INSERT ELEMENTS

If you find that any one or more of the eight elements has not been proved, then your verdict must be for Defendant.

On the other hand, if you find that all of the eight elements have been proved, then your verdict must be for Plaintiff.

INSTRUCTION NO. 14
INTRODUCTION TO DAMAGES INSTRUCTIONS

That concludes the part of my instructions relating to Plaintiff's claim(s) for relief. I will now instruct you on the law relating to damages.

The fact that I am instructing you as to the proper measure of damages should not be considered as indicating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance only in the event you should find in favor of Plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

Difficulty or uncertainty in determining the precise amount of any damages does not prevent you from deciding an amount. You should use your best judgment based on the evidence.

INSTRUCTION NO. 15
ACTUAL DAMAGES – CLAIM____- _____

Plaintiff has the burden of proving the nature and extent of its damages by a preponderance of the evidence. If you find in favor of Plaintiff, you must determine the total dollar amount of its damages, if any, that were caused by_____.

In determining these damages, you shall consider the following:

**INSTRUCTION NO. 16
DAMAGES – NOMINAL**

If you find in favor of Plaintiff, but you find that Plaintiff did not suffer any damages, then you shall award Plaintiff nominal damages in the sum of one dollar.

INSTRUCTION NO. 17
AFFIRMATIVE DEFENSE – FAILURE TO MITIGATE

If you find that Plaintiff has had actual damages, then you must consider whether Defendant, has proved its affirmative defense of Plaintiff's failure to mitigate or minimize damages. Plaintiff has a duty to take reasonable steps under the circumstances to mitigate or minimize its damages. Damages, if any, caused by Plaintiff's failure to take such reasonable steps cannot be awarded to Plaintiff.

This affirmative defense is proved if you find the following two elements have been proven by a preponderance of the evidence:

1. Plaintiff failed to take reasonable steps to mitigate or minimize its damages; and
2. Plaintiff has incurred increased losses because it did not take the reasonable steps to mitigate or minimize its damages.

If you find that Defendant has proved both of the elements by a preponderance of the evidence, then you must determine the amount of damages caused by Plaintiff's failure to take such reasonable steps. This amount must not be included in your award of damages.

On the other hand, if you find that Defendant has not proven one or both of these two elements by a preponderance of the evidence, then you shall make no deduction from Plaintiff's damages.

INSTRUCTION NO. 18
INTRODUCTION TO COUNTERCLAIMS

That concludes my instructions about Plaintiff's allegations against Defendant and the methods for calculating any damages related to those allegations. I will now instruct you about the law applicable to Defendant's counterclaims against Plaintiff and the methods for calculating any damages related to Defendant's counterclaims.

Defendant alleges that Plaintiff _____.

INSTRUCTION NO. 19
FIRST COUNTERCLAIM ALLEGATION OF BREACH OF CONTRACT – ELEMENTS

For Defendant to recover from Plaintiff, on its allegation of _____, you must find that all of the following have been proved by a preponderance of the evidence:

INSERT ELEMENTS

If you find that any one or more of these elements has not been proved, then your verdict must be for Plaintiff.

On the other hand, if you find that all of these elements have been proved, then your verdict must be for the Defendant.

INSTRUCTION NO. 20
JURY DELIBERATIONS – GENERAL INSTRUCTIONS

Each of you has a copy of the instructions to consult as you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts, you must apply and follow the laws contained in these instructions whether you agree with them or not. Your decision is called a verdict and is reached by applying these laws to the facts as you find them. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathies. You have taken an oath promising to do just so.

You must follow all of these instructions and not single out some and ignore others; they are all equally important. You must not read into these instructions, or into anything I may say or do, any suggestions as to what verdict you should return. Your verdict is a matter entirely for you to decide.

INSTRUCTION NO. 22
FOREPERSON AND SPECIAL VERDICT FORM

After the closing arguments, the Court Security Officer will escort you to the jury room and will give you the original jury instructions and the original verdict form. Any exhibits admitted into evidence will also be placed in the jury room for your review. You will be allowed to take your notes and your copy of the jury instructions that I have just read with you. The original of the jury instructions and the exhibits are a part of the court record. Do not place any marks or notes on them. Your copy of the instructions may be marked or used in any way you see fit.

When you go to the jury room, you should first select a foreperson, who will help to guide your deliberations and will speak for you here in the courtroom. The second thing you should do is review the instructions. Not only will your deliberations be more productive if you understand the legal principles upon which your verdict must be based, but for your verdict to be valid, you must follow the instructions throughout your deliberations. Remember, you are the judges of the facts, but you are bound by your oath to follow the law stated in the instructions.

A Special Verdict Form has been prepared to help guide you through your deliberations. This form contains questions and directions for answering them. In answering these questions, you must apply the law in the instructions that the Court gave you to the facts that were proved by the evidence. You will note that the Special Verdict Form includes a number of interrogatories or questions which call for a “yes” or “no” answer. 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 response. As you will note from the wording of the questions, it may not be necessary to consider or answer every question. This is the only copy of the Special Verdict Form that you will receive, so please do not write on it or indicate your answer to any questions on it until you have all agreed on the answer.

This is an important case. If you should fail to agree upon a verdict, the case is left open and must be tried again. Obviously, another trial would require the parties to make another large investment of time and effort, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

It is your duty, as jurors, to consult with one another and deliberate with a view toward reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if you are 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 your fellow jurors, or for the mere purpose of returning a verdict.

After you reach a verdict, your foreperson should ensure that the original Special Verdict Form is complete and then he/she must sign and date it. The foreperson should then advise the Court Security Officer that you have reached a verdict, but do not tell the Court Security Officer what your verdict is. The Court Security Officer will then inform me that you have reached a verdict. The foreperson should remain in possession of the Special Verdict Form until you return to the courtroom and I request that it be given to me.

INSTRUCTION NO. 22
COMMUNICATIONS WITH THE COURT

If it becomes necessary during your deliberations to communicate with me, you may send a folded note through the Court Security Officer, signed by one of you. Do not disclose the content of your note to the Court Security Officer. No member of the jury should hereafter attempt to communicate with me except in writing and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. You are not to tell anyone – including me – how the jury stands, numerically or otherwise, until you have reached a unanimous verdict and I have discharged you.

If you send a note to me containing a question or request for further direction, please bear in mind that responses take considerable time and effort. Before giving an answer or direction I must first notify the attorneys and bring them back to the court. I must confer with them, listen to arguments, research the legal authorities, if necessary, and reduce the answer or direction to writing.

There may be questions that, under the law, I am not permitted to answer. If it is improper for me to answer the question, I will tell you that. Please do not speculate about what the answer to your question might be or why I am not able to answer a particular question.