

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

CAROLYN BROWN, JERRY
ZIMMERMANN, THE GAZETTE
COMPANY, DUANE C.
SPRIESTERSBACH, JAMES
PETERSON, JOSEPH PETERSON,
RAYMOND RIEZMAN, JERRY FULL
and CHARLES PETERS,

Plaintiffs,

vs.

THE MCGRAW-HILL COMPANIES,
INC.,

Defendant.

No. 06-CV-34-LRR

FINAL JURY INSTRUCTIONS

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

In considering these instructions, the order in which they are given is not important.

INSTRUCTION NO. 1

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

INSTRUCTION NO. 2

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, you may consider a witness's intelligence, the opportunity a witness had to see or hear the things testified about, a witness's memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection, a lapse of memory, or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 3

In these instructions you are told that your verdict depends on whether you find certain facts have been proven. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 4

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 5

Certain testimony has been received into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing and, in this case, also on a DVD. Consider that testimony as if it had been given here in court.

INSTRUCTION NO. 6

In this case Defendant The McGraw-Hill Companies, Inc., is a corporation. The fact that Defendant is a corporation should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any person.

INSTRUCTION NO. 7

A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of his or her duties as an employee of the corporation.

INSTRUCTION NO. 8

In order to recover on their claim for contract damages from Defendant, Plaintiffs have the burden of proving the following four elements:

- (1) The existence of a contract between Plaintiffs and Defendant;
- (2) Performance by Plaintiffs of all of the obligations;
- (3) Defendant's failure to adequately perform its obligations under the contract;
and
- (4) Resulting damage to Plaintiffs.

I will explain and define these legal terms elsewhere in these instructions.

If you find from your consideration of all the evidence that one or more of these elements has not been proved, you must find in favor of Defendant.

INSTRUCTION NO. 9

In determining the terms of the contract, you may consider the following:

- (1) The intent of the parties along with a reasonable application of the surrounding circumstances.
- (2) The intent expressed in the language used prevails over any secret intention of either party.
- (3) The intent may be shown by the practical construction of a contract by the parties and by the surrounding circumstances.
- (4) You must attempt to give meaning to all language of a contract. Because an agreement is to be interpreted as a whole, assume that all of the language is necessary. An interpretation which gives a reasonable, effective meaning to all terms is preferred to an interpretation which leaves a part of the contract unreasonable or meaningless.
- (5) The meaning of a contract is the interpretation a reasonable person would give it if they were acquainted with the circumstances both before and at the time the contract was made.
- (6) Ambiguous language in a written contract is interpreted against the party who selected it.
- (7) Where general and specific terms in the contract refer to the same subject, the specific terms control.

INSTRUCTION NO. 10

As stated in Instruction No. 8, the third element of a contract claim which Plaintiffs must prove is Defendant failed to adequately perform its obligations under the contract—that is, it breached the contract. To recover on their claim, Plaintiffs have the burden to prove Defendant failed to do something the contract required it to do. Plaintiffs claim and have the burden of proving that Defendant breached the contract by failing to act

in good faith and with reasonable diligence, use commercially reasonable efforts to manufacture, produce, market, and distribute Breakthrough Products and to market, sell and provide Breakthrough Services, subject at all times to [Defendant's] right to manage its business in its sole and absolute discretion with or without regard to prevailing economic or other business conditions.

Defendant claims it did what was required of it under the contract and thus did not breach the contract.

INSTRUCTION NO. 11

You must decide whether Plaintiffs sustained damages as a result of the breach of the contract.

As stated in Instruction No. 8, the fourth element of a contract claim is damages. Plaintiffs must prove they sustained damage during the period between January 1, 2003, and June 2, 2005, resulting from Defendant's breach. To recover on their claim, Plaintiffs must prove that because of Defendant's failure to perform the contract, they have not received payment to which they are entitled under the contract.

Defendant denies that Plaintiffs sustained damage. Defendant claims Plaintiffs have already received more royalty payments than they were entitled to receive under the contract.

INSTRUCTION NO. 12

The plaintiff in a breach of contract action has the burden of proving all of the material terms of the contract.

INSTRUCTION NO. 13

Defendant's contractual obligation to act in good faith is defined as acting with honesty in fact and the observance of reasonable commercial standards of fair dealing.

INSTRUCTION NO. 14

Commercially reasonable efforts is defined as commonly accepted commercial practices of responsible business which afford all parties fair treatment.

INSTRUCTION NO. 15

When a party is given discretion in a contract, that party must exercise that discretion reasonably and with a proper motive, and may not act arbitrarily, capriciously or in a manner inconsistent with the reasonable expectations of the parties.

INSTRUCTION NO. 16

If you find in favor of Plaintiffs, you must then decide how much money, if any, would fairly compensate Plaintiffs for the Defendant's breach of contract. Plaintiffs have the burden of proving each element of damages claimed and that they occurred as a direct and natural result of Defendant's breach. In calculating Plaintiff's damages, you should determine that the sum of money that will put Plaintiffs' in as good a position as they would have been in if both Plaintiffs and Defendant had performed all of their promises under the contract.

Plaintiffs seek direct damages not to exceed \$2.682 million for royalties that they claim should have accrued during the period between January 1, 2003, and June 2, 2005.

"Direct damages" are the amount of gain Plaintiffs would have received if both parties had fully performed the contract. You calculate the amount of this gain by determining the value of the contract benefits Plaintiffs did not receive because of Defendant's breach and then subtracting from that value, the amount you calculate the value of whatever expenses Plaintiffs saved because of the breach.

INSTRUCTION NO. 17

The fact that I am instructing you on the proper measure of damages should not be considered as an indication that I have any view as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance in the event that you should find that Plaintiffs are entitled to damages in accord with other instructions.

If you find in favor of Plaintiffs, then you must award them such sum as you find by the greater weight of the evidence will fairly and justly compensate them for any damages that you find were proximately caused to them by Defendant's conduct at issue in Plaintiffs' claims. An act is a proximate cause of damage if the act was a substantial factor in producing the damage and the damage would not have happened except for the act. "Substantial" means that the act has such an effect in producing damage as to lead a reasonable person to regard it as a cause of the damage.

In arriving at an amount of damages on a claim, you cannot establish a figure by taking down the estimate of each juror as to damages and agreeing in advance that the average of those estimates shall be your award of damages. Rather, you must use your sound judgment based upon an impartial consideration of the evidence.

Remember, throughout your deliberations, you must not engage in any speculation, guess or conjecture. You must not award damages under these Instructions by way of punishment or through sympathy. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against either party.

INSTRUCTION NO. 18

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes, and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 19

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach 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.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

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INSTRUCTION NO. 19 (Cont'd)

Fifth, I am giving you a Verdict Form. The Verdict Form is simply the written notice of the decision that you reach in this case. The answers to the Verdict Form must be the unanimous decisions of the jury. You will take the Verdict Form to the jury room, and when you have completed your deliberations and each of you has agreed on the answers to the Verdict Form, your foreperson will fill out the form, and sign and date it. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict. When you have reached your verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return such a verdict as accords with the evidence and these instructions.

DATED this 2^d day of October, 2007.


LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

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VERDICT FORM

We, the jury, unanimously find the following verdict on the questions submitted to us:

Question 1: **Do you, the jury, find by the greater weight of the evidence that Defendant breached the contract? Please answer "yes" or "no."**

Answer: _____

(If your answer to Question 1 is "yes," please proceed to Question 2 and answer that question. If your answer to Question 1 is "no," do not answer any further questions, sign and date this Verdict Form.)

(CONTINUED)

VERDICT FORM (Cont'd)

Question 2: **State the amount of damages, if any, sustained by Plaintiffs between January 1, 2003, and June 2, 2005. as a result of Defendant's breach of contract.**

Answer: \$ _____

(After answering Question 2, please sign and date this Verdict Form.)

Dated this ____ day of _____, 2007.

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror