

**DUTY OF JURY TO FIND FACTS AND FOLLOW LAW**

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. Also, you must not read into these instructions, or into anything the court may have said or done, any suggestion as to what verdict you should return - that is a matter entirely up to you.

**WHAT IS EVIDENCE**

The evidence from which you are able to decide what the facts are consists of:

1. the sworn testimony of witnesses;
2. the exhibits which have been received into evidence; and
3. any facts to which the lawyers have agreed or stipulated.

**WHAT IS NOT EVIDENCE**

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.
2. Questions and objections by lawyers are not evidence. Attorneys 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 the court's 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 have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

**DIRECT AND CIRCUMSTANTIAL EVIDENCE**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eye witness. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. As a general rule, the law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

**DEPOSITION TESTIMONY**

During the trial, you have heard reference to the terms "examination under oath" and "deposition." As it applies in this case, these terms mean sworn testimony, under oath, given by a witness before this trial began. To the extent that you have heard reference to, and quotations from, such "deposition" or "examination under oath," you may give it the same credibility or weight as live witness testimony. That is to say, whatever credibility or weight, if any, you think it may deserve.

**CREDIBILITY OF WITNESSES**

In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it at all. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice the witness may have;
5. whether other evidence contradicted the witness's testimony; and
6. the reasonableness of the witness's testimony in light of all the evidence.

**CORPORATIONS**

The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this case. At all times, you should consider treating this matter as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life or in the community. Corporations act through their agents and employees.

**BURDEN OF PROOF**

The Plaintiff has the burden of proving by a fair preponderance of the evidence, that is by the greater weight of the evidence, the facts necessary to support its case. Because the Plaintiff is advancing the proposition that the Defendants should be held responsible for harm caused to the Plaintiff, it is the Plaintiff who has the responsibility of producing evidence that leads you to believe that what the Plaintiff claims is more likely true than not. The Defendants, on the other hand, have no obligation to produce evidence concerning the Plaintiff's claim.



**BREACH OF CONTRACT**

I will now instruct you on the Plaintiff's claim. Plaintiff alleges a claim for breach of contract. A contract is an agreement between two or more people which creates an obligation to do, or not do, a certain thing.

**ELEMENTS OF CONTRACT CLAIM**

To establish his contract claim against the Defendants, the Plaintiff has the burden to prove four basic propositions.

The four basic propositions which the Plaintiff must prove are:

1. Contract--that the parties entered into a valid contract that contained the terms claimed by the Plaintiff.
2. Plaintiff's Performance--that the Plaintiff did what the contract required the Plaintiff to do.
3. Defendants' Breach--that the Defendants breached the contract.
4. Resulting Damage--that the Defendants' breach caused a loss to the Plaintiff.

If you find that the Plaintiff has proved all four of these basic propositions, then your verdict must be for the Plaintiff. If, however, you find that the Plaintiff has not proved all of these basic propositions, then your verdict must be for the Defendants.

**CONTRACTS - LAW**

A contract is a legally binding agreement between two or more parties.

A contract need not be in any particular form or words and may be either written or oral unless the parties specify otherwise.

Furthermore, a contract need not be contained in a single document. It may consist of any number of documents and/or conversations as long as they all constitute part of the same agreement.

The key factor in determining whether a contract exists is the intent of the parties as evidenced by their acts and the surrounding circumstances. It is not what the parties may secretly intend that governs. Rather, it is what they manifest to each other by words or conduct that determines whether a contract exists and, if so, what its provisions are.

**CONTRACT DETERMINATION OF TERMS**

Before you can determine whether a party breached a contract, you must first determine what the terms of that contract were. That involves determining what the parties to the contract intended.

There are essentially three possible conclusions for you to reach. First, if you conclude the language of the Transition Agreement is clear and unambiguous, then that language is controlling as to the parties' intentions. Plaintiff contends that the Transition Agreement is clear and unambiguous, and that it fully expresses the understanding of the parties. Second, if you conclude that the language of the Transition Agreement is ambiguous, you must look to the surrounding circumstances as an aid in determining its intended meaning. Defendants contend that the language in the Transition Agreement does not create a stand alone contract regarding the payment of EARs and that reference to other documents, including the Plan Document, is necessary to determine when and if Plaintiff will be eligible to receive an EAR payment. Third, you may conclude that the parties had completely different understandings as to the meaning of Paragraph 4 of the Transition Agreement and therefore there was no "meeting of the minds"--no agreement as to that issue.

It is for you to determine if there was a "meeting of the minds" as to Paragraph 4 of the Transition Agreement (as

expressed either in the Transition Agreement standing alone or in some combination of documents). If you decide there was a meeting of the minds as to Paragraph 4 of the Transition Agreement, it is for you to decide what the terms of that section are and whether Defendants breached those terms. If you decide Defendants breached those terms, it is for you to decide if Plaintiff is owed anything as a result.

In reaching your conclusion, you should look to the words in the entire Transition Agreement, the commonly accepted meaning of those words, the events leading up to the Agreement's execution (including the course of preceding discussions and negotiations), who selected the words, and the manner in which the parties themselves understood the Agreement, as evidenced by what they said and did.

Understand that certain terms may be clear and unambiguous to the parties even though they are undefined in the Transition Agreement. "EAR" is an example of such a term. The parties agree that the term "EAR" in Paragraph 4 of the Transition Agreement means "Equity Appreciation Rights."

**DAMAGES**

If you find that the Defendants are liable to the Plaintiff, then you must consider the issue of damages. Damages are defined in law as that amount of money which will compensate an injured party for the harm or loss that he has sustained. The rationale behind compensatory damages is to restore a person to the position that he was in prior to the harm or loss. Compensatory damages, then, are the amount of money which will replace, as near as possible, the loss or harm caused to the person.

The burden is on the Plaintiff to prove by a fair preponderance of the evidence that he has suffered damages as a result of the Defendants's conduct.

In connection with the question of whether there was a contract and/or breach of contract, you have heard some testimony regarding Defendants' "ability to pay." You should note that if you reach a verdict for the Plaintiff, the Defendants' "ability to pay" is not to be considered by you in determining damages.

**SELECTION OF FOREMAN AND DUTY TO DELIBERATE**

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that should. Do not come to a decision simply because other jurors think it is right.

**COMMUNICATIONS WITH THE COURT**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.



**RETURN OF VERDICT**

A verdict form with interrogatories has been prepared for you by the Court. In rendering a verdict, you should follow the questions as presented on the verdict form. After you have reached a unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.