UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

T.G. PLASTICS TRADING CO., INC., d/b/a NATIONAL PLASTICS TRADING CO.	)	
v.	)	C.A. No. 09-336-M
TORAY PLASTICS (AMERICA), INC.	)	

JURY INSTRUCTIONS

I. GENERAL INSTRUCTIONS

Now that you have heard all of the evidence and the arguments of counsel, it is my job to instruct you on the law that is applicable to this case.

A. PROVINCE OF THE COURT AND JURY

It is your duty as jurors to follow the law as I state it to you. You are not to be concerned with the wisdom of any rule of law stated by me. It is your duty to apply that law that I am about to give you to the facts of the case as you determine those facts to be from the evidence in this case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Further, nothing I say in these instructions and nothing that I have said or done during the trial is to be taken as an indication that I have any opinion about the facts of the case. I do not. It is not my function to determine the facts, but rather it is your function to do so.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All parties -- and the law -- expect that you will carefully and impartially consider all the evidence, follow the

law as it is now being given to you, and reach a just verdict, regardless of the consequences. All parties are entitled to the same fair trial at your hands. All parties stand equal before the law, and are to be dealt with as equals in a court of justice.

In this case, both parties are corporations and are to be treated equally by you and before the law. A corporate entity is chargeable with whatever its authorized officers, employees, or agents do, and it is also chargeable with any knowledge that they may have and any information that is imparted to them.

B. EVIDENCE IN THE CASE

The evidence from which you decide the facts consists of the sworn testimony of witnesses, the exhibits that have been received into evidence, and the stipulations that have been presented to you.

You are to consider only the evidence that has been properly put before you in determining the facts in this case. Evidence that the court admits in full is properly before you for your consideration; evidence that this court has stricken or refused to admit is not a proper subject for your deliberations and should not be given consideration by you.

It is the duty of counsel to protect the rights and interests of his or her client, and in the performance of that duty counsel freely may make objections to the admission of proffered evidence and should not, in any manner, be penalized for doing so.

The fact that the Court admitted evidence over objection should not influence you in determining the weight you should give such evidence. Nor should statements made by counsel influence your determination of the weight you will give the evidence, if admitted. In other words, you should determine the weight you will give such evidence on the basis of your own

consideration of it and without regard to the ruling of the Court or the statements of counsel concerning the admissibility of such evidence.

C. NOT EVIDENCE

Certain things are not evidence, and you may not consider them in deciding what the facts are.

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. You should not be influenced by the objection or by the Court's ruling on it.
3. Testimony or evidence that has been excluded or stricken 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.

D. EVIDENCE – DIRECT OR CIRCUMSTANTIAL

There are two types of evidence from which you may properly find the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

E. INFERENCES

In your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are allowed to make reasonable inferences from the evidence.

Inferences are deductions or conclusions that reason and common sense lead you to draw from facts that have been established by the evidence in this case. Inferences, however, may not be based on speculation or conjecture. They must be based on evidence. Let me give you an example of an inference. If your mailbox was empty when you left home this morning, and you find mail in it when you go home tonight, you may infer that the letter carrier delivered the mail. Now, obviously, you didn't see the letter carrier deliver the mail, but from the fact that it was empty this morning and is filled tonight, you can properly infer that the letter carrier came in the interim and delivered the mail. That is all that we mean by an inference. You are permitted to draw reasonable inferences that seem justified in light of your experience, and from facts that you find have been proven.

F. CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. 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' testimony in light of all the evidence.

A witness may be impeached, that is, a witnesses' credibility may be questioned, by showing that on some prior occasion the witness made statements on a material issue that contradict the testimony at trial. If you believe that a witness, at some prior time, made statements contradicting the testimony at trial, then you may take this belief into consideration when determining the witness' credibility, or the weight that you will give to the testimony.

After making your own judgment, you may believe everything a witness says, or part of it, or none of it at all. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying.

G. <u>OPINION EVIDENCE - EXPERT WITNESS</u>

While the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions, an exception exists for those persons we refer to as expert witnesses. In this case, there was one witness called as an expert, Ms. Catherine Parente. She is a witness who, by education and experience, has become expert in some art, science, profession, or calling, and thus may state her opinions as to relevant and material matters in which she professes to be expert, and also may state her reasons for the opinion.

If testimony from an expert witness is to have any evidentiary value, it must speak in terms of "probabilities" rather than mere "possibilities." Although absolute certainty is not required, the conclusions of an expert must be reached to a reasonable degree of certainty – that is, to a probability. In order for an expert's opinion to be considered by you, it must have substantial probative value and not be based on speculation, conjecture, or surmise.

You should give an expert opinion such weight as you may think it deserves. If you conclude that the reasons given in support of the expert's opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

H. BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE

A party must prove every essential element of its claims against the other party by a preponderance of the evidence. National Plastics has asserted a claim against Toray, so National Plastics bears the burden of proof with respect to its claim.

To establish by "a preponderance of the evidence" means to prove that something is more probably true than not true. In other words, if you were looking at opposite ends of a scale, National Plastics' evidence would have to make one end of the scale tip somewhat to its side.

II. CASE-SPECIFIC INSTRUCTIONS

A. BACKGROUND

The dispute centers on the Settlement Agreement and Release, which I shall refer to as the "Agreement," that National Plastics and Toray signed in October 2007 to resolve the claims and counterclaims asserted by them in a prior lawsuit that was pending before this Court. The Agreement established a seventeen (17) year business relationship between National Plastics and Toray proceeding from 2007 through 2024.

National Plastics contends that Toray has breached the Agreement by failing to sell to National Plastics the "Agreed Materials." "Agreed Materials" are defined as "one hundred percent (100%) of all scrap plastic, other scrap, second quality materials, downgraded materials, recyclable materials not used internally and aged film." National Plastics seeks money from Toray in connection with the breach of the Agreement. Toray denies that it breached the Agreement.

B. BREACH OF CONTRACT

A contract is a legally enforceable promise or agreement made between two or more parties. To succeed on a claim for breach of contract, a party must prove three things:

1) the existence of a contract;

2) a breach of the terms of the contract by the other party; and

3) damages.

In this case, there is no question that a contract exists – the parties agree that the Agreement is a binding contract. The dispute that you must decide is did Toray breach the Agreement and if so, what damages, if any, did National Plastics suffer as a result of the breach.

You must determine whether National Plastics has substantially performed its contractual obligations under the Agreement. A party cannot prevail on a breach of contract claim unless it has substantially performed its promised obligations. Substantial performance is a fact-dependent inquiry, which you, as the factfinder, must determine based upon all relevant evidence before you.

C. CONTRACT INTERPRETATION

In deciding whether Toray breached the Agreement, you must first decide how to interpret the Agreement. In determining what the contract means or requires, you may consider

the wording of the contract, as well as extrinsic evidence. When reviewing the Agreement, your main objective is to determine the intent of the parties. The parties dispute the intended meaning of several terms of the Agreement contained in the provision regarding Toray's sale of the Agreed Materials to National Plastics.

By extrinsic evidence, I am referring to evidence that goes beyond the words that actually appear in the Agreement. You look to extrinsic evidence in this instance to determine the intent of the parties. "Extrinsic evidence" basically means evidence of intent other than the words themselves.

You may consider the construction placed upon the terms by the parties themselves as an aid in determining their intended meaning. Also, the circumstances surrounding the parties' signing of the contract may be relevant to the determination of their intent.

You may consider some or all of the following categories of extrinsic evidence in the following order of their priority: (1) the parties' negotiations of the contract, (2) their course of performance, (3) their prior course of performance, and (4) trade usage in the relevant industry.

As you are considering the evidence to determine what the Agreement means, you must keep in mind the following general legal principals and doctrines:

- You must consider the Agreement in its entirety.
- You must give its words their plain, ordinary and usual meaning.
- The terms of the Agreement should be construed to be consistent with one another.
- You cannot interpret the Agreement in a way that contradicts its written terms.
- You are not permitted add new or different terms to the contract that are not supported by the words written into the Agreement.

- When ascertaining the usual and ordinary meaning of contractual language, every word of the contract should be given meaning and effect; an interpretation that reduces certain words to the status of surplusage should be rejected.
- You should avoid interpreting a contract in a way that would render parts of the agreement meaningless.

D. BREACH

Once you have determined what the contract means or requires of the parties, you must then determine if Toray satisfied its obligations under the Agreement. If Toray did not live up to the obligations imposed under the Agreement, then you should find Toray to be in breach of the Agreement.

E. DAMAGES

I will now turn to the question of damages.

By instructing you on damages, this Court does not intend to indicate that it is of the opinion that one side is liable to the other on the claim asserted in this litigation. You may only consider damages if you have found that Toray is liable to National Plastics based upon the instructions that I have given you.

1. PROOF OF DAMAGES

A party seeking damages must prove its actual, not hypothetical, damages. Damages are defined in the law as the amount of money that will compensate an injured party for the harm or loss sustained. In this case, damages are the amount of money that would put the prevailing party back in the financial position it would have been in if the other party did not breach the contract, or otherwise acted properly. The underlying rationale in awarding damages is to place a party in the position it would have been in if the other party had not breached the contract.

While damages do not need to be calculated or proved with mathematical exactitude, the law requires that a party must prove its damages based upon reasonable, probable and supportable numbers. The amount of damages sustained must be proven with a reasonable degree of certainty. Damages cannot be proven through speculation or factually unsupported assumptions. However, you should not refuse to award damages merely because the damages are difficult to determine.

If you find that a breach of the Agreement has occurred, you should award damages in an amount that has been proven with reasonable certainty. You must confine your deliberations on damages to the actual evidence only, and you must not base your award of damages on any prejudices or conjecture.

2. NOMINAL DAMAGES

If you find that a breach has occurred, but that the amount of damages has not been proven with sufficient certainty, then you should award nominal damages in the amount of $1.

III. FINAL PROCEDURAL INSTRUCTIONS

Ladies and Gentleman, in a moment I will dismiss you so that you may commence your deliberations. However, before I do that I need to give you some instructions about the procedures you must use in the course of your deliberations.

It goes without saying that prejudice, sympathy or compassion should not be permitted to influence you in the course of your deliberations. From what I have said I do not and did not mean to imply that you should approach your consideration of this case in an intellectual vacuum. You are not required to put aside or to disregard your experiences and observations in the ordinary, everyday affairs of life. Indeed, your experiences and observations in the ordinary, everyday affairs of life are essential to your exercise of reasonably sound judgment and

discretion in the course of your deliberations; and it is your right and duty to consider the evidence in the light of such experiences and observations.

During your deliberations, you must not communicate with or provide any information to anyone outside of the jury room by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, or computer. You may not communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations.

Now, in order for you to return a final verdict, your decision must be unanimous. That means that you cannot return a verdict unless and until all eight of you are in agreement as to the verdict.

Therefore, in the course of your deliberations and in your consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open to conviction with respect to the point in dispute so that you will not be precluded or prevented from achieving a unanimous verdict by mere stubbornness. It is your right to maintain your conviction. Each vote of each juror is as important as the vote of any other juror, and you need not give up your sincerely held conviction simply because a majority holds to the contrary.

I am designating juror # 1, Ms. Cole, as the Foreperson of this jury. Ms. Cole, it will be your responsibility to organize the group and facilitate organized and healthy deliberations. The Foreperson's opinion, voice, or vote, however, is no more meaningful than any other juror.

When you are in the jury room, you will be provided with the evidence that has been admitted in this case. It may take us a few minutes to gather it up, but as soon as we do it will be brought to the jury room.

You will also be given a verdict form. When you have reached a verdict, the Foreperson will fill out that form and sign it. Once the verdict form is complete, you will inform the Court Security Officer.

[REVIEW OF VERDICT FORM]

If, in the course of your deliberations, you deem it necessary to be further instructed or assisted by the Court in any way, the Foreperson should reduce such request or question to writing, sign it, and give it to the Court Security Officer in whose charge you will now be placed. The Court Security Officer will then bring such written request to me and I, in consultation with the attorneys, will determine an appropriate response. Other than this method, please do not attempt to communicate privately or in any other way with the Court or with anyone outside the jury room.