UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

OPTICAL WORKS AND LOGISTICS, LLC, Plaintiff, v. SENTINEL INSURANCE COMPANY, LIMITED and THE HARTFORD INSURANCE GROUP, Defendant.	C.A. No. 15-163-JJM-LDA

JURY INSTRUCTIONS

I. GENERAL INSTRUCTIONS

Now that you have heard all the evidence and the arguments of counsel, it is my job to instruct you on the law that applies to this case. I will send a written copy of my instructions into the jury room.

A. PROVINCE OF THE COURT AND JURY

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

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 role to determine the facts; that is your role.

You must perform your duties as jurors without bias or prejudice to any party. All the 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.

Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. The social standing or wealth of the parties, the witnesses, or the attorneys should not influence you. 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.

B. EVIDENCE IN THE CASE

In determining the facts of this case, you are to consider only the evidence that has been properly put before you. That evidence consists of the sworn testimony of witnesses, including testimony read to you from a deposition, and the exhibits that have been admitted into evidence. Sworn testimony includes witness testimony that was heard via read-in or video. Evidence that the Court has refused to admit is not a proper subject for your deliberations and you should not consider it when reaching a verdict. Admitted evidence will be available to you in the jury room during your deliberations. All the evidence that the Court admits is appropriate for discussion during your deliberations, no matter which party called the witness or presented any given item of evidence during the trial.

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, either for or against the admission of such evidence, influence your determination of the weight you will give the evidence, if the evidence was admitted.

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.

2. Questions and objections by lawyers are not evidence.

3. 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.

C. EVIDENCE – DIRECT AND CIRCUMSTANTIAL

There are two types of evidence. 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 does not distinguish between direct and circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in this case, both direct and circumstantial.

In your consideration of the evidence in this case, you are allowed to make reasonable inferences from witnesses' testimony and the admitted exhibits.

D. EXPERT OPINION

In this case you have heard testimony from individuals designated as experts. These are witnesses who, by education, training, or experience, have become wellversed in particular topics, and may offer their opinions to help you determine the facts of this case. They may also state the reasons for their opinions. There is nothing magical or mystical about an expert's testimony. Simply because a witness has been identified to you as an expert does not mean that you are required to accept what the expert says as true. The opinion of an expert should be considered by you in the same manner as the testimony of any other witness.

In addition, you should consider the factual basis for the expert's opinion. If the facts on which the opinion is based are not in accord with the facts as you find them to be, then you should consider that in determining how much, if any, of the expert's testimony you will accept as true. If you decide that the opinion of an expert witness is not based on sufficient education or experience, or if you conclude that the expert's reasons given in support of their opinion are not sound or complete, or if you feel that the opinion is outweighed by other evidence, you may disregard the opinion entirely or only accept part of it.

E. <u>CREDIBILITY OF WITNESSES</u>

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. In deciding this case, you may have to decide which testimony to believe and which testimony not to believe. After making your own judgment, you may believe everything a witness says, part of it, or none of it at all. In considering the testimony of any witness, you may consider:

1. the opportunity and ability of the witness to see, hear, or know the things about which the witness testified;

2. the witness' memory;

3. the witness' manner while testifying;

4. the witness' interest in the outcome of the case and any bias or prejudice that the witness may have;

5. whether other evidence contradicted the witness' testimony; and

6. the reasonableness of the witness' testimony in light of all the evidence.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying.

F. <u>BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE</u>

In a civil action, such as this one, the burden is on the Plaintiff to prove every element of the claim by a preponderance of the evidence. If the Plaintiff fails to establish an element of any of the claim by a preponderance of the evidence, then you should find for the Defendants on that claim. The Defendants do not have any obligation to disprove what the Plaintiff asserts or claims.

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, the Plaintiff's evidence would have to make one end of the scale tip to its side.

Preponderance of the evidence does not depend on the number of witnesses testifying on either side, but rather on the credibility that, given all the evidence in this case, you attribute to the witnesses' testimony and the effect that testimony has in causing you to believe in its truth.

Where, in your opinion, the evidence on each side is equally balanced, the witnesses on each side are equally credible, and the evidence is just as strong on one side as the other, then OWL has not carried its burden of proof by a preponderance of the evidence.

When I say in these instructions that a party has the burden of proof on any proposition, I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true. This rule does not, of course, require proof to an absolute certainty or even to a near certainty.

G. 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. You may draw reasonable inferences that seem justified given your experience, and from facts that you find have been proven.

II. CASE-SPECIFIC INSTRUCTIONS

A. NATURE OF THE PLAINTIFF'S CLAIMS

First, just a point of clarification, throughout this case, the parties have referred to the two Defendants collectively as "Hartford." When these instructions refer to "Hartford," they are referring to both Defendants and you can treat them as one for the purpose of these instructions.

OWL claims that Hartford breached the insurance all-risk policy by denying any coverage for the losses it claims to have sustained as a result of the 2011 Storms including for physical damage to business personal property involving equipment as well as for "continuing normal operating expenses incurred" and for "extra" business expenses incurred from the Storms. I will define these phrases for you shortly. Hartford denies that OWL is entitled to coverage under the terms of the Policy.

For OWL to prevail under the terms of the Policy and recover from Hartford, it must prove by a preponderance of the evidence, first, that the damages it seeks are covered under the Policy and then, second, it must prove the amount of the damages the Storms caused that are covered under the Policy.

B. <u>BREACH OF CONTRACT</u>

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 OWL's insurance policy with Hartford is a binding contract in effect at the time of the Storms. The dispute that you must decide is did Hartford breach the contract and if so, what damages, if any, did OWL suffer as a result of the breach and the amount of damages.

C. CONTRACT INTERPRETATION

In deciding whether Hartford breached the contract, you must first decide how to interpret the insurance policy. In determining what the contract means or requires, you may consider the wording of the contract, as well as extrinsic evidence. When reviewing the policy, your main goal is to determine the intent of the parties. The parties dispute whether certain policy provisions provide insurance coverage for OWL's alleged damages. By extrinsic evidence, I am referring to evidence that goes beyond the words that actually appear in the contract. "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. As you are considering what the contract means, you must keep in mind the following general legal principles and doctrines:

- You must consider the contract as a whole.
- You must give its words their plain, ordinary, and usual meaning.
- The terms of the contract should be construed to be consistent with one another.
- You cannot interpret the contract in a way that contradicts its written terms.
- You are not permitted to add new or different terms to the contract that are not supported by the words written into the contract. When ascertaining the usual and ordinary meaning of contractual language, every word of the contract should be given meaning and effect.

• 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 whether Hartford satisfied its obligations under the contract. If Hartford did not live up to the obligations imposed under the contract, then you should find Hartford to be in breach of the contract.

E. DIRECT PHYSICAL LOSS OR DAMAGE TO COVERED PROPERTY BY A COVERED CAUSE OF LOSS

As for Covered Property, OWL must first prove that its losses were caused by "direct physical loss or damage to Covered Property … caused by or resulting from a Covered Cause of Loss." As noted already, OWL purchased insurance for loss or damage to its own property, such as equipment, and any property belonging to others that was in its care. OWL did not purchase insurance that would entitle it to compensation as if it owned the Building.

The all-risk Policy defines "Covered Cause of Loss" as "RISKS OF DIRECT PHYSICAL LOSS[.]" The meaning of "risk" as referred to in the Policy means an accidental or unplanned or unexpected event. The parties here further agree that the Storms were unanticipated, unplanned, and unexpected. Hartford has not denied coverage because there was no Covered Cause of Loss. Any reasons for denial of a Covered Cause of Loss are limited to the reasons contained in the denial letter and additional reasons for denial may not be added after the issuance of the denial letter.

Now the Court will turn to the other sections of the policy under which OWL makes its claims. The first is a claim for Business Personal Property. And then there are claims for Additional Coverages under the policy in the Special Property Coverage Form. Each should be treated separately as distinct coverages that are triggered under distinct conditions.

F. <u>COVERAGE FOR BUSINESS PERSONAL PROPERTY</u>

First, as for coverage in the Policy for BUSINESS PERSONAL PROPERTY, OWL is seeking coverage for alleged damage to manufacturing equipment it owned. Under this type of coverage, Hartford will pay "for direct physical loss of or physical damage to Covered Property at the [Building] caused by or resulting from a Covered Cause of Loss."

The Policy defines Covered Property as Business Personal Property located in the Building, that is either (a) property that OWL owns and that is used in its business or (b) property of others that is in OWL's care, custody, or control.

To prevail in its claim for Business Personal Property coverage, OWL must first show direct physical loss of or physical damage to business personal property at the Building. OWL only asserts a claim for alleged damage to its equipment.

If you find that OWL has proven that the evidence establishes that any of OWL's equipment suffered direct physical damage, then OWL must prove the amount of that damage. Because OWL did not repair or replace any of its equipment, this amount is the actual cash value of the property, which is the cost to replace the property with "other property comparable material and quality and which is used for the same purpose." That means you must consider the "decline in [the Covered Property's equipment's'] value because of use, wear, obsolescence, or age."

G. ADDITIONAL COVERAGE: CONTINUING NORMAL OPERATING EXPENSES INCURRED

Second, OWL is seeking from Hartford "continuing normal operating expenses incurred" after the Storms. The types of expenses for which OWL is seeking coverage are payroll, communications charges, legal fees, utilities, rent, and interest.

The Policy obligates reimbursement of these types of expenses if the insured incurs or pays them "due to the necessary 'suspension' of [an insured's] 'operations' during the 'period of restoration.'"

Suspension of a business means a partial slowdown or complete shutdown of the business, or where that part of the building where the business is operated is untenantable. The suspension must be "caused by direct physical loss of or direct physical damage to property" at the building.

The continuing normal operating expenses covered by the Policy are those expenses that were incurred by OWL during the "Period of Restoration." Insurance typically covers damages incurred even if the insured has not actually paid them yet – for example, when a driver gets in an accident, they do not have to pay the auto body shop before being reimbursed by the insurer. But the driver actually incurs the expense when they agree with the shop on the scope and cost of the repairs, and they become legally obligated pay at the time of the agreement.

The operating expenses covered are those that are unavoidable, and that the insured incurs or pays during the period necessary to repair the "physical loss of or physical damage to property" located at the Building and restore it to its pre-event condition. This is called the "Period of Restoration." Under the Hartford Policy, the "Period of Restoration" starts when the "physical loss of or physical damage to property" caused by a Covered Cause of Loss occurred and ends when the alleged "physical loss of or physical damage to property" "should be repaired, rebuilt or replaced with reasonable speed and similar quality." Here, OWL claims that its losses first occurred during the Storms. It is for you to determine whether OWL has proven this. It is also for you to determine how long it should have taken the physically lost or damaged property to be repaired, rebuilt, or replaced with similar speed and quality. Under the terms of the Policy, the maximum "period of restoration" is one year from the Covered Cause of Loss.

OWL has the burden to prove its entitlement to this coverage and the amount of expenses it incurred or paid, and that there was a Period of Restoration. Thus, OWL must prove that it incurred covered expenses and that they would not have been incurred but for the covered loss. These are the facts that OWL must prove to recover from Hartford under this coverage:

1. the expenses were "normal" expenses that OWL was paying before the Storms, as distinguished from unusual or unnecessary expenses;

2. OWL's expenses were "continuing" after the Storm, meaning OWL had to incur or pay these after the Storms;

3. OWL did incur or pay these expenses after the Storms;

4. OWL had to incur or pay these even though it needed to suspend its business due to "direct physical loss or physical damage to property" resulting from the Storms;

5. OWL incurred or paid these expenses during the Period of Restoration, meaning the period from the Storms and ending when the allegedly damaged property should have been repaired, rebuilt, or replaced with reasonable speed and similar quality; and

6. the expenses were incurred within one year from the Storms.

If you find that the evidence establishes that OWL's claimed expenses are covered under the Policy, OWL then has the burden to prove the amount of the expenses it incurred or paid during the Period of Restoration, but not longer than one year after the Storms.

H. ADDITIONAL COVERAGE: EXTRA EXPENSE COVERAGE

Third, OWL also contends that it is entitled to recover under the additional coverage of "Extra Expense," which is the reasonable and necessary expense the insured incurs during the Period of Restoration that the insured would not have incurred if there had been no direct physical loss or physical damage to property at the scheduled premises.

The types of extra expenses covered by the Hartford Policy are those incurred to avoid or minimize the "suspension" of the insured's business. The Policy also covers expense incurred to minimize the "suspension" of the insured's business where it cannot continue to operate because of direct physical loss or physical damage property at the location. These expenses allow for relocation expense. OWL is only claiming extra expenses for legal fees and rigging and storage.

For OWL to recover the extra expenses, OWL must prove the following:

1. the expenses were "reasonable and necessary;"

2. OWL incurred or paid these expenses;

3. the extra expense would not have been incurred or paid if there had been "no direct physical loss of or direct physical damage to property" caused by the Storms;

4. the expenses were incurred or paid to limit the period that its business was suspended or to continue its operations;

5. OWL incurred or paid these during the "period of restoration," meaning as earlier explained, the time that it takes to repair, rebuild, or replace the physical loss of or damage to property caused by a Covered Cause of Loss with reasonable speed and similar quality, but in no event no more than one year after the Storms. If you find that OWL proved by a preponderance of the evidence that it is entitled to coverage for its extra expenses, then OWL has the burden to prove the amount of its claim.

I. DAMAGES

I will now turn to the question of damages. By instructing you on damages, this Court does not intend to indicate that it believes 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 Hartford is liable to OWL based on the instructions that I have given you.

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 if it had acted properly. The 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 need not be calculated or proved with mathematical exactitude, the law requires that a party must prove its damages based on 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. But you should not refuse to award damages just because the damages are difficult to determine. If you find that a breach of the contract has occurred, you should award damages in an amount that has been proven with reasonable certainty.

III. FINAL PROCEDURAL INSTRUCTIONS

Ladies and gentlemen, in a moment I will dismiss you so that you may commence your deliberations. But before I do that, I will instruct you about the procedures you must use while you deliberate.

During your deliberations, you must not communicate with or provide any information to anyone outside the jury room by any means about this case. You may not use any electronic device during deliberations. You may not communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. You can only discuss the case in the jury room with your fellow jurors during deliberations.

As I said at the beginning of my instructions, you must not allow prejudice, sympathy, or compassion to influence you during your deliberations. That does not mean that you should approach this case in an intellectual vacuum. You are not required to put aside 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 during your deliberations; and it is your right and duty to consider the evidence given such experience and observations.

Now, 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 agree as to the verdict. You need not yield your convictions simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open with respect to the point in dispute so that you will not be prevented from achieving a unanimous verdict by mere stubbornness. Each vote of each juror is as important as the vote of any other juror, and you need not give up your sincerely held convictions simply because a majority holds to the contrary.

I am designating juror #8, Maria Lane, as the Foreperson of this jury. Ms.

Lane, 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.

You will 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, during your deliberations, you find it necessary to be further instructed or assisted by the Court in any way, the Foreperson should write such request or question down, sign it, and give it to the Court Security Officer Tom Mulligan in whose charge you will now be placed. Officer Mulligan 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.

[Swear in CSO]

[Attorneys come to bench for objections]