

**FINAL
INSTRUCTIONS**

INSTRUCTION NO. 1

Closing Roadmap

MEMBERS OF THE JURY:

You now have all of the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments.

Finally, you will go to the jury room to discuss and decide the case.

The remaining preliminary instructions have been omitted from this example.

INSTRUCTION NO. 2

Introduction to Substantive Law

Now that I have explained the procedures and general instructions, I will explain the specific laws for each of the claims at issue in this case.

INSTRUCTION NO. 3

Statement of the Case

COMPANY A'S PROPOSAL: Company A claims that it had a May 2, 2011 Service Agreement with Company B whereby Company B was to perform certain utility locate services for Company A and was to provide detailed invoices to Company A on a monthly basis for those locate services. Company A claims that Company B materially breached that contract by failing to submit detailed invoices on a monthly basis from May 2012 to August 2013 and that Company A has been damaged as a result. This Court has already determined that Company B breached the contract by failing to provide the detailed monthly invoices to Company A. Company A wants Company B to pay it money to compensate it for the damages Company A claims to have suffered.

COMPANY B'S PROPOSAL: Company B is a Utah company that provides underground utility locating services, similar to systems used in other states sometimes referred to as "Blue Stakes" or "Call Before You Dig". Company A is a telecommunications company operating primarily in Texas.

In 2011, Company B entered into a Service Agreement with Company A to perform utility locating services in the Dallas, Texas, area. During a period of time from May 2012 through September 2013, Company B alleges that it performed locating services for 14,322 locations requested by Company A. During this same period, Company B failed to send monthly invoices to Company A as required by the Service Agreement. Company B submitted the

invoices to Company A in September 2013. The total amount of the invoices submitted was approximately \$1.2 million.

Company A denies that it requested the locating services allegedly performed by Company B. It is Company A's position that, because invoices for May 2012 through August 2013 were not submitted monthly, Company A is not required to pay for any services that Company B provided from May 2012 through September 2013.

INSTRUCTION NO. 4

Facts Conclusively Established

COMPANY A'S PROPOSAL: This Court has already determined that:

1. the May 2, 2011 Service Agreement entered into by and between Company A and Company B is a valid contract;
2. the May 2, 2011 Service Agreement required that Company B submit detailed invoices to Company A on a monthly basis;
3. Company B failed to submit detailed invoices to Company A on a monthly basis between May 2012 to August 2013;
4. Company B breached the May 2, 2011 Service Agreement by failing to submit detailed invoices to Company A on a monthly basis from May 2012 to August 2013.

You may therefore treat these facts as established for purposes of your deliberations.

COMPANY B'S PROPOSAL: Prior to the trial of this case, the Court made the following factual determinations as a matter of law:

1. In May 2011, the parties entered into a contract, identified as the Service Agreement (stipulated trial Exhibit 1).
2. From May 2012 through August 2013, Company B failed to send monthly invoices to Company A as required by the Service Agreement.
3. Under ¶¶ 3 and 9 of the Service Agreement, Company B had agreed to send invoices to Company A on a monthly basis. Therefore, Company B's failure to send monthly invoices during this period was a breach of those paragraphs of the Service Agreement.

You are to take these facts as true for purposes of this case.

INSTRUCTION NO. 5

Material Breach

COMPANY A'S PROPOSAL: This Court has already determined that Company B breached the May 2, 2011 Service Agreement by failing to provide detailed monthly invoices to Company A.

You must decide whether there was a material breach of the contract. What constitutes so serious a breach as to justify rescission is not easily reduced to precise statement, but certainly a failure of performance which defeats the very object of the contract or is of such prime importance that the contract would not have been made if default in that particular had been contemplated is a material failure.

A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a rescission of the contract; the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom. A rescission is not warranted by a mere breach of contract not so substantial and fundamental as to defeat the object of the parties in making the agreement.

The relevant question is not whether the breach goes to the heart of the provision breached, but whether it goes to the heart of the contract itself. The following factors can assist in determining the materiality of a breach: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or offer to perform will cure his failure, taking account of all the

circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

If you decide that Company B materially breached the contract, then Company A was excused from doing what it had promised to do under the contract.

However, if you decide that what Company B failed to do was not important to fulfilling the purpose of the contract, then Company A was not excused from doing what it promised to do under the contract.

REF: Document 84, Memorandum Decision and Order on Pending Motions; MUJI 2d CV2116

COMPANY B'S PROPOSAL: You must decide whether there was a material breach of the contract. A breach is material if a party fails to perform an obligation that was important to fulfilling the purpose of the contract. A breach is not material if the party's failure was minor and could be fixed without difficulty.

Only a material breach will excuse further performance by the non-breaching party. Therefore, "[n]ot every minor failure justifies nonperformance. It must be something so substantial that it could be reasonably deemed to vindicate the other's refusal to perform. What constitutes so serious a breach as to justify rescission is not easily reduced to precise statement. A failure of performance which defeats the very object of the contract or is of such prime importance that the contract would not have been made if default in that particular had been contemplated is a material failure. A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant nonperformance. Nonperformance is not warranted by a mere breach

of contract not so substantial and fundamental as to defeat the object of the parties in making the agreement.

The relevant question is not whether the breach goes to the heart of the provision breached, but whether it goes to the heart of the contract itself. Therefore, whether a breach is material is a question of degree. It turns on a number of factors:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

If you decide that Company B, Inc. materially breached the contract by sending late invoices, then Company A Communications, L.P. was excused from doing what it had promised to do under the contract.

However, if you decide that what Company B, Inc. failed to do was not important to fulfilling the purpose of the contract, then Company A Communications, L.P. was not excused from doing what it promised to do in the contract.

Defendant Company A Communications, L.P. bears the burden of proving by a preponderance of the evidence that Company B, Inc. committed a material breach of the Services Agreement.

References:

Cross v. Olsen, 2013 UT App 135, ¶¶ 25-30, 303 P.3d 1030, 1035-36

Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 22, 94 P.3d 193, 199. Polyglycoat Corp. v. Holcomb, 591 P.2d 449, 451 (Utah 1979). Black's Law Dictionary (8th ed. 2004) (defining breach of contract).

MUJI 1

INSTRUCTION NO. 6

Partial Breach

COMPANY A’S PROPOSAL: Company B claims that Company A breached the May 2, 2011 Service Agreement by failing to pay sixteen invoices (ranging from May 2012 to August 2013) collectively submitted to Company A on September 10, 2013, and that Company B has been damaged as a result. Company B wants Company A to pay it money to compensate it for the damages Company B claims to have suffered.

Company A denies Company B’s claim on grounds that Company B breached the contract first by failing to provide detailed invoices to Company A as required by the contract.

COMPANY B’S PROPOSAL: If Company B did some but not all of the things it promised to do under the contract, then Company A may recover damages caused only by what Company B failed to do under the contract.

References

Restatement (Second) of Contracts § 236(1981).

INSTRUCTION NO. 7

Elements

COMPANY A'S PROPOSAL: In order to recover damages, Company B must prove each of these three things:

1. that Company B did what the contract required it to do;
2. that Company A breached the contract by not performing its obligations; and
3. that Company B was damaged because Company A breached the contract.

COMPANY B'S PROPOSAL: None?

MUJI 2d CV2102, omitting existence of valid contract

JOINT INSTRUCTION NO. 8

Damages

If a party is damaged by a breach of contract, then it has a right to recover damages that follow naturally from the breach as follows:

1. the loss of the benefits from the contract caused by the breach; minus
2. any cost or other loss that the damaged party has avoided by not having to perform.

MUJI 2d CV2135

JOINT INSTRUCTION NO. 9

If a party recovers damages for the benefits it expected to receive from the contract, then that party is also entitled to recover “consequential” damages caused by the breaching party.

Consequential damages are those losses or injuries reasonably within the contemplation of the parties, that is, they could have considered them or reasonably foreseen them, at the time the contract was made.

In order to decide whether a loss or an injury was foreseeable at the time the contract was made, you should examine the nature and language of the contract and the reasonable expectations of the parties. A loss may be foreseeable because it follows from the breach:

1. in the ordinary course of events, or
2. as a result of special circumstances, beyond the ordinary course of events, that the breaching party had reason to know.

JOINT INSTRUCTION NO. 10

Damages are only recoverable for loss in an amount that the evidence proves with reasonable certainty, although the actual amount of damages need not be proved with precision. Any alleged damages which are only remote, possible or a matter of guesswork are not recoverable.

MUJI 2d CV2140

INSTRUCTION NO. 11

Nominal Damages

COMPANY A'S PROPOSAL: None?

COMPANY B'S PROPOSAL: A party damaged by the other party's breach of the contract has a right to recover the damages caused by the breach. However, if Company A has not proved any actual or substantial damages caused by Company B's breach, or if Company A has not proved the amount of damages, then you may award as damages a small or nominal sum such as one dollar.

MUJI 2d CV2140

POST-ARGUMENT INSTRUCTIONS

POST-ARGUMENT INSTRUCTION NO. 12

Jury Deliberations—Overview

You have now heard all of the evidence and the arguments of counsel. In a moment you will be escorted to the jury room and each of you will be provided with a copy of the instructions that I have given you. Any exhibits admitted into evidence will also be placed in the jury room for your review.

When you go to the jury room, you should first select a foreperson who will preside over your deliberations and be your spokesperson here in the courtroom. I suggest that you should then review the jury 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 as stated in the instructions.

Once you have reviewed the instructions, you may also wish to review the Special Verdict Form to understand the questions you will need to answer. I would also suggest that before you begin discussing the issues presented to you for resolution, you may find it helpful for each of you to write down your own views about the case. This may help you to clarify your own thinking about the issues.

You should then begin to deliberate. When you have reached unanimous agreement as to your verdict, you will have the foreperson fill in the Special Verdict Form, date and sign the form, and then return your verdict to the courtroom.

Your deliberations will be confidential. You will not be required to explain your verdict to anyone.

POST-ARGUMENT INSTRUCTION NO. 13

Commencement of Deliberations

The attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his or her sense of pride may be inflamed, and he or she may hesitate to recede from an announced position if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges of the facts.

POST-ARGUMENT INSTRUCTION NO. 14

Jury Deliberations

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to the verdict. Your verdict must be unanimous. This means each of you must agree on the answer to each question on the Special Verdict Form.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to 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 re-examine your own views, and change your opinion, if convinced it is wrong. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, for the mere purpose of returning a verdict.

POST-ARGUMENT INSTRUCTION NO. 15

Do Not Speculate or Resort to Chance

When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.

POST-ARGUMENT INSTRUCTION NO. 16

Communications with the Court During Deliberations

If it becomes necessary during your deliberations to communicate with the court, you may send a note through a court security officer, signed by your foreperson or by one or more jurors. No member of the jury should attempt to communicate with the court by any means other than a signed writing; and the court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing or orally here in open court.

You will note from the oath the court security officer will take that he, as well as any other person, is also forbidden to communicate in any way with any juror about any subject touching the merits of the case.

Bear in mind also that you are not to reveal to any person—not even to the court—how the jury stands numerically or otherwise until you have reached a unanimous verdict.

POST-ARGUMENT INSTRUCTION NO. 17

Schedule for Deliberations

During your deliberations, you are able as a group to set your own schedule for deliberations. I would suggest that you not feel pressured to continue your deliberations if you feel so exhausted or stressed that you may risk compromising your conviction simply to finish your deliberations. A good night's rest and time for reflection may be helpful to resolve doubts you may have. You may, however, deliberate as late as you wish or recess at an appropriate time set by yourselves. You may set your own schedule for lunch and dinner breaks.

I do ask, however, that you notify the court by a note when you plan to recess for the night.