

Members of the jury, you have seen and heard all of the evidence and the arguments of the attorneys. Now I will instruct you on the law that applies to this case.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in this case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

You must perform your duties fairly and impartially. In deciding your verdict, you must not allow sympathy, bias, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex. The parties to this case and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law that I give you, and reach a just verdict regardless of the consequences.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be. It is not my function to determine the facts in this case. That function belongs to you.

You should consider and decide this case as an action between persons of equal standing in the community, and holding the same or similar stations in life. Each party is entitled to the same fair consideration. A corporation is entitled to the same fair consideration as a private individual. All persons and corporations stand equal before the law and are to be dealt with as equals in a court of justice.

As I stated, it is your duty to determine the facts. In determining the facts, you must consider only the evidence that I have admitted in the case. The evidence consists of the testimony of the witnesses, deposition testimony that was read, and the exhibits admitted in evidence, and stipulations. A stipulation is an agreement between the parties that a witness would testify in a particular way.

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the evidence in the case. However, the charts or summaries are not themselves evidence or proof of any facts. If you do not believe that they correctly reflect the evidence in the case, you should disregard them. You may, however, consider them if you believe that they accurately reflect the evidence.

Certain things are not evidence. I will list them for you.

First, any testimony that I struck from the record, or that I told you to disregard, is not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements and arguments to you are not evidence. The purposes of these statements and arguments is to discuss the issues and the evidence. If the evidence as you remember is different from what the lawyers said, your memory is what counts.

Some of you may have heard the phrases “direct evidence” and “circumstantial evidence.”

Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, or in other words, it is proof of one or more facts that point to the existence or non-existence of another fact. You are to consider both direct and circumstantial evidence. The law allows you to give equal weight to both types of evidence, but it is up to you to decide how much weight to give to any evidence in the case.

You are to consider all of the evidence in determining your verdict. However, that does not mean that you must accept all of the evidence as true or accurate.

You should use common sense in considering the evidence, and you should consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from that fact that another fact exists. In law we call this an “inference.” You are allowed to make reasonable inferences. Any inferences that you make must be reasonable and must be based on the evidence in the case.

In determining the facts in 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. You will also have to decide what weight, if any, to give to the testimony of each witness.

In considering the testimony of any witness, you may take into account:

- the opportunity and ability of the witness to see or hear or know the things that the witness testified about;
- the witness' memory;
- the witness' intelligence;
- any interest the witness may have in the outcome of the case, and any bias or prejudice the witness may have;
- the witness' manner while testifying;
- the reasonableness of the witness' testimony in light of all the evidence in the case; and
- any other factors that bear on believability, including candor, forthrightness, and the witness' tax return filing history.

The weight of the evidence as to a particular fact does not necessarily depend on the number of witnesses who testify. You may find the testimony of a smaller number of witnesses to be more persuasive than that of a greater number.

A witness may be discredited or “impeached” by contradictory evidence, by, among other things, a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something that is inconsistent with the witness’ testimony.

If you believe that any witness has been impeached, then you must determine whether to believe the witness testimony in whole, in part, or not at all, and how much weight to give to that testimony.

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

There is more than one defendant in this lawsuit. Each defendant is entitled to fair and separate consideration of the claims made against that defendant. It does not necessarily follow that if one defendant is liable to the plaintiff, then all are liable.

Unless I instruct you differently, all of the instructions that I give you apply to each defendant.

In the following instructions, I will use the term “preponderance of the evidence.” When I use the term “preponderance of the evidence,” I mean evidence that persuades you that a particular proposition is more likely true than not true.

In deciding whether any proposition has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

Plaintiff's claims

Howington has made three claims against the various defendants. In summary form, these claims are as follows:

- 1) Finkelman and Ghourdjian breached a joint venture agreement with Howington;
- 2) Finkelman and Ghourdjian breached their fiduciary duties as joint venturers of Howington;
- 3) Finkelman and Ghourdjian breached their fiduciary duties as directors and officers of SellSignal.com, Inc.

Claim 1 is made against Finkelman and Ghourdjian only; claims 2 and 3 are made against Finkelman, Ghourdjian, and Digital Convergence Corp.

The defendants have denied each of these claims.

In the following instructions, I will describe the requirements for each of these claims.

Joint venture claims - plaintiff's contentions

Howington claims that beginning in late 1998, Howington, Finkelman and Ghourdjian reached an agreement to form a joint venture to develop Howington's stock portfolio tracking idea into a Web site, make money from it, and split the money three ways. Howington claims that pursuant to this agreement, Howington agreed to contribute his stock portfolio tracking idea and his personal services; Ghourdjian agreed to provide Web incubation services and a sum of money; and Finkelman agreed to provide personal services and a sum of money; and that in return each would receive one-third of the venture's profits and each would have an equal say in the affairs of the venture.

Howington claims that defendants Finkelman and Ghourdjian breached their joint venture agreement and their fiduciary duties as his joint venture partner by:

- concealing from Howington that Finkelman had accepted Ghourdjian's offer to become a Digital employee;
- executing the Digital - SellSignal.com Services Agreement and two promissory notes, and approving payments from SellSignal.com to Digital;
- refusing to provide Howington information about SellSignal.com's affairs;
- removing Howington as a director of SellSignal.com;
- making Digital the beneficiary of the Wells Fargo contract; and
- taking actions to make SellSignal.com a worthless shell.

Joint venture claims - defendants' contentions

Finkelman and Ghourdjian claim that they never intended to form a joint venture with Howington and that no joint venture was ever formed. Rather, they contend that it was always their intention to establish a corporation, with Finkelman, Ghourdjian, Howington, and others as shareholders of the corporation. Finkelman and Ghourdjian also contend that even if a joint venture existed, it ended when the corporation, SellSignal.com, Inc., was formed.

Finkelman and Ghourdjian also claim that they have not breached any fiduciary duties or other obligations to Howington.

Digital Convergence Corp. contends that it was a vendor of services to SellSignal.com and that the services for which it invoiced SellSignal.com were in fact rendered, were necessary, and were billed at fair rates.

First claim

Elements of claim for breach of joint venture agreement

Howington's first claim is against defendants Finkelman and Ghourdjian for breach of an alleged joint venture agreement.

To prevail on this claim, Howington must prove each of the following elements by a preponderance of the evidence:

First, that a joint venture agreement existed, as set forth on the next page of these instructions;

Second, that he complied with the terms of the joint venture agreement;

Third, that the defendant breached the terms of the joint venture agreement; and

Fourth, that Howington was damaged as a result of the breach.

You must evaluate these elements separately for each defendant.

If you find from your consideration of all the evidence that Howington has proved each of these elements as to a particular defendant, then you should find for Howington and against that defendant on this claim.

If, on the other hand, you find from your consideration of all the evidence that Howington has failed to prove any one of these elements as to a particular defendant, then you should find for that defendant and against Howington on this claim.

Definition of joint venture

To prove that a joint venture agreement existed, Howington must prove each of the following elements by a preponderance of the evidence:

First, that the alleged members of the joint venture made an agreement to carry on a joint enterprise;

Second, that the members had a common interest in the enterprise;

Third, that the members had an expectation of profits from the enterprise;

Fourth, that the members each had a duty to share profits and losses from the enterprise; and

Fifth, each member had the right to govern the conduct of the other members.

The existence of an agreement can be inferred from the statements and conduct of the parties in light of the surrounding circumstances.

If the members of a joint venture do not specifically determine when the joint venture will end, then it is deemed to continue in effect until its purpose has been accomplished or has become impracticable.

The fact that the members of a joint venture form a corporation may, but does not necessarily, end the joint venture.

Second claim

Fiduciary duty of joint venture members

Howington's second claim concerns the alleged breach by Finkelman and Ghourdjian of their fiduciary duties as members of a joint venture. This claim is made against Finkelman, Ghourdjian, and Digital Convergence Corp.

The members of a joint venture owe each other a "fiduciary" duty to treat each other with good faith, to act for each other's benefit, and to disclose to each other all material facts concerning the joint venture. A "material" fact is one that would make a difference to a reasonable person in the particular circumstances.

Elements of claim for breach of fiduciary duty of joint venturers

To prevail on his claim against Finkelman and Ghourdjian for breach of their fiduciary duties as members of a joint venture, Howington must prove each of the following elements by a preponderance of the evidence:

First, that a joint venture agreement existed, as defined earlier in these instructions;

Second, that the defendant breached his fiduciary duties to Howington; and

Third, that Howington was damaged as a result of the breach.

You must evaluate these elements separately for each defendant.

If you find from your consideration of all the evidence that Howington has proved each of these elements as to a particular defendant, then you should find for Howington and against that defendant on this claim.

If, on the other hand, you find from your consideration of all the evidence that Howington has failed to prove any one of these elements as to a particular defendant, then you should find for that defendant and against Howington on this claim.

Second claim - alleged liability of Digital Convergence Corp.

In his second claim, Howington also contends that Digital Convergence Corp. is liable for the actions of Ghourdjian and Finkelman in connection with their alleged breach of fiduciary duty.

To prevail on his claim against Digital in connection with Ghourdjian and Finkelman's alleged breach of fiduciary duty, Howington must first prove the elements of his claim against Ghourdjian and Finkelman for breach of fiduciary duty as stated in the previous instruction, and must also prove that Digital was aware of the breach of fiduciary duty, cooperated in the breach, and received the benefits of the breach.

Third claim

Claim for breach of fiduciary duty as director or officer

Howington's third claim concerns the alleged breach by Finkelman and Ghourdjian of their fiduciary duties as directors and officer of SellSignal.com. This claim is made against Finkelman, Ghourdjian, and Digital Convergence Corp.

Directors and officers of a corporation have a fiduciary duty to the corporation and its shareholders to exercise independent judgment and to act for the benefit of the corporation and shareholders.

Howington claims that Ghourdjian and Finkelman breached their fiduciary duty as directors and officers of SellSignal.com by taking self-interested actions that benefitted Ghourdjian and Finkelman at SellSignal.com's expense. Howington also claims that Digital Convergence Corp. is liable for the actions of Ghourdjian and Finkelman.

Ghourdjian and Finkelman deny that they sought to benefit themselves at SellSignal.com's expense. With regard to the Services Agreement between SellSignal.com and Digital, Ghourdjian and Finkelman contend that it was entirely fair to SellSignal.com and its shareholders and that the transaction was ratified by the shareholders of SellSignal.com.

Digital Convergence Corp. contends that it was a vendor of services to SellSignal.com and that the services for which it invoiced SellSignal.com were in fact rendered, were necessary, and were billed at fair rates.

Elements of claim for breach of fiduciary duty as director of officer

On this claim, Howington has the burden of proving by a preponderance of the evidence that Ghourdjian and Finkelman used their authority as directors and officers of SellSignal.com to engage in self-dealing. Self-dealing occurs when a director or officer of a corporation has a personal stake in another firm that does business with the corporation, so that the director is in effect “on both sides” of the transaction.

If Howington satisfies his burden, then the burden shifts to defendants to prove by a preponderance of the evidence one of two things: 1) that the transaction was “entirely fair” to SellSignal.com, or 2) that the transaction was properly ratified by the shareholders of the corporation.

To prove that the transaction was “entirely fair” to SellSignal.com, Ghourdjian and Finkelman must show that the transaction involved fair dealing and a fair price.

To prove that the transaction was ratified by the disinterested shareholders of SellSignal.com, Ghourdjian and Finkelman must show that the majority of the disinterested shareholders of the corporation voted to approve the transaction after the transaction had been entered into, after being accurately informed of: 1) the material facts concerning the interest any corporate directors may have had in the transaction, and 2) the material facts concerning the transaction itself. As stated earlier, a “material” fact is one that would make a difference to a reasonable person in the particular circumstances.

Third claim - alleged liability of Digital Convergence Corp.

In his third claim, Howington also contends that Digital Convergence Corp. is liable for the actions of Ghourdjian and Finkelman in connection with their alleged breach of fiduciary duty.

To prevail on his claim against Digital in connection with Ghourdjian and Finkelman's alleged breach of fiduciary duty, Howington must first prove the elements of his claim against Ghourdjian and Finkelman for breach of fiduciary duty as stated in the previous instruction, and must also prove that Digital was aware of the breach of fiduciary duty, cooperated in the breach, and received the benefits of the breach.

Damages

If you decide that Howington has proven either of his first two claims against any of the defendants, you must determine what amount of damages, if any, the defendants have caused to Howington. You should not interpret the fact that I am giving you instructions about damages as an indication in any way that I believe that Howington should, or should not, win this case. It is up to you to decide that question. I am instructing you on damages only so that you will have guidance in the event that you decide that Howington has proven any of his first two claims. You are not to address the issue of damages with regard to Howington's third claim.

Howington has the burden of proving his damages to a reasonable degree of certainty. You may not award damages based on sympathy, speculation, or guesswork. On the other hand, the law does not require Howington to prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

In determining the amount of damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

Compensatory damages

If you decide in favor of Howington on either his first claim (for breach of the alleged joint venture agreement) or his second claim (for breach of fiduciary duties as members of a joint venture), you must fix the amount of money which will reasonably compensate Howington for all loss naturally arising from the breach. These are called “compensatory” damages.

If you determine that Howington has not suffered any monetary damages as a result of the breach, or that you are unable to calculate Howington’s monetary damages without speculation, then you should not award Howington any monetary damages.

In calculating Howington’s damages, you should determine that sum of money that will put him in as good a position as he would have been if the defendants’ alleged breaches had not occurred.

The elements of compensatory damages claimed by Howington in this case are financial losses.

Punitive damages

In addition to compensatory damages, Howington also seeks an award of punitive damages. The law allows you, but does not require you, to award punitive damages on Howington's second claim (for breach of alleged fiduciary duties). Punitive damages are not available on Howington's other claims.

The purpose of punitive damages is to punish a wrongdoer and deter that party, and others like it, from committing similar acts in the future.

You may award Howington punitive damages on his second claim only if you find that he has proven by clear and convincing evidence that the defendant acted with oppression or malice. "Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. This requires a higher standard of proof than proof by a preponderance of the evidence. You must evaluate this separately as to each of the defendants.

If you decide that Howington has met this burden as to a particular defendant, the amount of punitive damages that you award should be consistent with the purposes of punitive damages as stated earlier in this instruction. In addition, the amount of any punitive damages that you award must bear a reasonable relationship to the amount of harm inflicted upon Howington by the particular defendant, and must also bear a reasonable relationship to the amount of any compensatory damages that you have awarded.

If you do award punitive damages, you should fix the amount using calm discretion and sound reason. You must not be influenced by sympathy or dislike for any party in the case.

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

A form of verdict has been prepared for you.

[Explanation of verdict form.]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the form, and each of you will sign it.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the court security officer.

If any communication is made, it should not indicate your numerical division.

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the views of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or solely for the purpose of returning a unanimous verdict.

All of you should give fair consideration to all the evidence and deliberate with the goal of reaching a verdict which is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine the truth from the evidence in case.

VERDICT FORM

We, the jury, unanimously find as follows:

1. First claim (alleged breach of joint venture agreement)

(for each, check one of the two choices)

FOR PLAINTIFF FOR DEFENDANT

- as to defendant Matthew Ghourdjian: _____

- as to defendant Richard Finkelman: _____

We award the following damages to plaintiff on this claim (to be filled in only if you find for the plaintiff against one or more of the defendants on this claim):

Compensatory damages: \$ _____

2. Second claim (alleged breach of fiduciary duty as joint venture members)

(for each, check one of the two choices)

FOR PLAINTIFF FOR DEFENDANT

- as to defendant Matthew Ghourdjian: _____

- as to defendant Richard Finkelman: _____

- as to defendant Digital Convergence Corp: _____

We award the following damages to plaintiff on this claim (to be filled in only if you find for the plaintiff against one or more of the defendants on this claim):

Compensatory damages: \$ _____

Punitive damages:

- as to defendant Ghourdjian: \$ _____

- as to defendant Finkelman: \$ _____

- as to defendant Digital: \$ _____

3. Third claim (alleged breach of fiduciary duty as directors and officers)

A. Do you find that Howington has proved by a preponderance of the evidence that Ghourdjian and Finkelman engaged in self-dealing?

- as to Ghourdjian: yes _____ no _____

- as to Finkelman: yes _____ no _____

B. (to be answered only if you answered “yes” to one of the questions in line A)

Do you find that defendants have proved by a preponderance of the evidence that the transaction between SellSignal.com and Digital Convergence Corp. was “entirely fair” to SellSignal.com?

yes _____ no _____

C. (to be answered only if you answered “yes” to one of the questions in line A)

Do you find that defendants have proved by a preponderance of the evidence that the transaction between SellSignal.com and Digital Convergence Corp. was properly ratified by the disinterested shareholders of SellSignal.com?

yes _____ no _____

Foreperson

Dated: _____, 2001