

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SYNERGY ASSOCIATES, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 02 C 3320
)	
MARY ROSE CUSIMANO,)	
)	
Defendant.)	

INSTRUCTIONS GIVEN TO THE JURY

Date: October 20, 2004

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. 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 earlier, 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, testimony that was read to you from depositions, and the exhibits admitted in evidence.

During the trial, certain testimony was presented to you by the reading of a deposition. Deposition testimony is entitled to the same consideration as testimony that was given in court. You are to judge its truthfulness and accuracy, and you are to weigh and consider it, insofar as possible, in the same way as if the witness had been present and testified from the witness stand.

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

First, testimony and exhibits that I struck from the record, or that I told you to disregard, are 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 it 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, 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 sometimes 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's memory;
- the witness's intelligence;
- any interest the witness may have in the outcome of the case, and any bias or prejudice the witness may have;
- the witness's manner while testifying;
- the reasonableness of the witness's testimony in light of all the evidence in the case; and
- any other factors that bear on believability.

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’s testimony in whole, in part, or not at all, and how much weight to give to that testimony.

In deciding whether any fact has been proven, 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.

The claims

The plaintiff in this case, Synergy Associates, Inc., has made three claims against the defendant, Mary Rose Cusimano. You must consider each claim separately.

In the first claim, Synergy alleges that Cusimano defrauded Synergy in connection with Synergy's decision to advance funds to Sun Biotechnologies, Inc.

In the second claim, Synergy alleges that Cusimano transferred \$15,866 in funds of Sun to herself or for her benefit, without getting reasonably equivalent value in return, when Sun was insolvent.

In the third claim, Synergy alleges that Cusimano transferred \$15,866 in funds of Sun to herself or for her benefit, in order to hinder, delay or defraud Sun's creditors.

First claim - elements

To prevail on its first claim, Synergy must prove the following six things by clear and convincing evidence.

1. Cusimano made a false representation to Synergy about the amount of Sun Biotechnologies, Inc.'s debt.
2. Cusimano knew that the representation was false, or acted with reckless disregard of whether the representation was true or false.
3. Cusimano made the representation with the intent to induce Synergy to enter into the funding agreement.
4. Synergy relied on the representation.
5. In relying on the representation, Synergy acted with ordinary prudence.
6. Synergy was damaged due to its reliance on the representation.

If you find that Synergy has proved each of these things, then your verdict on this claim should be for Synergy, and you should go on to consider the question of damages.

If you find that Synergy has failed to prove any one of these things, then your verdict on this claim should be for Cusimano, and you will have no occasion to consider the question of damages.

First claim - compensatory damages

If you find for Synergy on its first claim, you must then determine the amount of money that will fairly and reasonably compensate Synergy for the damage it suffered as a result of Cusimano's conduct. This is called "compensatory damages." On this claim, you should consider the following elements of compensatory damages, and no others:

- the amount of funds provided by Synergy to Sun Biotechnologies, Inc. pursuant to the funding agreement;
- the interest that Synergy would have earned through the present date on the funds it provided to Sun Biotechnologies, Inc. pursuant to the funding agreement.

If you find for Synergy on its third claim, and if you further find that Cusimano's conduct was willful and wanton, and you further find that justice and the public good require it, you may, in addition to compensatory damages, award an amount that will serve to punish Cusimano and deter her and others from similar conduct. This is called "punitive damages." Willful and wanton conduct is conduct that shows an utter indifference to or conscious disregard for the rights or interests of another.

Punitive damages, if you decide to award them, should be in an amount sufficient to fulfill the purposes of punitive damages that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages that you decide to award, you should consider the following factors:

- the nature and degree of reprehensibility of the defendant's conduct;
- the impact of the defendant's conduct on the plaintiff;
- the relationship between the plaintiff and the defendant;

- the likelihood that the defendant would repeat the conduct if an award of punitive damages is not made;
- the relationship of any award of punitive damages to the amount of actual harm inflicted on the plaintiff;
- the defendant's financial condition.

Second claim - elements

To prevail on its second claim, Synergy must prove the following three things by a preponderance of the evidence. A preponderance of the evidence is evidence that convinces you that the particular proposition is more likely true than untrue.

1. Cusimano transferred assets of Sun Biotechnologies to herself or for her benefit.
2. The transfer was made without receiving reasonably equivalent value in return for the transfer.

3. At the time of the transfer, Cusimano believed, or reasonably should have believed, that Sun Biotechnologies was insolvent or became insolvent as a result of the transfer. A company is insolvent if its debts exceed the fair value of its assets. A company that is generally not paying its debts as they become due is presumed to be insolvent.

If you find that Synergy has proven each of these things, then your verdict on this claim should be for Synergy, and you should go on to consider the question of damages.

If you find that Synergy has failed to prove any one of these things, then your verdict on this claim should be for Cusimano, and you will have no occasion to consider the question of damages.

Second claim - damages

If you find for Synergy on its second claim, you must then determine the amount of money that will fairly and reasonably compensate Synergy for the damage it suffered as a result of Cusimano's conduct. This is called "compensatory damages." On this claim, you should consider the following element of compensatory damages, and no others:

- the transfer of \$15,866 funds by Sun.

Third claim - elements

To prevail on its third claim, Synergy must prove the following two things by clear and convincing evidence.

1. Cusimano transferred assets of Sun Biotechnologies to herself or for her benefit.
2. Cusimano made the transfer with the intent to hinder, delay, or defraud a creditor or creditors of Sun.

To determine whether Cusimano had such intent, you may consider the following factors:

- whether the transfer was made to an “insider” of Sun Biotechnologies;
- whether Sun retained possession or control of the property transferred after the transfer;
- whether Sun had been sued or threatened with suit before the transfer was made;
- whether the transfer was of substantially all of Sun’s assets;
- whether Sun was insolvent or became insolvent shortly after the transfer was made.

The term “insolvent” is defined in the same way as in the instruction regarding the Second Claim.

If you find that Synergy has proven each of these things, then your verdict on this claim should be for Synergy, and you should go on to consider the question of damages.

If you find that Synergy has failed to prove any one of these things, then your verdict on this claim should be for Cusimano, and you will have no occasion to consider the question of damages.

Third claim - damages

If you find for Synergy on its third claim, you must then determine the amount of money that will fairly and reasonably compensate Synergy for the damage it suffered as a result of Cusimano's conduct. This is called "compensatory damages." On this claim, you should consider the following element of compensatory damages, and no others:

- the transfer of \$15,866 funds by Sun.

If you find for Synergy on its third claim, and if you further find that Cusimano's conduct was willful and wanton, and you further find that justice and the public good require it, you may, in addition to compensatory damages, award an amount which will serve to punish Cusimano and deter her and others from similar conduct. This is called "punitive damages." Willful and wanton conduct is conduct that shows an utter indifference to or conscious disregard for the rights or interests of another.

Punitive damages, if you decide to award them, should be in an amount sufficient to fulfill the purposes of punitive damages that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages that you decide to award, you should consider the following factors:

- the nature and degree of reprehensibility of the defendant's conduct;
- the impact of the defendant's conduct on the plaintiff;
- the relationship between the plaintiff and the defendant;
- the likelihood that the defendant would repeat the conduct if an award of punitive damages is not made;
- the relationship of any award of punitive damages to the amount of actual harm inflicted

on the plaintiff;

- the defendant's financial condition.

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. [Read the 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 appropriate 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 re-examine 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 or 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 the case.

Verdict form - page 1

We, the jury, find as follows on the claims of the plaintiff, Synergy Associates, Inc., against the defendant, Mary Rose Cusimano:

Claim 1: _____ For Synergy
 _____ For Cusimano

We assess Synergy's compensatory damages on Claim 1 as follows:

(to be answered *only* if you find for Synergy on Claim 1): \$ _____

We have determined to award Synergy punitive damages

on Count 1, and we assess those damages as follows

(to be answered *only* if you find for Synergy on Claim 1): \$ _____

Claim 2: _____ For Synergy
 _____ For Cusimano

We assess Synergy's compensatory damages on Claim 2 as follows:

(to be answered *only* if you find for Synergy on Claim 2): \$ _____

Claim 3: _____ For Synergy
 _____ For Cusimano

We assess Synergy's compensatory damages on Claim 3 as follows:

(to be answered *only* if you find for Synergy on Claim 3): \$ _____

We have determined to award Synergy punitive damages

on Count 3, and we assess those damages as follows

(to be answered *only* if you find for Synergy on Claim 3): \$ _____

Verdict form - page 2

Foreperson

Date: October ____, 2004