UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

BIOMET ORTHOPEDICS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 3:01 CV 895 PS
	)	
TACT MEDICAL, INC.,	)	
	)	
	)	
Defendant.	)	

COURT'S FINAL JURY INSTRUCTIONS

Date: November 5, 2004

s/ Philip P. Simon
Philip P. Simon, Judge
United States District Court

Court's Instruction No. 1

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you instructions concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply the law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by me.

Neither by these instructions, nor by any ruling or remark I have made, do I mean to indicate any opinion as to the facts or as to what your verdict should be. You are the sole judges of the facts.

Court's Instruction No. 2

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you 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 trial at your hands. The law respects all persons, including corporations, equally; both parties stand equal before the law and are to be dealt with as equals in a court of justice.

Court's Instruction No. 3

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes sworn testimony of the witnesses, the exhibits admitted into evidence, and any stipulated facts. A stipulation is an agreed statement of facts between the parties, and you should regard such agreed statements as true. Any evidence to which I sustained an objection or that I ordered stricken must of course be disregarded. The only issues to be determined by you are those which I will set out in detail later in these instructions.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their respective sides of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding on you.

So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

In determining any fact in issue you may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

Court's Instruction No. 4

There are two types of evidence: direct and circumstantial. Direct evidence is the direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances that tend to show whether or not an asserted fact is true. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Court's Instruction No. 5

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness you should consider: the witness's relationship to any of the parties; the witness's interest, if any, in the outcome of the case; the witness's manner of testifying; the witness's opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the witness's candor, fairness and intelligence; and the extent to which the witness's testimony has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The testimony of a single witness that produces in your minds a belief in the likelihood of its truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

Similarly, the weight of the evidence is not necessarily determined by whether the evidence is in the form of a document or the oral testimony of a witness. It is for you to determine based upon the circumstances surrounding each document and each piece of testimony what weight to give to that evidence.

Court's Instruction No. 6

During the trial, the Court instructed you to consider certain evidence only for specific limited purposes. You must consider such evidence only for those limited purposes.

Court's Instruction No. 7

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 at issue in this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned during this trial.

Court's Instruction No. 8

A witness may be discredited or "impeached" by contradictory evidence, by 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, or has failed to say or do something, that is inconsistent with the witness's present testimony.

If you believe that any witness has been so impeached, then it remains your exclusive province to give the testimony of that witness such credibility or weight, if any, that you think it deserves.

Court's Instruction No. 9

When any witness is questioned about an earlier statement that the witness may have made, or earlier testimony that the witness may have given, such questioning is permitted in order to aid you in evaluating the truth or accuracy of the witness's testimony at the trial. In addition, if that earlier statement was made under oath and is inconsistent with the witness's testimony at the trial, you may consider that earlier sworn statement as evidence of the truth or accuracy of such earlier statement.

Whether or not such prior statements of a witness are, in fact, consistent or inconsistent with the witness's trial testimony is entirely for you to determine.

Court's Instruction No. 10

The purpose of the attorneys' opening statements is to acquaint you in advance with the facts the attorneys expect the evidence to show. The purpose of the attorneys' closing arguments is to discuss the evidence actually presented. Opening statements, closing arguments and other statements of counsel should be disregarded to the extent that they are not supported by the evidence.

During the course of a trial it often becomes the duty of counsel to make objections and for me to rule on them in accordance with the law. The fact that an attorney made objections should not influence you in any way. Nor should the nature or manner of my ruling on any objection influence you in any way.

Whenever I have sustained an objection to a question addressed to a witness you must disregard the question entirely, and draw no inference from the wording of it, or speculate as to what the witness would have said if he or she had been permitted to answer the question. You should also disregard any answer the witness may have given prior to my ruling on the objection.

Court's Instruction No. 11

During the trial, certain testimony was presented to you by the reading of a deposition or the playing of a video deposition. This testimony is entitled to the same consideration you would give it had the witness personally appeared in court.

Court's Instruction No. 12

You have heard testimony of an expert witness. This testimony is admissible where the subject matter involved requires knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding on you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given to the expert opinion in light of all the evidence in the case.

Court's Instruction No. 13

Biomet's Claim that TACT Failed to Use Best Efforts

Biomet claims that TACT breached the Agreement they had with each other. Specifically, Biomet claims that TACT breached Section 1.3 of the parties' Agreement. Section 1.3 of the Agreement required TACT to use its best efforts to promote and sell Biomet products in Japan and to develop the market for Biomet's products in Japan. Biomet has the burden of proving these claims by a preponderance of the evidence.

TACT denies that they breached Section 1.3 of the parties' Agreement. TACT has no burden to disprove these claims of the Plaintiff; as I already stated, it is Biomet who has the burden to prove these claims.

TACT has claimed a defense to Biomet's breach of contract claim, and has the burden of proving that defense by a preponderance of the evidence. If you find that TACT breached the contract, then you must consider the defense that TACT raised. That defense is that Biomet waived its right to enforce Section 1.3. Even if you find that TACT breached Section 1.3 of the Agreement, if you find that Biomet waived its right to enforce Section 1.3, you should find in favor of TACT on this part of the case.

Court's Instruction No. 14

Parties may mutually modify contractual undertakings, and it is not always necessary to prove a written or oral modification of a contract because modification of a contract can be implied from the conduct of the parties. Even a contract providing that any modification thereof must be in writing may nevertheless be modified orally.

Court's Instruction No. 15

A breach of contract occurs when a party fails to perform all the obligations it agreed to undertake.

Court's Instruction No. 16

In order for Biomet to recover from TACT for breaching the best efforts obligation of the contract, Biomet must prove the following elements:

(1) That TACT and Biomet entered into a contract;

(2) That Biomet performed its part of the contract;

(3) That TACT failed to perform its part of the contract or performed in a defective manner; and

(4) That TACT's breach of contract damaged Biomet.

If you find that Biomet has not proved any one of these elements, your verdict should be for TACT with regards to the alleged breach of the best efforts obligation of the contract. If you find that Biomet has proven all of these elements, then you must consider TACT's defense of waiver. If you find that TACT has not proved its defense, then your verdict should be for Biomet with regards to the alleged breach of the best efforts obligation of the contract.

Court's Instruction No. 17

"Best efforts" requires the party to make a diligent, reasonable and good faith effort to accomplish the contract's objective. The obligation takes into account unanticipated events and does not require such events be overcome at all costs. It requires only that the party exercise all reasonable efforts within a reasonable time to overcome any hurdles and accomplish the contract's objective. It does not require the party to accomplish a particular result.

Court's Instruction No. 18

TACT has raised the defense of waiver. If you find that TACT breached the contract, you must consider this defense. A waiver is the voluntary and intentional giving up of a known right. Before you can find that a party waived a right, you must find that the party acted with full knowledge of the right and that the party intended to give up that right. Waiver can be either express or implied. The existence of waiver may be implied from acts, omissions, or conduct. There must be a finding that there was a clear, unequivocal and decisive act showing the waiver. Mere silence, acquiescence or inactivity is not waiver unless there is a duty to speak.

TACT bears the burden of proving the defense of waiver. If you find from a preponderance of the evidence that TACT has proven that Biomet acted in such a way as to waive its right to enforce a breach of the best efforts requirement in the parties' contract, then your verdict must be for TACT on this issue.

Court's Instruction No. 19

If you find that TACT has breached its best efforts obligation under the contract and not proved its defense of waiver, the measure of Biomet's damages is the sum that would put Biomet in the same position it would have been in had the contract been fulfilled.

Biomet may only recover the loss actually suffered and should not be placed in a better position than before the breach.

Court's Instruction No. 20

In a claim for breach of contract, a party may recover only those damages that are the natural and proximate consequence of the breach, and those reasonably anticipated by the parties when they entered into the contract.

Consequential damages, losses that do not flow directly and immediately from an injurious act but that result indirectly from the act, may be awarded on a breach of contract claim when the non-breaching party's loss flows naturally and probably from the breach and was contemplated by the parties when the contract was made. Consequential damages may include lost profits, provided the evidence is sufficient to allow you to estimate the amount with a reasonable degree of certainty and exactness. You may not award damages on the mere basis of conjecture and speculation. However, lost profits need not be proved with mathematical certainty. Lost profits are not uncertain where there is testimony that, while not sufficient to put the amount beyond doubt, is sufficient to enable you to make a fair and reasonable finding as to the proper damages.

Court's Instruction No. 21

Claims Regarding the Meaning of Section 2.3 of the Agreement

In addition to Biomet's claim regarding the best efforts obligation, both TACT and Biomet have filed claims for declaratory judgment seeking a declaration regarding the meaning of Section 2.3 of their Agreement. However, a party first guilty of a material breach of a contract may not seek to enforce the contract against the other party while they are in breach. Thus, if TACT breached the best efforts clause, they cannot enforce Section 2.3, and you need not consider the rest of this section regarding the meaning of Section 2.3 of the Agreement.

Court's Instruction No. 22

Section 2.3 of the contract between Biomet and TACT is ambiguous. A contract term is considered ambiguous when its terms, or the words used, can reasonably support different interpretations. Biomet claims that Section 2.3 does not require Biomet to repurchase the inventory of Biomet products that TACT had in its possession when the Agreement expired. In contrast, TACT claims that Section 2.3 does require Biomet to repurchase all of the inventory that TACT had in its possession when the Agreement expired, including non-saleable items such as used, expired, obsolete, and customized product, and the samples and instruments.

It is your job to decide the meaning of Section 2.3 after considering all of the evidence presented. Each party must prove their interpretation of Section 2.3 of the Agreement by a preponderance of the evidence.

Court's Instruction No. 23

You are to interpret ambiguous terms to give effect to the intent of the parties at the time the contract was made, as reflected by the language that was used. You should construe any ambiguities in the Agreement against the party that drafted the ambiguous provision. In interpreting the ambiguous terms of the contract, you should consider:

1) the nature of the agreement, together with all the facts and circumstances leading up to the execution of the contract, the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract;

2) the customs and practices within the orthopedic medical supplies industry; those engaged in a particular industry and accustomed to dealing with others engaged in that same industry can be presumed to know the uniform custom and practice of the industry, and you may reasonably suppose, absent an agreement to the contrary, that the parties included their industry's customs and practices in the Agreement; and

3) the parties subsequent conduct as it related to the Agreement.

In determining what the parties intended by the use of ambiguous terms, the subjective intent of only one of the parties cannot guide you in the interpretation of the contract. The parties' intention, which controls in interpreting a contract, is not the secret design in one party's mind, but the intention expressly declared or flowing, patently to all, from the nature and character of the act and the purposes to be served.

Court's Instruction No. 24

The entire contract must be read together. Words, phrases, sentences, paragraphs and sections cannot be read alone. You should not lift isolated clauses out of their context and consider them without reference to the contract as a whole, and the facts and circumstances existing when the contract was made. No part of a contract should be treated as redundant or unnecessary if a meaning reasonable and consistent with the other parts can be given. In other words, you should interpret the agreement in a manner that will harmonize its provisions as a whole and give effect to the parties intentions. A literal or technical construction of an isolated clause should not be used if it defeats the true meaning of the contract as a whole.

The construction that is to be adopted in construing a contract is one which appears to be in accord with justice and common sense and the probable intention of the parties in light of honesty and fair dealing and to accomplish and serve the purpose intended by the parties as disclosed by the evidence.

Court's Instruction No. 25

If you find that Section 2.3 of the Agreement does not require Biomet to repurchase the inventory that TACT had in its possession when the Agreement expired, then you must find for Biomet on this issue. But if you find that Section 2.3 of the Agreement does require Biomet to repurchase the inventory that TACT had in its possession when the Agreement expired, then you must next consider these defenses raised by Biomet:

1) that TACT violated parts of the Indiana Commercial Code; and

2) that TACT waived its rights to enforce Biomet's alleged obligation to buy back its inventory of Biomet products.

Biomet bears the burden of proving these defenses by a preponderance of the evidence. If you find that Biomet has proven either of them by a preponderance of the evidence, then you must find for Biomet on this issue. But if you find that they have not, and TACT has proven that Section 2.3 of the Agreement requires Biomet to repurchase the inventory, you must find for TACT.

Court's Instruction No. 26

Indiana has adopted a law called the Indiana Commercial Code, and it covers transactions involving the sale of goods. The Indiana Commercial Code imposes an obligation that all contracts for the sale of goods will be performed or enforced in good faith, which means honesty in fact and the observance of reasonable commercial standards.

Under the Indiana Commercial Code, agreements to sell goods require the seller to tender delivery of the goods–meaning that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. If you find that the Agreement does not specify the place or means for tender of delivery, then the place for delivery of goods is the seller's place of business. If, on the other hand, the seller is required or authorized to ship the goods, but the contract does not require the seller to deliver them at a particular destination, then unless otherwise agreed, the seller must ship the goods as may be reasonable having regard to the nature of the goods and other circumstances and promptly notify the buyer of the shipment. Failure to make a proper shipment or to notify the buyer is a ground for rejection only if material delay or loss results. The seller is also obligated to deliver to the buyer goods that conform to the contract's requirements. If the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may reject the goods.

You must decide whether TACT violated these provisions of the Indiana Commercial Code. If you find that they have, then you must find in favor of Biomet.

Court's Instruction No. 27

If you find that TACT has proven that Section 2.3 of the Agreement requires Biomet to repurchase TACT's inventory of Biomet product, you must consider Biomet's defense of waiver. A waiver is the voluntary and intentional giving up of a known right. Before you can find that a party waived a right, you must find that the party acted with full knowledge of the right and that the party intended to give up that right. Waiver can be either express or implied. The existence of waiver may be implied from acts, omissions, or conduct. There must be a finding that there was a clear, unequivocal and decisive act showing the waiver. Mere silence, acquiescence or inactivity is not waiver unless there is a duty to speak.

Biomet bears the burden of proving the defense of waiver. If you find from a preponderance of the evidence that Biomet has proven that TACT acted in such a way as to waive its right to enforce Section 2.3 of the Agreement, then your verdict must be for Biomet on this issue.

Court's Instruction No. 28

Upon retiring to the jury room, you should first select one of your number to act as your foreperson. The foreperson will then preside over your deliberations and act as your spokesperson here in court.

You will take the verdict form with you to the jury room. When you reach unanimous agreement as to your verdict, the foreperson should fill in the verdict form, all of you should sign it, and then you should tell the court security officer to inform me that you have reached a verdict.

If, during deliberations, you should desire to communicate with the court, please reduce your message or question to writing and have the foreperson sign the note and include the date and time. Then, pass the note to the courtroom security officer, who will bring it to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you in person.

With respect to any message or question that you provide to the court during your deliberations, please be advised of the following rules. First, do not state or specify, your numerical division at any time; that is, do not inform the court or even hint at how many among you were or are in favor or against reaching any particular verdict. Also, please be advised that the court cannot supply you with transcripts of any of the trial testimony.

Court's Instruction No. 29

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 view, and listen to the opinions 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 believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to seek the truth from the evidence on the case.