UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

SIOUX FALLS KENWORTH, INC., d/b/a/ ISUZU TRUCKS OF SIOUX FALLS, Plaintiff, vs. ISUZU COMMERCIAL TRUCK OF AMERICA, INC., Defendant.	4:14-CV-04187-RAL FINAL JURY INSTRUCTIONS

FINAL INSTRUCTION NO. 1

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions. The instructions I am about to give you now are in writing and will be available to you in the jury room.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important.

All instructions, whenever given and whether in writing or not, must be followed.

FINAL INSTRUCTION NO. 2

From the evidence, you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think your verdict should be.

FINAL INSTRUCTION NO. 3

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

FINAL INSTRUCTION NO. 4

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses, documents and other things received as exhibits, and any facts that have been stipulated—that is, formally agreed to by the parties.

Certain things are not evidence. I shall list those things for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

FINAL INSTRUCTION NO. 5

During the trial, certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness was in court, and you should consider this testimony together with all other evidence received.

FINAL INSTRUCTION NO. 6

You have heard testimony from a person described as an expert. A person who, by knowledge, skill, training, education, or experience, has become an expert in some field may state opinions on matters in that field and may also state the reasons for those opinions.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

FINAL INSTRUCTION NO. 7

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement or acted in a manner inconsistent with the witness's testimony in this case on a matter material to the issue. You may consider evidence of this kind in connection with all of the other facts and circumstances in evidence in deciding the weight to give the testimony of that witness.

FINAL INSTRUCTION NO. 8

In civil actions, the party who has the burden of proving an issue must prove that issue by a preponderance of the evidence.

"Preponderance of the evidence" means the greater weight of the evidence or the greater convincing force of the evidence. Preponderance of the evidence means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard that applies in criminal cases. It does not apply to civil cases such as this.

FINAL INSTRUCTION NO. 9

Sioux Falls Kenworth's first claim concerns SDCL § 32-6B-45. Under § 32-6B-45, a franchisor like Isuzu may not terminate a franchise agreement without good cause. Good cause is defined as the "failure by a vehicle dealer to substantially comply with essential and reasonable requirements imposed upon the vehicle dealer by the vehicle dealership agreement, if the requirements are not different from those requirements imposed on other similarly situated vehicle dealers by their terms." In addition, good cause to terminate a franchise agreement exists if the vehicle dealer "has engaged in conduct which is injurious or detrimental to the dealer's customers or to the public welfare."

Section 32-6B-45 also contains what the parties have referred to as a "notice and cure" requirement, which states: "A vehicle manufacturer shall provide a vehicle dealer at least ninety days prior written notice of termination, cancellation, or nonrenewal of the dealership agreement. The notice shall state all reasons constituting good cause for the action and shall provide that the dealer has sixty days in which to cure any claimed deficiency. If the deficiency is rectified within sixty days, the notice is void." The notice and cure requirement does not apply if the reason for termination is that the vehicle "dealer has engaged in conduct which is injurious or detrimental to the dealer's customers or to the public welfare."

Sioux Falls Kenworth claims that Isuzu violated § 32-6B-45 by terminating the franchise agreement without good cause and without complying with the notice and cure requirement. Isuzu contends that it properly terminated the franchise agreement because Sioux Falls Kenworth committed conduct that was injurious to the public and its customers.

To determine whether Isuzu violated § 32-6B-45, you must answer the following questions:

1. Did Sioux Falls Kenworth engage in conduct that was injurious or detrimental to Sioux Falls Kenworth's customers or the public welfare?

If your answer to this question is "yes," your verdict on the wrongful termination claim must be for Isuzu. If your answer is "no," or you are unable to agree on a verdict as to Question No. 1, proceed to Questions No. 2 and 3. You are to use the preponderance of the evidence standard, also known as the greater weight of the evidence standard, in answering these questions. If you find that the evidence is in balance, such that the weight of the evidence is exactly 50%–50%, then so indicate on the verdict form and this Court will provide you further instructions. Rarely is evidence exactly 50%–50%, so you should endeavor to decide this question using the preponderance of the evidence standard.

2. Did Sioux Falls Kenworth fail to substantially comply with the essential and reasonable requirements imposed upon Sioux Falls Kenworth by the franchise agreement, if the requirements are not different from those requirements imposed on other similarly situated vehicle dealers by their terms?

You are to use the preponderance of the evidence standard, also known as the greater weight of the evidence standard, in answering this question. If you find that the evidence is in balance, such that the weight of the evidence is exactly 50%–50%, then so indicate on the verdict form and this Court will provide you further instructions. If you answered Question No.

2 "yes," then in answering Question No. 3 and in any determination of damages, you may consider whether it would have made any difference if Isuzu had given a notice and opportunity to cure; that is, whether Sioux Falls Kenworth would have cured any substantial failure to comply with the essential and reasonable requirements of the franchise agreement. Regardless of how you answer Question No. 2, you are to consider Question No. 3.

3. Did Isuzu's violation of SDCL § 32-6B-45 legally cause damages to Sioux Falls Kenworth?

If you reach this question and your answer to this question is "yes," your verdict on the wrongful termination claim must be for Sioux Falls Kenworth. You are then to consider the amount of damages that Sioux Falls Kenworth has proven by a preponderance of the evidence was legally caused by a violation of SDCL § 32-6B-45. If your answer is "no," your verdict on the wrongful termination claim must be for Isuzu. On this question, Sioux Falls Kenworth has the burden of proof by a preponderance of the evidence, which means by the greater weight of the evidence.

FINAL INSTRUCTION NO. 10

Under South Dakota law, the sole fact that Isuzu wanted Sioux Falls Kenworth to sell more trucks, parts, or service in order to achieve greater market penetration is not a legally sufficient reason for terminating Sioux Falls Kenworth's dealership. You may not find this to be "good cause" for termination.

FINAL INSTRUCTION NO. 11

Sioux Falls Kenworth's next claim is for breach of contract, alleging that Isuzu breached the franchise agreement in how it terminated the agreement. Sioux Falls Kenworth has the burden of proof by the preponderance of the evidence on this claim. Article V.A.3. of the franchise agreement provides that if Isuzu desires to terminate the agreement for failure of performance, Isuzu will endeavor to review the failures with Sioux Falls Kenworth and will determine based on Sioux Falls Kenworth's plan whether it can remedy any failure and, if so, then allow Sioux Falls Kenworth a reasonable amount of time in which to remedy any failure. The termination procedure described in Article V.A.3. of the franchise agreement does not apply if Sioux Falls Kenworth submitted false or fraudulent warranty reimbursement claims.

To determine whether Isuzu breached the franchise agreement, you must answer the following questions:

1. Did Sioux Falls Kenworth submit any false or fraudulent warranty reimbursement claims? For a warranty reimbursement claim to be false or fraudulent, the entity submitting the claim must know that the claim is false or act in deliberate ignorance or reckless disregard of the falsity of the claim. A mere mistake by itself does not make a claim false or fraudulent.

If your answer to Question No. 1 is "yes," your verdict on the breach of contract claim must be for Isuzu. If your answer is "no," proceed to Question No. 2.

2. Were there any failures of performance by Sioux Falls Kenworth?

If your answer to Question No. 2 is "no," then skip Questions No. 3 and 4 and answer Question No. 5. If your answer to Question No. 2 is "yes," proceed to Question No. 3.

3. Did Isuzu breach the franchise agreement by failing to follow the procedure in Article V.A.3. of the franchise agreement?

If your answer to Question No. 3 is "no," your verdict on the breach of contract claim must be for Isuzu. If your answer is "yes," proceed to Question No. 4.

4. Would Sioux Falls Kenworth have proposed a plan and remedied any breach of the franchise agreement within a reasonable time period?

If your answer to Question No. 4 is "no," then your verdict on the breach of contract claim must be for Isuzu. If your answer is "yes," proceed to Question No. 5.

5. Did Isuzu's breach of contract legally cause Sioux Falls Kenworth damage?

If your answer to question No. 5 is "no," your verdict on the breach of contract claim must be for Isuzu. If your answer to Question No. 5 is "yes," your verdict on the breach of contract claim must be for Sioux Falls Kenworth.

FINAL INSTRUCTION NO. 12

Sioux Falls Kenworth's next claim is that Isuzu breached the implied covenant of good faith and fair dealing by failing to properly pay warranty claims made by Sioux Falls Kenworth to Isuzu. Every contract contains an implied covenant of good faith and fair dealing which allows an aggrieved party to sue for breach of contract when the other contracting party, by its lack of good faith, limited or completely prevented the aggrieved party from receiving the reasonably expected benefits of the contract.

"Good faith" is defined as honesty in fact in the conduct or transaction concerned. The meaning of good faith varies with the type of contract involved. The implied covenant of good faith must arise from the language used in the contract or it must be indispensable to carry out the intention of the parties to the contract.

A lack of good faith in performance of a contract may be identified by, among other things, the following conduct: evasion of the spirit of the contract, abuse of power to determine compliance, or interference with or failure to cooperate with the other parties' performance. The intention of the parties may be established by the custom and usage of the trade or business.

FINAL INSTRUCTION NO. 13

Sioux Falls Kenworth claims that Isuzu in handling warranty claims violated SDCL §§ 32-6B-58 and 32-6B-61. Section 32-6B-61 provides:

> **Schedule of compensation for warranty work**. The schedule of compensation for warranty work shall include reasonable compensation for diagnostic work, as well as repair service, parts, and labor. Time allowances for diagnosis and performance of warranty work and service shall be adequate for the work to be performed. The hourly labor rate paid to the dealer for warranty services may not be less than the rate charged by the dealer for like service to nonwarranty customers for nonwarranty service. Reimbursement for parts used in the performance of warranty repair may not be less than the current retail rate customarily charged by the vehicle dealer for such parts. Each manufacturer, in establishing a schedule of compensation for warranty work, shall rely on the vehicle dealer's written schedule of hourly labor rates and parts and may not obligate any vehicle dealer to engage in unduly burdensome documentation thereof, including, without limitation, obligating vehicle dealers to engage in transaction by transaction calculations.

Section 32-6B-58 states that if a manufacturer rejects for technical reasons a dealer's claim for reimbursement for warranty parts or work, the dealer may put the claim into proper form and resubmit it.

Sioux Falls Kenworth asserts that Isuzu violated SDCL §§ 32-6B-58 and 32-6B-61 by underpaying Sioux Falls Kenworth for warranty parts and warranty service work. Sioux Falls Kenworth has the burden of proof by a preponderance of the evidence on this claim. Isuzu disputes this assertion, arguing that Sioux Falls Kenworth was requesting payment at rates above those required by §§ 32-6B-58 and 32-6B-61. Isuzu also contends that it did not require Sioux Falls Kenworth to engage in unduly burdensome documentation when it asked Sioux Falls Kenworth for a one-time submission of 50 and then of 100 consecutive repair orders to substantiate that its customary parts mark-up rate was 58%.

To determine whether Isuzu violated SDCL §§ 32-6B-58 and 32-6B-61, you must answer the following questions:

1. Did Sioux Falls Kenworth in fact have a 58% markup of Isuzu parts as what it customarily charged?

2. Did Isuzu fail to pay Sioux Falls Kenworth for time that was adequate for the service work performed in connection with warranty work?

If you answered "no" to Questions No. 1 and 2, your verdict on Sioux Falls Kenworth's claim that Isuzu violated SDCL §§ 32-6B-58 and 32-6B-61 must be for Isuzu. However, if you answered "yes" to either Questions No. 1 or 2, proceed to Questions No. 3 and 4.

3. Did Isuzu's violation of §§ 32-6B-58 and 32-6B-61 limit or completely prevent Sioux Falls Kenworth from receiving the reasonably expected benefits of the contract?

4. Did Isuzu's conduct legally cause Sioux Falls Kenworth damages?

If your answer to either Questions No. 3 or 4 is "no," your verdict on Sioux Falls Kenworth's claim that Isuzu breached the implied covenant of good faith and fair dealing by violating SDCL §§ 32-6B-58 and 32-6B-61 must be for Isuzu. If your answers to Questions No. 3 and 4 are "yes," your verdict on Sioux Falls Kenworth's claim that Isuzu breached the implied covenant of good faith and fair dealing by violating SDCL §§ 32-6B-58 and 32-6B-61 must be for Sioux Falls Kenworth.

FINAL INSTRUCTION NO. 14

Sioux Falls Kenworth also claims that Isuzu breached the implied covenant of good faith and fair dealing by withholding payments for warranty service work that were undisputed. Isuzu denies this allegation and asserts that it acted in good faith in all of its dealings with Sioux Falls Kenworth.

Sioux Falls Kenworth has the burden of proof by a preponderance of the evidence on this claim. To establish that Isuzu breached the implied covenant of good faith and fair dealing by withholding payments for warranty service work that was undisputed, Sioux Falls Kenworth must prove the following elements:

1. Isuzu limited or completely prevented Sioux Falls Kenworth from receiving the reasonably expected benefit of the franchise agreement by withholding payment for warranty service work that was undisputed; and

2. Isuzu's conduct legally caused Sioux Falls Kenworth damages.

If you find that each of these two elements has been proved by a preponderance of the evidence, your verdict on the claim that Isuzu breached the implied covenant of good faith and fair dealing by withholding payments for undisputed warranty service work must be for Sioux Falls Kenworth. If, on the other hand, any of these elements has not been proved by a preponderance of the evidence, then your verdict must be for Isuzu.

FINAL INSTRUCTION NO. 15

Some of these jury instructions use the phrase "legally caused." A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred. A legal cause does not need to be the only cause of a result. A legal cause may act in combination with other causes to produce a result. For a legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of, and not merely remotely connected to the events leading up to the injury.

INSTRUCTION NO. 16

Sioux Falls Kenworth seeks damages from Isuzu under more than one legal theory. However, each item of damages may be awarded, if at all, only once, regardless of the number of legal theories alleged. Sioux Falls Kenworth has the burden of proving by a preponderance of the evidence the amount of damages, if any, it is entitled to recover.

FINAL INSTRUCTION NO. 17

If you find that Isuzu violated SDCL § 32-6B-45 or breached the franchise agreement in its termination of Sioux Falls Kenworth and that Sioux Falls Kenworth was thereby damaged, you must determine the amount of damages this conduct caused Sioux Falls Kenworth. The measure of damages for a breach of contract is the amount that will compensate the aggrieved party for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach. Damages for a breach of contract that are not clearly ascertainable in both their nature and origin are unrecoverable.

Sioux Falls Kenworth claims breach of contract damages in the form of lost net profits from no longer being an Isuzu dealer; costs of its Isuzu parts and inventory; and signage expense.

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 18

If you find that Isuzu violated §§ 32-6B-58 and 32-6B-61 and thereby breached the implied covenant of good faith and fair dealing or otherwise breached that implied covenant in handling warranty claims, you must determine the amount of damages this breach caused Sioux Falls Kenworth. The measure of damages for a breach of the implied covenant of good faith and fair dealing is the amount that will compensate the aggrieved party for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach. Damages for a breach of the implied covenant of good faith and fair dealing that are not clearly ascertainable in both their nature and origin are unrecoverable.

Sioux Falls Kenworth claims damages for breach of the implied covenant of good faith and fair dealing in the form of not collecting a 58% part markup on parts used for warranty work, not getting its claimed hours for service work on warranty claims paid, and not getting paid at all for certain warranty work.

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

INSTRUCTION NO. 19

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The fact and cause of the loss must be established with reasonable certainty. Once future detriment is established, the law does not require certainty as to the amount of such damages. Thus, once the existence of such damages is established, recovery is not barred by uncertainty as to the measure or extent of damages, or the fact that they cannot be measured with exactness. On the other hand, an award of future damages cannot be based on conjecture, speculation, or mere possibility.

FINAL INSTRUCTION NO. 20

If you find in Sioux Falls Kenworth's favor on any of its claims, you must consider Isuzu's mitigation defense. A company that is damaged by another's misconduct must exercise reasonable diligence and effort to minimize existing damages and to prevent further damages. Sioux Falls Kenworth cannot recover money for damages which could have been avoided by the exercise of reasonable diligence and effort. The burden is on Isuzu to prove that any damages to Sioux Falls Kenworth attributable to Isuzu's misconduct could have been avoided if Sioux Falls Kenworth had exercised reasonable diligence and effort.

FINAL INSTRUCTION NO. 21

Isuzu contends that Sioux Falls Kenworth materially breached the franchise agreement and that any breach by Isuzu occurring after Sioux Falls Kenworth's initial breach is therefore excused. A material breach of a contract, unless it is waived, excuses the non-breaching party from further performance. A breach of contract is "material" if it would defeat the very object of the contract. Isuzu bears the burden of proving by a preponderance of the evidence that Sioux Falls Kenworth committed a material breach of the franchise agreement. If you find that Sioux Falls Kenworth materially breached the franchise agreement, Sioux Falls Kenworth may not recover damages for any breach by Isuzu that occurred after Sioux Falls Kenworth's initial breach.

INSTRUCTION NO. 22

This Court has determined that Sioux Falls Kenworth has waived any claim to be entitled to more than a 40% parts markup, which is the rate set forth in the franchise agreement, predating December 17, 2013 when it first sought a higher parts markup rate on warranty claims from Isuzu. Sioux Falls Kenworth also has waived any claim to be entitled to "other labor hours," unless such "other labor hours" were submitted to Isuzu with some explanation, whether by repair order or otherwise.

A waiver occurs when one in possession of a right, whether obtained by law or by agreement, who with full knowledge of the facts, voluntarily and intentionally does or fails to do something inconsistent with the enforcement of that right. To support a defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to give up the existing right. A party who has waived a right cannot recover damages based on that right.

The party that has asserted the existence of a waiver has the burden of proving waiver by a preponderance of the evidence.

FINAL INSTRUCTION NO. 23

A form of Special Verdict will be submitted to you. You are required to provide written answers to certain questions in this Special Verdict. The questions are to be answered with "Yes" or "No" or other brief answer. When you have unanimously agreed to all of the answers to the questions, that will be the verdict of the jury. The foreperson will write the answers of the jury in the space provided opposite the question. You will refrain from answering any question that has become moot by your answer to a previous question.

FINAL INSTRUCTION NO. 24

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Fourth, during your deliberations, you must not communicate with or provide any information to anyone other than by note to me by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, Snapchat, LinkedIn, Instagram, YouTube, or Twitter, to communicate to anyone information about this case or to conduct any research about this case until I accept your verdict.

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court security officer that you are ready to return to the courtroom. Depending on what your verdict is, you may have additional issues to consider.