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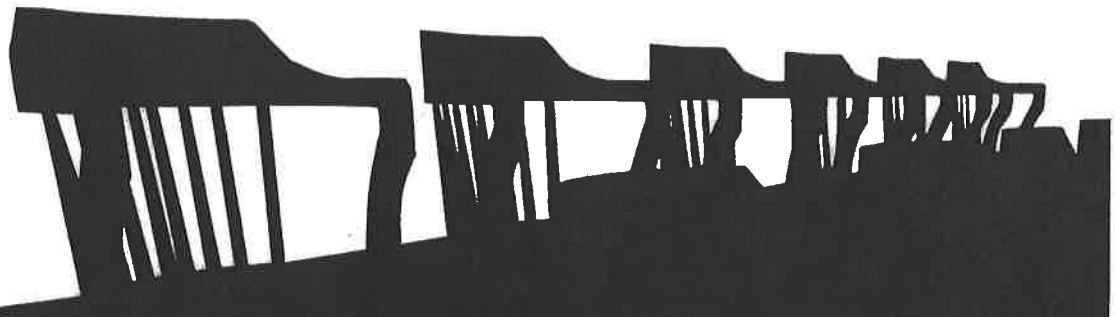
ON THE Jury Trial

PRINCIPLES AND PRACTICES FOR EFFECTIVE ADVOCACY



THOMAS M. MELSHEIMER

and

JUDGE CRAIG SMITH

The crowd—there was a bit of an uproar, and from the crowd voices said, "Wait a minute. Why are the other boys not the winners? Why not the boy who grew it the best?"

The king said, "No, this was not a test of who could grow the most. It was a test of character. The one thing that a king must have is the trust of his people. He cannot be dishonest. This boy proved his honesty."

When you get back there to the jury room, please remember, integrity counts. And sometimes it is hard—it is hard to come by, and it has been in this courtroom. And please remember Mr. Schultz was the man in charge. Dr. T was a knowing participant.

Dr. Garcia and I will be waiting to shake your hands when you come out.

Thank you.

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The lawyer is all in on this story. It's rather lengthy, and takes time to tell properly. In most cases, a story like this would be far too long and your time would be better spent arguing the facts. If you are going to do something like this, you need to make sure the story fits your facts like a glove. But the story is memorable, and carries a moral that the jury will likely understand.

Breach of Fiduciary Duty Closing

Here is an example, with excerpts from both sides, of a closing in a breach of fiduciary duty case where a group of minority shareholders sued the majority shareholders, and those acting in concert with them, for wrongfully devaluing their interest in a company called EMS. We note where appropriate the good use of the rules and advice we have described earlier in this chapter.

Good morning. I want to start off by thanking you for the time that you've spent on this case. From the questions that you've had, from your

attention, it's clear that you're taking this matter very seriously and fairly. And that's all we can ask.

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It's always a good idea to thank the jury. Be sincere. Don't overdo it.

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In fact, I think that as we review the evidence, all the evidence, I think it's beyond any real dispute that you, the ladies and gentlemen of the jury, are the first people to see the truth, the whole truth of how these minority shareholders, Mr. Casey, Mr. Murphy and Mr. Martin, have been treated by the defendants in the case.

I have in front of me some questions that you'll answer on the verdict form and as well as some language from the charge, and I'll be referring to that as we continue.

As my partner told you in his opening, this case is founded on some fundamental principles that are critical to our system of justice—good faith and fairness. And the evidence you've heard in this case proved the defendants acted neither fairly, nor in good faith, nor in compliance with the written agreements that they signed.

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In the very beginning of his argument, the lawyer has referred to the opening statement in an attempt to remind the jury that what his side said they would prove, they did.

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Now, let's look first at the written agreements that the defendants signed but have breached and ignored time and time again. This is from the certificate, Exhibit 677. And you'll see that it sets out that the term CCV shall mean the gross assets of the corporation, as defined, as determined as of the business day preceding the measurement date minus the liabilities.

Gross assets mean everything. The aggregate amount of cash, the market value of securities, and then at the bottom the fair market value of any other assets of the corporation. You get gross assets. Then out of gross assets, you take out liabilities. And the term liability shall mean the contingent liabilities, and this is important, and the present value determined in that cash flow analysis. That means they had to be known and determined at the time this agreement was entered into.

And in determining the present value of the liabilities, what are you supposed to do? What did they agree to do? They agreed to employ in good faith, the same methodology and the same assumptions that they did in 1998. So you got to do it the same way in 2005, that you did in 1998, and you have to do it in good faith.

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The case is governed by a few key documents and, indeed, a few key clauses in those documents. The lawyer rightly emphasizes these clauses to the jury.

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No one—no one disputes that these are the governing documents in the case. And no one disputes that these are the rules that these defendants were supposed to follow in valuing Mr. Casey, Mr. Murphy, and Mr. Martin's interest.

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We know that EMS had great success. It worked out well, very well, maybe better than anyone had hoped. They saved money in all kinds of ways. Instead of litigating to the grave, which was NL's old way of doing things, they worked to settle cases more quickly so they could have more money to spend on environmental cleanup. On other sites, like Sayreville, they worked hard to clean up that property, so that it would be attractive to potential folks that might want to buy the property and thus create value for NL and for EMS.

One of you posed a question to Mr. Hardy about whether or not he agreed that EMS had been a success and he told you it was. So it should come as no surprise to anyone that Mr. Casey, Mr. Martin and Mr. Murphy looked forward to putting their shares back to the company in June of 2005. It was no surprise. In fact, as we now know and you know, NL unbeknownst to anyone started working on this valuation way back in 2004. And I submit to you that this is the beginning of the evidence that proves the defendants breached their fiduciary duties and conspired with each other to do so.

***

In this trial, the jury had been allowed to ask questions of witnesses, under close supervision by the Court. Some of these questions were quite pointed and the answers to them were favorable to the plaintiff's case. So it's a good idea to emphasize that to the jury. Juror questions are very useful in a trial and, where possible, both sides should propose that such questions be allowed. The ability to ask questions keeps jurors engaged and can let both sides know what issues are important to the jury in real time. Whether they are allowed is up to the judge. Note that sometimes judges have restrictions on how questions are later used by counsel. You should make sure that referring to a prior juror question is permitted by the judge.

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Now, what do I mean by that? Let's look at the evidence. Let's start out in March of 2004.

March of 2004, Mr. Graham in Exhibit 803 starts to devise the strategy. He wanted to get Robert's views on the buyout of EMS, and any negotiating thoughts he might have with respect to Marcus. So from the get-go they're talking about how to disadvantage the minority shareholders. They're not talking about complying with the agreement. They're talking about negotiating strategies. What's the next thing? October 30th, 2004, a meeting, for discussion purposes only, to set out the proposed strategy

for the buyout. Not how we can comply with the agreement, not how are we going to follow the rules, but what our strategy is going to be. What else did we see in October, 2004? You saw a memo from defendant Mr. Hardy, who valued this Sayreville property at $200,000 per acre. I think it is clear what he testified to, with environmental costs deducted. Now, do the math on that. It's 440 acres at $200,000 an acre. This is back in 2004. Y'all know it sold last October for $82.75 million. That's pretty darn close right there and that's before they even started negotiating with minority shareholders.

What else have we seen? We see the strategy is implemented in about December of 2004. This is a memo from Mr. Graham to Mr. Swalwell and others copying Mr. Lindquist, and he talks about all the adjustments they're going to make to Mr. Martin, Mr. Casey and Mr. Murphy's valuation of the shares. And what does he say? From the get-go, he says, it can be expected that many of these proposed adjustments will be contested by the minority shareholders.

But they're not ready to unveil this strategy. Look what happens in March of 2005. There's a question you may remember. Mr. Murphy's accounting person called and asked for financial statements. Where are they? Mr. Graham gets this and says, you know what, let's tell her that they're not ready. Let's tell her that they are not ready because they've still got some work to do on that tax sharing agreement that you've heard so much about. And that is when the conspiracy continued.

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The lawyer is using a timeline to organize his summary of the evidence. He is emphasizing particular facts and arguing their implications with loaded (and completely appropriate) words like "conspiracy." He also quotes liberally from a damaging email where a defense witness tells someone to tell the plaintiff that a financial statement is not ready to be reviewed—when in fact that was simply a ruse to buy more time. That kind of seemingly "white lie" can resonate negatively with the jury.

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Now, you heard what Professor Aldave told you about fiduciary duties. It's like setting up a trust account with a bank. The banker has to put aside his own interest and look out just for you. I ask you, these secret meetings, these conversations that were unknown, these strategies, these negotiations, is that what happened here? Were any interests put aside? If you went to the bank for distribution of your trust assets, would you expect a bank to have a strategy for dealing with you? Would you expect the bank to negotiate? Would you expect the bank to have done calculations that put some of your assets in and took some of them out? Of course you wouldn't. They wouldn't hide anything from you and they wouldn't do that. Because if the banker did that, it would be a breach of fiduciary duties, which is exactly what it is for Mr. Graham and NL.

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An early expert testified about the law of fiduciary duties. Here, the lawyer reminds the jury of that testimony and uses a simple but compelling analogy.

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Look at the charge here. This is on page 12. I have it in the witness box. And in a sense the charge is the witness here to the actions of the various defendants. Defendants have to show all these things. That they treated the plaintiffs fairly. That the result was fair. That they acted with utmost good faith. That they did not use their powers, number 5 there, for their own advantage. So think about these principles and terms as we go through more of the facts.

***

You should always use the charge in your closing. It's how the jury will decide the case. Here, there were so many charts and timelines in the courtroom that the lawyer propped up a board with some key language from the charge on the witness stand. He used the location of the board to describe the charge as kind of a witness.

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So I submit to you that Mr. Graham told a lie to the minority shareholders in April of 2005, when he said nothing was important. But I submit to you that he sat here under oath and lied to you about something else as well. Now, remember, one of the defenses they've thrown up against the wall is that they were surprised that Mr. Martin decided to put his stock. Remember that? They were surprised. Let's look at what Mr. Graham told you under oath.

Did Marcus Martin ever tell you that he did not intend to exercise his put? Yes, he did. And when he actually did do it, were you surprised? He wasn't just surprised, folks, he said he was stunned. But let's look at the truth. Let's look at what he wrote in April 2005, before he knew that he'd be in front of a Dallas County jury under oath having to explain his actions. What did he say in April of 2005? He calculated Mr. Martin's interest along with the others. That is not what a fiduciary does. That's a lie. He lied to the minority shareholders. Under oath he didn't tell you the truth.

Now, what happened next?

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What follows is a continuing chronology of the facts. Note how the lawyer says "what happened next?" There's no phrase like "what does the evidence show" or "what do the exhibits say." Instead, the chronology is told in a matter-of-fact way as if to remind the jury that there is really no argument, that what the lawyer is saying is exactly what happened. Because this is closing argument, you should be aggressive in saying what happened. Unlike opening statement, you are not limited to a "preview" of what you expect the evidence will be. You are only limited by the evidence and reasonable inferences from it.

***

How do Mr. Graham and the various co-conspirators—how do they go about defending these circumstances? Well, you know what they're doing? They're back to the old NL way. Remember the old NL way was to fight to the grave and throw up a bunch of excuses for their conduct. That's what they did here. Doesn't matter if the smokescreens make any sense, or even if they're true. They've put them in front of you and put them out in the hope that you will not see their conduct for what it truly is.

***

You should try, where possible, to anticipate and refute your opponent's arguments. Here, the derisive term "smokescreen" is used to convey the sense that the defense arguments are designed to conceal the truth. In closing, that's fair game.

***

Let's now turn to what the plaintiffs in this case are owed under the written contracts and the law. And it bears noting that the defendants spent most of their time on this one issue, damages. They know and they almost acknowledge that they owe us something. They are not going down from that $3.8 million they came up with in 2005, even though I think you're going to hear from their lawyer that you shouldn't give us that. That would certainly be the NL way.

But let's use that as a starting point, 3.8 million. As you heard from Mr. Leathers, there are a number of things missing that should be included. He worked hard and did a lot of calculations. You know what their criticism of Mr. Leathers is. Well, you know what, you changed your numbers. You got new information and you changed your numbers. You know what, folks? That's what smart people are supposed to do. When they get new information, they're supposed to evaluate it and take account of it, and that's what Mr. Leathers did.

***

This case was a dispute about the valuation of an ownership interest in a company. The other side valued the interest low. The

plaintiffs valued it high. But here the plaintiff starts with the defense number. It's not the number the plaintiffs are seeking or even close to it, but the lawyer uses it effectively to show that even the defense doesn't think damages are zero here.

The lawyer also preempts another issue that the defense is sure to raise. The plaintiff's valuation expert took some hits on cross examination because his damage calculation changed over time. Better to acknowledge that and try to turn it into a positive than ignore it.

***

Now, unlike the defendants, we brought you an appraiser from New Jersey who conducted an appraisal as of July 2002. That's the important date. They brought you nobody. They didn't bring somebody that said that appraisal was poorly done. They didn't bring you somebody to say he was a bad appraiser. They didn't bring you anybody on that point. It's a large tract. It's well-situated. It's got development potential. They could have gone out and found an appraiser to contradict all that and they didn't do it.

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Pointing out what the other side did not do can be an effective argument. A comparison between your proof and the other side's proof can illustrate a strength in your case or a deficiency in your opponent's.

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I don't have all that much have more time. Folks, use your common sense and experience. Lots of places look rough but have development potential. Down the road is the AAC and Victory. If y'all lived in Dallas, you know for years that was an empty spot. A vacant piece of land that had all kinds of problems, but somebody saw the potential in it. And now it's the American Airlines Center in Victory Park. This is one of the most valuable pieces of property around. Property that Mr. Gibson

thought was so valuable, by the way, that he wanted to make sure that Mr. Graham showed this article to Harold and Steve, Harold Simmons and Steve Watson. This was the article in the local newspapers talking about the mayor of Sayreville's big plans for Sayreville. He wanted to make sure Mr. Simmons and Mr. Watson were in on it.

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The lawyer is running out of time. He has more to say and he needs to do it quickly. It's possible to cram a lot of substance into just a few minutes, but there is a risk of overwhelming the jury.

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They're going to tell you that no one knew what Sayreville was worth. Folks, their lawyer wrote a memo saying the property was worth between 50 and 100 million back in 2001. Mr. Hardy told them the property was worth 200 thousand an acre.

Now, finally, they're going to say, well, you know, we only got 50 million. We may not get the rest. One of you had a question about what happens if the developer doesn't pay and I'll ask you to look at Exhibit 1263, section 13. If you have a question about that, Exhibit 1263, section 13. Here's what happens. If O'Neil doesn't make that payment, Mr. Graham and NL get to go back to an arbitration with SERA and the floor is going to be, it's a minimum 82. They get to argue it's worth more. And within 30 days SERA has to be ordered to pay the full amount in arbitration. That's what section 13 says.

Now, I've only got a couple more minutes. These are the questions you're going to be asked in the charge. Mr. Susman will go over those in more detail. It's important that you answer these according to the evidence. There's some questions you don't have to answer in the sense that if you answer no, you skip them. So I'd ask you to follow that. But I'll let Mr. Susman go over it with you.

Punitive damages, real important, folks. Think about it, if you don't award punitives here, then this is a good economic decision for these guys

to hold onto our money for five years. It's a great decision. They get that money, they get the time value of it. Punitive damages are appropriate.

Mr. Sayles is going to get up and he's going to make his arguments. While he's doing that, I want you to think about some common sense questions. Common sense questions. Was NL lying to the IRS about monitoring savings? Were they just lying back in 2003 when they said it was 20 million? If the tax sharing agreement didn't need to be back dated, why was it? You heard that it didn't need to be, why was it? Why did Mr. Graham write that he'd like to take out Sayreville from the valuation on March 10th? Why did he do that? And if he did do that, and we know he did, why didn't he tell Mr. Casey and Mr. Murphy and Mr. Martin?

***

Posing questions to your adversary can be an effective way of baiting him to address evidence favorable to your case. It's risky, of course, if there is a good answer to your question. But if you phrase the question in what amounts to an unanswerable way, you are making an effective rhetorical point. Here, the framing of questions related to "lying to the IRS" or "backdating" an agreement cannot be fairly answered. That doesn't make them unfair questions. If you can frame questions this way, you are putting your adversary in a very difficult position.

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Another common sense question, was Mr. Gibson telling the truth when he told courts and government officials in New Jersey that he expected to receive $140 million and believed the cleanup costs were no more than 10 to 15? Remember that's the big issue on Sayreville. They say as the value keeps going up, the costs keep going up. He said it was 10 to 15 million. Was he just lying? Or was he just making an argument?

Ask yourself this question too as you listen, before June of 2005, did NL or its lawyers ever write down anywhere with anyone that Sayreville was worth zero?

These are the common sense questions I would like you to look at.

Folks, I want to thank you very much for your time and attention. Woody Guthrie was a songwriter and poet from the Great Depression. Woody Guthrie said that there are two ways you can rob somebody. You can rob them with a six-gun. You can rob them with the stroke of a pen. And I submit to you, folks, that that's exactly what Mr. Graham and Mr. Swalwell and the other conspirators have done. They've robbed these gentlemen with the stroke of a pen.

Thank you for your time.

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Ending your closing memorably is important. You don't want to just stop talking or, worse, run out of time. Craft your last few sentences to strike a chord with the jury, based on the evidence. It can be a quote, a story, or anything that neatly sums up your case. If you use an example from a real person or event, it should be something non-controversial—like a line from a famous folk singer—or some well-known story.

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Here is the defense response, excerpted, to the previous closing by the plaintiff.

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Counsel, ladies and gentlemen of the jury, I stand before you representing the nine parties that have been sued in this case, six individuals and three companies. Basically everybody in sight. But I stand here representing them proudly.

I'm going to start out by telling you a concern that I have. I'm concerned sometimes that because there's so much evidence and over a thousand exhibits, that something might escape your notice and that through skillful lawyering, you'll be misled in your charge to find a just result in this case. But actually, when I think about it for just a minute, I'm

comforted by the fact that when I look at this jury and I see the people in this jury box paying attention as you are, and I add up your ages, there's over 500 years of experience in the jury box.

Some of you asked some questions and it concerned me, because I thought that perhaps I had failed in some way to point out something to you that is represented in the evidence. But I took comfort in knowing that among the twelve of you that will deliberate, and hopefully with the assistance that I can give you now, that you will be able to see how these pieces fit together. So while I start out by telling you that I have concerns, I also have confidence. And although it is a business case, let's just face it, it's among individuals that are doing just fine. Nevertheless, this is an exercise in achieving justice. It is nothing less than that.

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It is often useful, especially on the defense side, to align yourself with the "wisdom" or "common sense" of the jury. In this case, the jurors asked questions, some of which appeared negative for the defense case. By acknowledging this circumstance, the lawyer may improve his credibility, while reminding the jurors about the evidence that supports his side of the case.

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There's another instruction, and it happens to be Instruction Number 1. Instruction Number 1 I know by heart. Do not let bias, sympathy or prejudice play any part in your deliberations. I think it's first for a reason. All of you know what prejudice is. And all of you know what bias is. But you know, you may have never thought of it just this way that I'm about to tell you. In this case it was pointed out through counsel's statements on numerous occasions that Harold Simmons is a wealthy man; that Harold Simmons is a billionaire; that Harold Simmons has a big corporate structure that his family trust controls.

Now, I ask you, what is that except a form of appeal to a prejudice? Hoping that because those facts have been stated to you, that somehow Mr. Simmons and the other defendants in this case will not get fair

treatment at your hands. That's a form of prejudice. That is playing to your sympathy and it's improper.

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Certainly, there is a risk that a jury will not be sympathetic to a wealthy defendant. Here, the lawyer tries to turn that potential prejudice around and remind the jury that the very first legal instruction from the Court concerns the avoidance of prejudice. He also takes a gentle jab at the other side by suggesting that they have tried to appeal to prejudice.

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When I sit down I do not get to speak again and I will sit there and behave myself. It will be hard. But what I would ask you to do, each of you has a right to deliberate here. Each of you has a right to express your opinion. And I'll ask you, whatever arguments are raised, ask yourself, not just what did I say about this, but what does the evidence say about this. If you do that, you'll reach a verdict that's grounded in the evidence and based on this Court's charge and blessed by your conscience. And nobody can ask for more.

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A defense case will often close by reminding the jury that the last word will come from the other side. Asking the jurors to put themselves in the place of the defendant—what would the defendant say in response to this or that point—can be an effective way of creating an "echo" of your arguments in the jury room.

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Here is the plaintiff's rebuttal, the last word in the trial.

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It's been amazing how attentive you have been for two weeks, listening to the evidence, taking notes, looking at your juror notebooks, asking questions. I wish I had a video of it because it would really help me prove false the idea that complex business cases are not suitable for average

American citizens; that disputes like this can't be trusted to people who don't have law degrees, or engineering degrees, or accounting degrees; to people who have 500 years of experience, but because they lack some kind of—somehow the idea that we have heard from the defendants in this case is that, well, we should have gone and had this thing reviewed by an accounting firm. And we certainly had the option. And we did not take it because we wanted people like you to hear the evidence.

Without Courts who are able to cause big corporations to cough up internal documents, without folks like you who are willing to sit here and leave your families and your jobs, to resolve disputes like this, people without great wealth and power, and without access to full information, would be at the mercy of big corporate enterprises like the one Harold Simmons presides over. Main Street would continue to be at the mercy of Wall Street.

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The lawyer is empowering the jury here and aligning his case with the jury's wisdom. The Main Street/Wall Street point here is memorable and casts plaintiff as the "little guy" fighting powerful interests.

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I began my opening statement two weeks ago talking about the importance of the twin concepts of good faith which is motive and fairness which is a result. Fairness both as to the result and as to the process. I explained that those two concepts, good faith and fairness, are embedded in the idea of fiduciary duties designed by the courts of this country and our laws to protect minorities from the oppression of the majority. And it applies to shareholders, minority shareholders.

I might point out defendants spent an hour and didn't even talk about what the law is in this case. Indeed they didn't even talk about the questions that you are going to be asked. But Judge Smith in his instructions and Professor Aldave confirmed what I said to you at the beginning were the duties of a fiduciary. There are six of them and they're

highlighted. And the important thing about those duties, ladies and gentlemen, is that the defendants have got to prove that they complied with each and every one of them. See the word "and" after the fifth one there. It's not one or the other, it's all of them. And if they missed any of the six, you have to answer no, as we hope you will to the Question Number 6, did NL and the officer defendants comply with their fiduciary duties. It requires that they bear the burden of proof and that they prove each and every one of those things.

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Referring back to your opening in closing is a good idea as it illustrates continuity and coherency in your presentation. It's also useful to refer to what defense counsel did not say in his closing, especially if it allows you to embrace the court's charge and focus on the law that the jury must follow.

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Ladies and gentlemen, I want to discuss with you how I would suggest you answer these jury questions. The evidence overwhelmingly supports these answers, and they're all up here. The numbers on the left correspond to the questions in the verdict form. The description of them corresponds to what the question's about. I think you will find that accurate when you get back there to deliberate. And these are the answers that the plaintiffs, the minority shareholders, think are justified by the evidence.

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Taking the verdict form and respectfully suggesting to the jury how to answer the question is a critical part of any closing. A lawyer skips doing so at his peril. But don't be pushy about it. The jury must come to its own conclusion because they are convinced, not because you said so.

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I want to talk to you about the subject of punitive damages.

We mentioned the worth of Mr. Simmons and that NL is a billion-dollar company, not to create bias, but because if you look at the Judge's charge on punitive damages, you are to consider the financial ability of the defendant to pay in determining whether you want to award punitive damages. You've got to consider that, as Chris Gibson said, NL is a billion-dollar corporation with the ability to swing back.

How much should you put down for punitive damages? What will it take to get Mr. Simmons's attention? I can tell you one thing, if you put a big number in there, like three times the amount of the actual damages you find, when your verdict is returned, Mr. Graham will walk out of that door and the first call he will make is to Mr. Simmons, wherever he is right now. A jury in Dallas, Texas, has just told you that you can't do business the old NL way. You've got to honor contracts. You've got to make the people that work for you and that you control live up to all six of their fiduciary duties.

These people, little guys really, have spent four years to get to this place. They've had to hire lawyers, expensive experts. You've heard evidence that they had to pay the lawyers on a contingent fee. You know what that means. So we urge you to give them the full amount of damages they are asking for. To follow this carefully because if you make a mistake in answering some of these questions, the consequences could be you may not be awarding damages. And to give them a large enough number on punitives to get the attention of people who didn't even have the decency to walk through that door.

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Arguing punitive damages should be saved for the end. It's the last issue the jury will consider. If you've argued your case properly, your closing should be moving to a logical crescendo and punitive damages, and the notion of sending a message, is a perfect way to end.

CLOSING CHECKLIST

1. Refer back to your opening and argue that what you said you would prove, you have proved.
2. Emphasize key documents and testimony. Display key documents to the jury and, where possible, key testimony.
3. Spend time on the jury instructions. Highlight the important ones for the jury.
4. Try for a dramatic or memorable moment to emphasize a key point but don't force it. Better to spend time arguing the facts than to tell a story that is awkward or tone deaf.
5. Use the verdict form to suggest to the jury how the questions should be answered.