ELEVENTH CIRCUIT

PATTERN JURY INSTRUCTIONS

(CIVIL CASES)

2005

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FOR THE ELEVENTH CIRCUIT

JUDICIAL COUNCIL

RESOLUTION

The Judicial Council of the Eleventh Circuit hereby RESOLVES,

That the Committee on Pattern Jury Instructions of the Judicial Council of the Eleventh Circuit is hereby authorized to distribute to the District Judges of the Circuit for their aid and assistance, and to otherwise publish, the Committee's Pattern Jury Instructions, Civil Cases, Eleventh Circuit (2005 revision); provided, however, that this resolution shall not be construed as an adjudicative approval of the content of such instructions which must await a case by case review by the Court.

For the Council:

_____

CHIEF JUDGE

Date: _____

PREFACE

These Pattern Jury Instructions (Civil Cases) have been prepared by a Committee of District Judges of the Eleventh Circuit building upon earlier works of the same kind first published in 1980 by a predecessor committee in the former Fifth Circuit and republished in 1990 and in 1999 by a predecessor committee in the Eleventh Circuit.

Apart from reflecting evolving changes in the law, the prime objective of the committee has remained constant - - to provide in words of common usage and understanding a body of brief, uniform jury instructions, fully stating the law without needless repetition. The format is also the same as in the earlier editions - - one designed to facilitate rapid assembly of a complete jury charge in each case, suitable for submission to the jury in written form.

The body of the work has been arranged in five parts:

A. Preliminary Instructions Before Trial
B. Basic Instructions
C. Federal Claims Instructions
D. State Claims Instructions
E. Supplemental Damages Instructions

A. The Preliminary Instructions Before Trial constitute a complete charge designed to be given after the jury has been selected and sworn, but before the opening statements of counsel.

B. The Basic Instructions cover in a logical sequence those topics that should normally be included in the Court's instructions in every case. Alternative instructions are provided when necessary depending upon the presence or absence of common variables as they may exist in the case at hand (such as the presence or absence of corporate parties, single or multiple claims, etc.). By referring to the Index To Basic Instructions, beginning with Basic Instruction No. 1, and then proceeding through the Index from one instruction to the next, one may select the appropriate instruction applicable to the case at hand and thus assemble, in the end, a complete charge.

C. The Federal Claims Instructions cover the most common types of federal civil claims or causes of action pending as jury cases in the district courts. Each instruction contains a generic description or explanation of the claim; an enumeration of the essential elements that must be proved to establish the claim; definition of the key words or phrases necessary to a proper understanding of those elements; a description of the defense(s) usually asserted in response to the claim;

and an enumeration of the essential elements of the defense(s) followed by definition of the key words or phrases necessary to a proper understanding of those elements.

D. The State Claims Instructions cover a number of common causes of action governed by state law. They are structured in the same format as the Federal Claims Instructions, and alternative choices are provided when it appears that the governing principle(s) may differ in one or more of the three states of the Circuit (Alabama, Florida and Georgia). Nevertheless, these instructions are offered merely as a guide. Caution should be exercised in every case to insure that the instruction as worded correctly conveys the current state of the evolving law of the jurisdiction supplying the rule of decision.

E. The Supplemental Damages Instructions cover a number of topics relating to damages issues that may be appropriate to include in the charge in a given case even though the applicable Federal or State Claims Instruction does not address the issue. These topics are the duty to mitigate, punitive damages, mortality tables, effect of income taxes, and reduction to present value.

* * * * *

All of the Claims Instructions, both Federal and State, also contain passages relating to the recoverable elements of damages normally sought in cases presenting those claims, and each instruction is followed by a set of Special Interrogatories tracking each of the essential elements of the claims and the defenses, as well as the separate elements of damages normally sought in cases presenting that claim.

Brief Annotations and Comments are provided after each instruction citing the governing law of the Circuit and/or highlighting certain issues or potential problem areas relating to the subject of that instruction.

In many of the Claims Instructions some of the wording has been bracketed or bracketed and underscored to draw attention to subject matter that must be added, edited, or deleted, in order to adapt the instruction to the individual case. Normally, when words are bracketed but not underscored, it will be necessary to make a choice, i.e., the language used will present alternatives, one of which may not apply in the case. When words are both bracketed and underscored they will normally present an example and it will be necessary to delete the underscored passage and substitute language specially formulated to

fit the case. In addition, extreme care should be exercised in every case to insure that the instruction as worded correctly states the current law as applied in that case. This is particularly important with respect to the instructions concerning claims based on state law. Those instructions are presented only as a guide and may require editing or revision to correctly state the law of any particular jurisdiction.

* * * * *

It is the hope of the Committee that this work will not only ease the burden of district judges in preparing instructions, but will also provide a technique for the rapid preparation and assembly of complete instructions in suitable form for submission to the jury in writing. The experience of an increasing number of district judges in the submission of written instructions to the jury has been good and the practice is recommended by the Committee.

The Committee also recommends the submission of interrogatories to the jury in conjunction with a general charge pursuant to Federal Rule of Civil Procedure 49. The use of interrogatories not only assists the jury in an orderly decision making process, it also diminishes the likelihood of a retrial following an appeal. The jury's answer to some interrogatories may moot others; or, in the event error

is found on appeal with respect to one claim or one issue, the other responses may render the error moot or harmless or may at least reduce the issues to be retried. The use of a general verdict often forecloses these advantages.

Judge Wm. Terrell Hodges	➢ Chair
Judge James H. Hancock Judge W. Harold Albritton III	➢ Alabama
Judge C. Roger Vinson Judge Donald M. Middlebrooks	➢ Florida
Judge B. Avant Edenfield	➢ Georgia

PRELIMINARY INSTRUCTIONS BEFORE TRIAL

Ladies and Gentlemen:

You have now been sworn as the Jury to try this case. By your verdict you will decide the disputed issues of fact.

I will decide all questions of law and procedure that arise during the trial, and, before you retire to the jury room at the end of the trial to deliberate upon your verdict and decide the case, I will explain to you the rules of law that you must follow and apply in making your decision.

The evidence presented to you during the trial will primarily consist of the testimony of the witnesses, and tangible items including papers or documents called "exhibits."

Transcripts Not Available. You should pay close attention to the testimony because it will be necessary for you to rely upon your memories concerning what the testimony was. Although, as you can see, the Court Reporter is making a stenographic record of everything that is said, typewritten transcripts will not be prepared in sufficient time or appropriate form for your use during your deliberations and you should not expect to receive them.

Exhibits Will Be Available. On the other hand, any exhibits admitted in evidence during the trial will be available to you for detailed study, if you wish, during your deliberations. So, if an exhibit is received in evidence but is not fully read or shown to you at the time, don't be concerned because you will get to see and study it later during your deliberations.

* * * * *

Notetaking - Permitted. If you would like to take notes during the trial you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you, individually.

If you do decide to take notes, do not try to write everything down because you will get so involved in notetaking that you might become distracted from the ongoing proceedings. Just make notes of names, or dates and places - - things that might be difficult to remember.

Also, your notes should be used only as aids to your memory, and, if your memory should later differ from your notes, you should rely upon your memory and not your notes.

If you do not take notes, you should rely upon your own independent recollection or memory of what the testimony was and you

should not be unduly influenced by the notes of other Jurors. Notes are not entitled to any greater weight than the recollection or impression of each Juror concerning what the testimony was.

Notetaking - Not Permitted. A question sometimes arises as to whether individual members of the Jury will be permitted to take notes during the trial.

The desire to take notes is perfectly natural especially for those of you who are accustomed to making notes because of your schooling or the nature of your work or the like. It is requested, however, that Jurors not take notes during the trial. One of the reasons for having a number of persons on the Jury is to gain the advantage of your several, individual memories concerning the testimony presented before you; and, while some of you might feel comfortable taking notes, other members of the Jury may not have skill or experience in notetaking and may not wish to do so.

* * * * *

During the trial you should keep an open mind and should avoid reaching any hasty impressions or conclusions. Reserve your judgment until you have heard all of the testimony and evidence, the closing

arguments or summations of the lawyers, and my instructions or explanations to you concerning the applicable law.

Because of your obligation to keep an open mind during the trial, coupled with your obligation to then decide the case only on the basis of the testimony and evidence presented, you must not discuss the case during the trial in any manner among yourselves or with anyone else, nor should you permit anyone to discuss it in your presence; and you should avoid reading any newspaper articles that might be published about the case. You should also avoid seeing or hearing any television or radio comments about the trial.

[In addition, you must not visit the scene of the events involved in this case unless I later instruct you to do so.]

From time to time during the trial I may be called upon to make rulings of law on objections or motions made by the lawyers. You should not infer or conclude from any ruling or other comment I may make that I have any opinions on the merits of the case favoring one side or the other. And if I should sustain an objection to a question that goes unanswered by a witness, you should not guess or speculate what the answer might have been nor should you draw any inferences or conclusions from the question itself.

During the trial it may be necessary for me to confer with the lawyers from time to time out of your hearing with regard to questions of law or procedure that require consideration by the court or judge alone. On some occasions you may be excused from the courtroom for the same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

The order of the trial's proceedings will be as follows: In just a moment the lawyers for each of the parties will be permitted to address you in turn and make what we call their "opening statements." The Plaintiff will then go forward with the calling of witnesses and presentation of evidence during what we call the Plaintiff's "case in chief." When the Plaintiff finishes (by announcing "rest"), the Defendant[s] will proceed with witnesses and evidence, after which, within certain limitations, the Plaintiff may be permitted to again call witnesses or present evidence during what we call the "rebuttal" phase of the trial. The Plaintiff proceeds first, and may rebut at the end, because the law places the burden of proof or burden of persuasion

upon the Plaintiff (as I will further explain to you as a part of my final instructions).

When the evidence portion of the trial is completed, the lawyers will then be given another opportunity to address you and make their summations or final arguments in the case, after which I will instruct you on the applicable law and you will then retire to deliberate upon your verdict.

Now, we will begin by affording the lawyers for each side an opportunity to make their opening statements in which they may explain the issues in the case and summarize the facts they expect the evidence will show.

I caution you that the statements that the lawyers make now (as well as the arguments they present at the end of the trial) are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for purposes of opening statements.

INDEX TO BASIC INSTRUCTIONS

INDEX TO BASIC INSTRUCTIONS
(Continued)

DIRECTIONS TO COUNSEL CONCERNING PREPARATION OF PROPOSED INSTRUCTIONS

PREPARE FOR INSERTION HERE YOUR PROPOSED INSTRUCTIONS CONCERNING THE CLAIMS AND DEFENSES, SPECIAL ISSUES AND DAMAGES IN THE FOLLOWING FORMAT AND SEQUENCE:

(a) Description of the Plaintiff's claim(s), followed by

(1) Enumeration of the essential elements of the claim(s).

(2) Definition of key terms used in enumerating the elements of the claim(s); and other special instructions, if any, necessary to further explain or qualify the claim(s).

(b) Description of the Defendant's defense(s) and counterclaim(s), if any, followed by

(1) Enumeration of the essential elements of the defense(s) and counterclaim(s), if any.

(2) Definition of key terms used in enumerating the essential elements of the defense(s) and counterclaims; and other special instructions, if any, necessary to further explain or qualify the defense(s) and/or the counterclaim(s).

(c) Enumeration of Plaintiff's (and counterclaimant's) recoverable elements of damage and explanation, as appropriate, of each element.

Note: **In submitting your proposed or requested instructions it is not necessary to duplicate or request the Court's standard instructions which precede and follow this page. Those instructions will be given in every case. Confine your package of requested instructions to those prepared in accordance with the directions given on this page.**

1
Face Page - Introduction

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____
_____ DIVISION

Plaintiff,

-vs- CASE NO.

Defendant.
_____/

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case.

When I have finished you will go to the jury room and begin your discussions - - what we call your deliberations.

2.1
Consideration Of The Evidence
Duty To Follow Instructions
No Corporate Party Involved

In deciding the case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone.

In your deliberations you should consider only the evidence - - that is, the testimony of the witnesses and the exhibits I have admitted in the record - - but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Remember that anything the lawyers say is not evidence in the case. And, except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your

decision concerning the facts. It is your own recollection and interpretation of the evidence that controls.

2.2
Consideration Of The Evidence
Duty To Follow Instructions
Corporate Party Involved

In deciding the case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone.

The fact that a corporation is involved as a party must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of the company.

In your deliberations you should consider only the evidence - - that is, the testimony of the witnesses and the exhibits I have admitted in the record - - but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an

eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Remember that anything the lawyers say is not evidence in the case. And, except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your decision concerning the facts. It is your own recollection and interpretation of the evidence that controls.

2.3
Consideration Of The Evidence
Duty To Follow Instructions
Governmental Entity Or Agency Involved

In deciding the case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone.

The fact that a governmental entity or agency is involved as a party must not affect your decision in any way. A governmental agency and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a governmental agency is involved, of course, it may act only through people as its employees; and, in general, a governmental agency is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of that governmental agency.

In your deliberations you should consider only the evidence - - that is, the testimony of the witnesses and the exhibits I have admitted in the record - - but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an

eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Remember that anything the lawyers say is not evidence in the case. And, except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your decision concerning the facts. It is your own recollection and interpretation of the evidence that controls.

3
Credibility Of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness' testimony differ from other testimony or other evidence?

4.1
Impeachment Of Witnesses
Inconsistent Statement

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

4.2
Impeachment Of Witnesses
Inconsistent Statement And Felony Conviction

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe the testimony of that witness.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

5.1
Expert Witnesses
General Instruction

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

5.2
Expert Witnesses
When Expert Witness Fees Represent A Significant Portion Of The Witness' Income

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

When a witness has been or will be paid for reviewing and testifying concerning the evidence, you may consider the possibility of bias and should view with caution the testimony of such a witness where court testimony is given with regularity and represents a significant portion of the witness' income.

6.1
Burden Of Proof
When Only Plaintiff Has Burden Of Proof

In this case it is the responsibility of the Plaintiff to prove every essential part of the Plaintiff's claim by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that the Plaintiff's claim is more likely true than not true.

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

If the proof fails to establish any essential part of the Plaintiff's claim by a preponderance of the evidence, you should find for the Defendant as to that claim.

6.2
Burden Of Proof
When There Are Multiple Claims Or
When Both Plaintiff And Defendant Or
Third Parties Have Burden Of Proof

In this case each party asserting a claim or a defense has the responsibility to prove every essential part of the claim or defense by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that a claim or contention is more likely true than not true.

When more than one claim is involved, and when more than one defense is asserted, you should consider each claim and each defense separately; but in deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence you should find against the party making that claim or contention.

7.1
Duty To Deliberate
When Only The Plaintiff Claims Damages

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

7.2
Duty To Deliberate
When Both Plaintiff And Defendant Claim
Damages Or When Damages Are Not An Issue

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

8
Election Of Foreperson
Explanation Of Verdict Form(s)

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

9

Civil Allen Charge

Members of the jury, I'm going to ask that you continue your deliberations in an effort to reach agreement upon a verdict and dispose of this case; and I have a few additional thoughts or comments I would like for you to consider as you do so.

This is an important case. The trial has been expensive in terms of time, effort, money and emotional strain to both the plaintiff and the defense. If you should fail to agree on a verdict, the case is left open and may have to be tried again. A second trial would be costly to both sides, and there is no reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you.

Any future jury would be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to a jury of people more conscientious, more impartial, or more competent to decide it or that more or clearer evidence could be produced on behalf of either side.

As stated in my previous instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you

can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced it is wrong. To bring your minds to a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard to the opinions of others and with a disposition to reexamine your own views.

If a substantial majority of your number are for a verdict for one party, each of you who hold a different position ought to consider whether your position is a reasonable one since it makes so little impression upon the minds of so many equally honest and conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and consider all the evidence in the

case bearing upon the questions before you in light of the court's instructions on the law.

You may be as leisurely in your deliberations as the occasion may require and you may take all the time that you may feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given to you as a whole. You should not single out any part of any instruction, including this one, and ignore others.

You may now retire and continue your deliberations.

ANNOTATIONS AND COMMENTS

This proposed instruction was derived largely from Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions § 106.09 and § 106.10 (5th ed. 2000).

The former Fifth Circuit approved of the use of civil Allen charges in Brooks v. Bay State Abrasive Products, Inc., 516 F.2d 1003, 1004 (5th Cir. 1975), which was cited in U.S. v. Chigbo, 38 F.3d 543, 546 (11th Cir. 1994). In Brooks, the court stated that it has approved the use of an Allen charge if it makes clear to members of the jury that (1) they are duty bound to adhere to honest opinions; and (2) they are doing nothing improper by maintaining a good faith opinion even though a mistrial may result.

INDEX TO FEDERAL CLAIMS INSTRUCTIONS

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1.1.1
Public Employee
First Amendment Claim
Discharge/Failure To Promote
Free Speech On Matter Of Public Concern

In this case the Plaintiff claims that the Defendants, while acting "under color" of state law, intentionally deprived the Plaintiff of the Plaintiff's rights under the Constitution of the United States.

Specifically, the Plaintiff claims that while the Defendants were acting under color of authority of the State of _____ [as members of the School Board of _____ County] they intentionally violated the Plaintiff's constitutional rights under the First Amendment to the Constitution when the Defendants [discharged the Plaintiff from employment] [failed to promote the Plaintiff] because of the Plaintiff's exercise of the right of free speech.

The Defendants deny that they violated the Plaintiff's rights in any way, and assert that [describe the Defendants' theory of defense or affirmative defenses, if any].

Under the First Amendment to the Constitution of the United States, every public employee has the right to "freedom of speech" addressing issues of public concern.

In this case, therefore, if you find that the Plaintiff engaged in speech activity concerning _____, you are instructed that the

subject of such speech activity was a matter of public concern; and, as a public employee, the Plaintiff could not legally be penalized because of the Plaintiff's exercise of First Amendment rights in discussing that subject of public concern.

The law further provides that a person may sue in this Court for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates the Plaintiff's rights under the Constitution of the United States.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the actions of the Defendants were "under color" of the authority of the State;

Second: That the Plaintiff engaged in speech activity concerning [describe the subject of public concern];

Third: That such speech activity was a substantial or motivating factor in the Defendants' decision to [discharge the Plaintiff from employment] [not promote the Plaintiff]; and

Fourth: That the Defendants' acts were the proximate or legal cause of damages sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[In this case the parties have stipulated or agreed that the Defendants acted "under color" of state law and you should, therefore, accept that fact as proven.]

[A state or local official acts "under color" of the authority of the state not only when the official acts within the limits of lawful authority, but also when the official acts without or beyond the bounds of lawful authority. In order for unlawful acts of an official to be done "under color" of state law, however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of official duty; that is, the unlawful acts must be an abuse or misuse of power which is possessed by the official only because of the position held by the official.]

You should be mindful that the law applicable to this case requires only that a public employer refrain from taking action against a public employee because of the employee's exercise of protected First Amendment rights. So far as you are concerned in this case, a public employer may [discharge] [fail to promote] a public employee for any

other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the Defendants even though you personally may not approve of the action taken and would have acted differently under the circumstances. Neither does the law require that a public employer extend any special or favorable treatment to public employees because of their exercise of protected First Amendment rights.

On the other hand, in order to prove that the Plaintiff's protected speech activities were a "substantial or motivating" factor in the Defendants' decision, the Plaintiff does not have to prove that the protected speech activities were the only reason the Defendants acted against the Plaintiff. It is sufficient if the Plaintiff proves that the Plaintiff's protected speech activities were a determinative consideration that made a difference in the Defendants' adverse employment decision.

Finally, for damages to be the proximate or legal result of wrongful conduct, it must be shown that, except for such conduct, the damages would not have occurred.

[If you find in the Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendants have shown by a preponderance of the evidence that the Plaintiff would [have been dismissed] [not have been promoted] for other reasons even in the absence of the protected speech activity. If you find that the Plaintiff would [have been dismissed] [not have been promoted] for reasons apart from the speech activity, then your verdict should be for the Defendants.]

If you find for the Plaintiff [and against the Defendants on their defense], you must then decide the issue of the Plaintiff's damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

[On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical

aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial;

(b) Emotional pain and mental anguish.

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive

damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

1.1.1
Public Employee
First Amendment Claim
Discharge/Failure To Promote
Free Speech On Matter Of Public Concern

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

[1. That the actions of the Defendants were "under color" of the authority of the State?

Answer Yes or No _____]

1. That the Plaintiff engaged in speech activity concerning [describe the subject of public concern]?

Answer Yes or No _____

2. That such speech activity was a substantial or motivating factor in the Defendants' decision to [discharge the Plaintiff from employment] [not promote the Plaintiff]?

Answer Yes or No _____

3. That the Defendants' acts were the proximate or legal cause of damages sustained by the Plaintiff?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not answer any of the remaining questions.]

4. That the Plaintiff [would have been discharged from employment] [would not have been promoted] for other reasons even in the absence of the Plaintiff's protected speech activity?

Answer Yes or No _____

[Note: If you answered Yes to Question No. 4 you need not answer the remaining questions.]

5. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

6. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

7. That the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

In Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989), the Eleventh Circuit set out a four part inquiry applicable to adverse employment action claims by public employees based on the First Amendment: (1) Whether the speech activity involved a matter of public concern; (2) if so, whether the employee's First Amendment interests counterbalance the interest of the state in promoting the efficiency of the services it provides through its employees; (3) if the employee prevails on both of those issues, whether the protected speech activity was a motivating factor in the adverse employment action; and (4) if so, whether the Defendant has shown that it would have made the same decision even in the absence of the protected speech activity. The first two of these questions are legal issues for the court to decide, usually on summary judgment; the latter two issues are for the fact finder at trial. See Morgan v. Ford, 6 F.3d 750, 754 (11th Cir. 1993). The Bryson test remains the law of the Circuit. See Chesser v. Sparks, 248 F.3d 1117, 1122 (11th Cir. 2001); Vista Comm. Services v. Dean, 107 F.3d 840, 844 (11th Cir. 1997); Tindal v. Montgomery County Comm'n., 32 F.3d 1535, 1540 (11th Cir. 1994).

With regard to that portion of the instruction defining actions taken "under color" of the authority of the state, see West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). See also Edwards v. Wallace Community College, 49 F.3d 1517 (11th Cir. 1995) and Almand v. DeKalb County, 103 F.3d 1510 (11th Cir.) (not

all acts by state employees are taken under color of state law; the issue is whether the official was acting pursuant to power possessed by virtue of state authority or was acting only as a private individual).

The "substantial" or "motivating" factor causation requirement was first set forth in Mt. Healthy City Dist. Bd. Of Ed. v. Doyle, 429 U.S. 274,97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and is part of the four part Bryson test.

In Board of County Commissioners v. Umbehr, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), the Court held that the First Amendment also protects independent contractors from termination of at-will government contracts in retaliation for the exercise of protected free speech. This instruction would also apply in those cases. The Eleventh Circuit declined to extend this protection to First Amendment retaliation claims brought pursuant to § 1983 by independent contractors without pre-existing relationships (i.e., "disappointed bidders"). See, Webster v. Fulton County, 283 F.3d 1254, 1257 (11th Cir. 2002).

The text of § 1983 does not provide for specific remedies. Therefore, it is necessary to look to the law as it has developed in the Eleventh Circuit and in other Federal Circuits. Historically, Plaintiffs have been able to recover compensatory damages (including pain and suffering), punitive damages, back pay, and front pay or reinstatement. Section 1983 has been interpreted, even prior to the Civil Rights Act of 1991, to permit the recovery of compensatory and punitive damages. The Supreme Court has held that punitive damages may be recovered when the defendant commits acts with reckless or callous disregard for the plaintiff's rights. Smith v. Wade, 461 U.S. 30, 51, 103 S.Ct. 1625, 1637, 75 L.Ed.2d 632 (1983).

A major limitation on the recovery of punitive damages is the Supreme Court's announcement that few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process. State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) Another limitation on the recovery of punitive damages in § 1983 claims is that they are not recoverable against a government entity. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); Gonzales v. Lee County Housing Authority, 161 F.3d 1290, 1299 n.30 (11th Cir. 1998); Garrett v. Clarke County Board of Education, 857 F.Supp. 949, 953 (S.D. Ala. 1994); Thornton v. Kaplan, 937 F.Supp. 1441, 1450 (D.Col. 1996). Because many § 1983 claims are brought against government officials in their official capacities or against municipal entities themselves (often school boards), punitive damages are not recoverable in a large number of § 1983 claims. The Civil Rights Act of 1991 has clarified that government entities may not be sued for punitive damages. However, punitive damages are recoverable against all other defendants in § 1983 suits (i.e. individual capacity suits), and the statutorily mandated caps set out in § 102 of the 1991 Civil Rights Act, which apply in Title VII claims, do not apply to § 1983 claims. See Thornton, 937 F.Supp. at 1450 (noting that in Title VII claims, the 1991 Act also limits recovery of combined compensatory and punitive damages, depending upon the size of the employer).

Additionally, the Court, in its discretion, may award front pay as an alternative to reinstatement. See Feldman v. Philadelphia Housing Authority, 43 F.3d 823 (3d Cir. 1994). Reinstatement is available as an equitable remedy, and it is the preferred remedy for employment discharges that violate 42 USC § 1983. Id. at 831-32. Because reinstatement or an award of front pay is a choice of equitable remedies to be made by the Court, not the jury, the enumerated elements of recoverable damages do not include front pay as an issue for the jury. However, reinstatement is not the exclusive remedy, and it is not always a feasible option. Id. (upholding a $500,000.00 jury award of front pay as not excessive when supported by sufficient evidence.) See Annotations and Comments following Federal Claims Instruction No. 1.2.1, infra.

Damages for pain and suffering may also be awarded as part of compensatory damages. The Eleventh Circuit has noted that damages under § 1983 are determined by compensation principles brought over from the common law. Wright v. Sheppard, 919 F.2d 665, 669 (11th Cir. 1990). The courts may award damages for injuries such as humiliation, emotional distress, mental anguish and suffering as "within the ambit of compensatory damages." Id. See also Slicker v. Jackson, 215 F.3d 1225, 1231 (11th Cir. 2000) (stating that a § 1983 plaintiff may also be awarded compensatory damages based on demonstrated mental and emotional distress, impairment of reputation and personal humiliation).

A plaintiff is not automatically entitled to a nominal damages instruction for constitutional violations. See Oliver v. Falla, 258 F.3d 1277, 1282 (11th Cir. 2001) (stating that Plaintiff must specifically seek nominal damages and a failure to do so waives any entitlement to such damages for an Eighth Amendment violation). A Plaintiff is entitled to nominal damages, however, if requested and a violation of a fundamental constitutional right is established. See Hughes v. Lott, 350 F.3d 1157, 1162 (11th Cir. 2003) (citing Carey v. Piphus, 435 U.S. 247, 255 (1978)); see also Kelly v. Curtis, 21 F.3d 1544, 1557 (11th Cir. 1994) ("When constitutional rights are violated, a plaintiff may recover nominal damages even though he suffers no compensable injury.").

1.1.2
Public Employee
First Amendment Claim
Discharge/Failure To Promote
Political Disloyalty/Key Employee

In this case the Plaintiff claims that the Defendant, while acting "under color" of state law, intentionally deprived the Plaintiff of the Plaintiff's rights under the Constitution of the United States.

Specifically, the Plaintiff claims that while the Defendant was acting under color of authority of the State of _____, as [Sheriff of _____ County] the Defendant intentionally violated the Plaintiff's constitutional rights when the Defendant [discharged the Plaintiff from employment] [failed to promote the Plaintiff] because of the Plaintiff's exercise of the constitutional right of free speech, political belief and association.

The Defendant denies that the Plaintiff's rights were violated in any way, and asserts that [describe the Defendant's theory of defense or affirmative defenses, if any].

Under the First Amendment to the Constitution of the United States, every citizen has the right to "freedom of speech," which includes the right to engage in “political activity,” such as holding meetings and hearing the views of political candidates, or running for office or supporting political candidates, without governmental

interference or penalty. This means, then, in the case of governmental or public employees [except for certain "key" employees as hereafter defined] that such public employees may not be [discharged from their employment] [denied a promotion] by governmental authority because of that kind of political activity which is protected by the First Amendment.

The law further provides that a person may sue in this Court for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates the Plaintiff's rights under the Constitution of the United States.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the actions of the Defendant were "under color" of the authority of the State;

Second: That the Plaintiff engaged in constitutionally protected political activity, a form of free speech, as previously defined, by [describe the Plaintiff's protected activity];

Third: Such protected political activity was a substantial or motivating factor in the Defendant's decision to [discharge the Plaintiff from employment] [not promote the Plaintiff]; and

Fourth: That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[In this case the parties have stipulated or agreed that the Defendant acted "under color" of state law and you should, therefore, accept that fact as proven.]

[A state or local official acts "under color" of the authority of the state not only when the official acts within the limits of lawful authority, but also when the official acts without or beyond the bounds of lawful authority. In order for unlawful acts of an official to be done "under color" of state law, however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of official duty; that is, the unlawful acts must be an abuse or misuse of power which is possessed by the official only because of the position held by the official.]

You should be mindful that the law applicable to this case requires only that a public employer refrain from taking action against a public employee because of the employee's exercise of protected First

Amendment rights. So far as you are concerned in this case, a public employer may [discharge] [fail to promote] a public employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the Defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances. Neither does the law require that a public employer extend any special or favorable treatment to public employees because of their exercise of protected First Amendment rights.

On the other hand, in order to prove that the Plaintiff's constitutionally protected political activities were a "substantial or motivating" factor in the Defendant's decision, the Plaintiff does not have to prove that the protected activities were the only reason the Defendant acted against the Plaintiff. It is sufficient if the Plaintiff proves that the Plaintiff's protected political activities were a determinative consideration that made a difference in the Defendant's decision.

Finally, for damages to be the proximate or legal result of wrongful conduct, it must be shown that, except for such conduct, the damages would not have occurred.

[If you find in the Plaintiff's favor with respect to each of the things the Plaintiff must prove, you must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff would have been [dismissed] [denied a promotion] for other reasons, even in the absence of the protected activity. If you find that the Plaintiff would have been [dismissed] [denied a promotion] for reasons apart from the protected political activity, then your verdict should be for the Defendant.]

[Now, if you find in favor of the Plaintiff, and then find that the Defendant has not established the defense that the Plaintiff would have been [dismissed] [denied a promotion] in any event for reasons unrelated to protected political activity, you must then decide another defense put forward by the Defendant - - namely, that the Plaintiff was a "key" employee whose job duties and responsibilities were such that the Defendant had a right to expect and demand political loyalty from the Plaintiff as a condition of employment.

An elected official such as the Defendant must stand for election and is politically responsible or accountable for the acts of certain key employees. The elected official has a right, therefore, to expect and demand political loyalty from these key employees so that if such an

employee engages in politically disloyal activity, that employee may be [terminated] [denied a promotion] even though the politically disloyal activity would otherwise be a form of free speech or free association protected by the First Amendment. On the other hand, non-key employees continue to enjoy full First Amendment protection and cannot be [terminated] [denied a promotion] simply because they engaged in politically disloyal activity.

Thus, one of the issues you must decide in this case is whether the Plaintiff was a "key" employee. A key employee is one who holds a position, policymaking or otherwise, which implicates partisan political concerns in its effective functioning. Such a position would be one in which the employee's private political beliefs or political activity may interfere with the performance of the public duties of the position. The inherent powers and actual job responsibilities of the particular position involved, and the relationship of the particular position to the elected official are a part of the analysis. If a person is a key employee, political support by the employee of the elected public employer is an appropriate requirement for the effective performance of the employee's responsibilities.

To decide whether the Plaintiff was a key employee by virtue of the Plaintiff's position as [describe the Plaintiff's job], you should consider any or all of the following factors as they may apply:

(1) Whether the Plaintiff acted as an advisor or formulated plans or policies for the implementation of broad goals concerning the operation of the [describe the office or department in which the Plaintiff worked];

(2) Whether the Plaintiff exercised discretion in carrying out the Plaintiff's responsibilities or, in other words, whether the Plaintiff exercised independent judgment in executing policies and procedures;

(3) Whether the Plaintiff had regular contact with or worked closely with the Defendant as the elected official;

(4) Whether the Plaintiff frequently interacted with the public as the representative or alter ego of the elected official; and

(5) Whether the Plaintiff had access to confidential information not generally available to other employees of the agency.

No one of these factors is more important than any of the others, and it is not necessary that all of them exist in a particular position in order for the job to be a “key” position. What you must do is weigh these considerations, together with any other similar features you find to exist from the evidence, and then decide whether the Plaintiff was, or was not, a “key” employee.]

If you find in favor of the Plaintiff, and against the Defendant with respect to the defenses, you will then consider the Plaintiff's claim for damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

[On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the

value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial;

(b) Emotional pain and mental anguish;

[(c) Punitive damages, if any (as explained in the Court's instructions).]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or

employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

1.1.2
Public Employee
First Amendment Claim
Discharge/Failure To Promote
Political Disloyalty/Key Employee

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

[1. That the actions of the Defendant were "under color" of the authority of the State?

Answer Yes or No _____]

1. That the Plaintiff engaged in constitutionally protected political activity, a form of free speech, as defined in the court's instructions by [describe the Plaintiff's protected activity]?

Answer Yes or No _____

2. That such protected political activity by the Plaintiff was a substantial or motivating factor in the Defendant's decision to [discharge the Plaintiff from employment] [not promote the Plaintiff]?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not answer the remaining questions.]

3. That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff?

Answer Yes or No _____

4. That the Plaintiff [would have been discharged from employment] [would not have been promoted] for other reasons even in the absence of the protected political activity?

Answer Yes or No _____

5. That the Plaintiff was a "key" employee (as defined in the Court's instructions) whose job duties were such that the Defendant had a right to expect and demand political loyalty from the Plaintiff as a condition of [employment] [promotion]?

Answer Yes or No _____

[Note: If you answered Yes to either Question No. 4 or Question No. 5 you need not answer the remaining questions.]

6. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

7. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

8. That the Defendant acted with malice or with reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

In Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) and Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Supreme Court held that governmental employers cannot condition employment upon an employee's political affiliation, which is protected by the First Amendment, unless the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the public office involved," i.e., that the position in question is that of a "key employee" as defined in this instruction. Branti, 445 U.S. at 518, 100 S.Ct. at 1295. The holdings in Elrod and Branti were reaffirmed by the Supreme Court in Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), holding that other employment decisions such as promotions, transfers, and recalls after layoffs, cannot be based upon political affiliation or other protected political activity unless the patronage practice is narrowly tailored to advance vital governmental interests. Id. at 73-74, 110 S.Ct. at 2736-37.

In Terry v. Cook, 866 F.2d 373 (11th Cir. 1989), the Court held that deputies of a Florida sheriff are key employees. But see Cutcliffe v. Cochran, 117 F.3d 1353 (11th Cir. 1997), questioning the breadth of the Terry holding and suggesting that a fact intensive analysis of each job position should be required in determining whether

an employee is a "key employee." See also Welch v. Laney, 57 F.3d 1004 (11th Cir. 1995) (discussing the employment of deputy sheriffs in Alabama); Parrish v. Nikolits, 86 F.3d 1088, 1092-93 (11th Cir. 1996) (holding that party affiliation must be essential to the effective performance of a position before employee holding that position can be susceptible to patronage dismissal) and Cutcliffe, 117 F.3d at 1358 (holding that Branti "demands a showing that the position, policymaking or otherwise, implicates partisan political concerns in its effective functioning.").

With regard to remedies, see the Annotations and Comments following Federal Claims Instruction 1.1.1, supra.

1.1.3
Public Employee
Equal Protection Claim
Race And/Or Sex Discrimination - Hostile Work Environment
(Separate Liability Of Public Body And Individual Supervisors)

In this case the Plaintiff claims that the Defendants, while acting "under color" of state law, intentionally discriminated against the Plaintiff based on [his] [her] [race] [sex or gender] in violation of the Plaintiff's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The Defendants deny that they violated the Plaintiff's rights in any way, and assert that [describe the Defendants' theory of defense or affirmative defenses, if any].

You are instructed that the Equal Protection Clause of the Fourteenth Amendment does prohibit discrimination against public employees on the basis of [race] [sex or gender]. This includes the creation of a [racially] [sexually] hostile or abusive work environment which is also prohibited. And, federal law provides that a person may sue in this Court for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates the Plaintiff's rights under the Constitution of the United States.

[The rules of law that apply to the Plaintiff's claim against the [City] are different from the law that applies to the Plaintiff's claims against the individual Defendants, and each claim must be considered separately.]

I will first explain the rules or principles of law you must apply in deciding the Plaintiff's claim against the individual Defendants.

With respect to the Plaintiff's claims against the individual Defendants _____ and _____, respectively, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the individual Defendant intentionally discriminated against the Plaintiff in the terms and conditions of [his] [her] employment based on the Plaintiff's [race] [sex] through the creation and maintenance of a [racially] [sexually] hostile or abusive work environment;

Second: That the individual Defendant committed such act or acts of discrimination "under color" of state law or authority; and

Third: That the individual Defendant's act or acts were the proximate or legal cause of damages sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

A [racially] [sexually] hostile or abusive work environment means (1) an environment in which an employee is continuously and repeatedly subjected to [racially] [sexually] offensive acts or statements, or to different treatment based on [race] [sex]; (2) such treatment or such acts or statements are unwelcome and have not been invited or solicited by the employee's own acts or statements; (3) such treatment or such acts or statements resulted in a work environment that was so permeated with discriminatory intimidation, ridicule or insult of sufficient severity or pervasiveness that it materially altered the conditions of the Plaintiff’s employment; (4) that a reasonable person, as distinguished from someone who is unduly sensitive, would have found the workplace to be hostile or abusive; and (5) that the Plaintiff personally believed the workplace environment to be hostile or abusive.

Whether a workplace environment is "hostile" or "abusive" can be determined only by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating; and whether it unreasonably interfered with the employee's work performance. The effect on the employee's psychological well being is also relevant to determining whether the Plaintiff actually found the workplace environment to be

hostile or abusive; but while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Conduct that only amounts to ordinary socializing in the workplace such as occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing, does not constitute an abusive or hostile environment. Only extreme conduct amounting to a material change in the terms and conditions of employment is actionable.

[In this case the parties have stipulated or agreed that the individual Defendant(s) acted "under color" of state law, and you should, therefore, accept that fact as proven.]

[A state or local official acts "under color" of the authority of the state not only when the official acts within the limits of the official's lawful authority, but also when the official acts without or beyond the official's lawful authority. In order for unlawful or unconstitutional acts of an official to be done "under color" of state law, however, the acts must be done while the official was purporting or pretending to act in the performance of official duty; that is, the unlawful act must be an abuse or misuse of power which is possessed by the official only because [he] [she] is an official. In this case, therefore, you must determine whether

the individual Defendant had supervisory authority over the Plaintiff in the terms and conditions of the Plaintiff's employment, and whether such Defendant abused or misused that authority by intentionally discriminating against the Plaintiff because of the Plaintiff's [race] [sex].

You will note that proof of intentional discrimination on the part of the individual Defendant is required; any evidence of mere negligence or the failure to exercise reasonable care in supervising other employees is insufficient. The Plaintiff must prove that the individual Defendant committed intentionally discriminatory acts, either personally or through the direction of others, or that the Defendant knowingly and deliberately acquiesced in discriminatory acts being committed by the Defendant's subordinates without intervening to stop such discrimination.

For damages to be the proximate or legal result of wrongful conduct, it must be shown that, except for such conduct, the damages would not have occurred.

I will now explain the rules or principles of law you must apply in deciding the Plaintiff's claim against the [City]

Ordinarily, a corporation - - including a public body or agency such as the [City of _____] - - is legally responsible for the acts of its

employees carried out in the regular course of their job duties as employees. This is known in the law as the doctrine of "respondeat superior" which means "let the superior respond" for any losses or injuries wrongfully caused by its employees in the performance of their jobs.

This doctrine does not apply, however, in a case such as this where the Plaintiff claims a violation of constitutional rights.

In such a case it is not enough for the Plaintiff to prove that [he] [she] was discriminated against on the basis of [race] [sex] by other employees of the [City]; rather the [City of _____] can be held liable only if you find that the deprivation of the Plaintiff's constitutional right to equal protection of law was the direct result of a [City] policy or custom that created a [racially] [sexually] hostile or abusive work environment.

In order to prevail on the claim against the [City] the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was treated differently than other employees in the terms and conditions of [his] [her] employment by the [City];

Second: That such different treatment was the intended result of a [racially] [sexually] hostile or abusive work environment

which had become a [City] policy or custom, as hereafter defined; and

Third: That the Plaintiff suffered damages as a proximate or legal result of such [City] policy or custom.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

A policy or custom means a persistent, widespread or repetitious course of conduct by public officials or employees that, although not authorized by, or which may even be contrary to, written law or express municipal policy, is so consistent, pervasive and continuous that the [City] policy makers must have known of it, so that, by their acquiescence, such policy or custom has acquired the force of law without formal adoption or announcement. The Court has determined that the [City's] policy makers, within the meaning of this instruction, were the [City Manager and the City Council].

Finally, for damages to be the proximate or legal result of a wrongful [City] policy or custom, it must be shown that, except for such policy or custom, the damages would not have occurred.

If you find in favor of the Plaintiff and against the Defendant, you will then consider the issue of the Plaintiff's damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

[On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial;

(b) Emotional pain and mental anguish.

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

1.1.3
Public Employee
Equal Protection Claim
Race And/Or Sex Discrimination - Hostile Work Environment
(Separate Liability Of Public Body And Individual Supervisors)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the individual Defendant intentionally discriminated against the Plaintiff in the terms or conditions of [his] [her] employment based on the Plaintiff's [race] [sex] through the creation and

maintenance of a [racially] [sexually] hostile or abusive work environment?

Answer Yes or No _____

[Note: If you answered "No" to Question No. 1 you need not answer the remaining questions.]

[2. That the individual Defendant committed such act or acts of discrimination "under color" of state law or authority?

Answer Yes or No _____]

2. That the individual Defendant's act or acts were the proximate or legal cause of damages sustained by the Plaintiff?

Answer Yes or No _____

3. That the [racially] [sexually] hostile or abusive work environment had become a [city] policy or custom, as defined in the Court's instructions, for which the [city] would be legally responsible?

Answer Yes or No _____

4. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

5. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

6. That the Defendant acted with malice or with reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

Gender based discrimination against public employees by their employers is a violation of the Fourteenth Amendment. Snider v. Jefferson State Comm.College, 344 F.3d 1325 (11th Cir. 2003); Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991); Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Bohen v. City of East Chicago, Indiana, 799 F.2d 1180 (7th Cir. 1986); Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989).

The definition of a sexually hostile work environment is derived directly from Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). See also Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Supervisor liability for constitutional violations (denial of equal protection) is discussed in Cross v. State of Alabama, 49 F.3d 1490 (11th Cir. 1995).

The definition of policy or custom is derived from Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). See also Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985).

With regard to remedies, see the Annotations and Comments following Federal Claims Instruction 1.1.1, supra.

1.2.1
Title VII - Civil Rights Act
Race And/Or Sex Discrimination
Discharge/Failure To Promote
Including "Same Decision" Defense

In this case the Plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of their employment because of the employee's [race] [sex or gender].

More specifically, the Plaintiff claims that [he] [she] was [discharged from employment] [denied a promotional opportunity] by the Defendant because of the Plaintiff's [race] [sex or gender].

The Defendant denies that the Plaintiff was discriminated against in any way and asserts that [describe the Defendant's theory of defense or affirmative defenses, if any].

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was [discharged from employment] [denied a promotional opportunity] by the Defendant; and

Second: That the Plaintiff's [race] [sex or gender] was a substantial or motivating factor that prompted the Defendant to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

You should be mindful that the law applicable to this case requires only that an employer not discriminate against an employee because of the employee's [race] [sex or gender]. So far as you are concerned in this case, an employer may [discharge] [fail to promote] an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the Defendant even though you personally may not favor the action taken and would have acted differently under the circumstances. Neither does the law require an employer to extend any special or favorable treatment to employees because of their [race] [sex or gender].

On the other hand, it is not necessary for the Plaintiff to prove that the Plaintiff's [race] [sex or gender] was the sole or exclusive reason for the Defendant's decision. It is sufficient if the Plaintiff proves that [race] [sex or gender] was a determinative consideration that made a difference in the Defendant’s decision.

[If you find in the Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff would [have been dismissed] [not have been promoted] for other reasons even in the absence of consideration of the Plaintiff's [race] [sex or gender]. If you find that the Plaintiff would [have been dismissed] [not have been promoted] for reasons apart from the Plaintiff's [race] [sex or gender], then you will make that finding in your verdict.]

If you find for the Plaintiff and against the Defendant on its defense, you must then decide the issue of the Plaintiff's damages:

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

[On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

[(a) Net lost wages and benefits to the date of trial;]

(b) Emotional pain and mental anguish.

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

In some cases punitive damages may be awarded for the purpose of punishing the Defendant for its wrongful conduct and to deter others from engaging in similar wrongful conduct. However, an employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where those acts by such employees are contrary to the employer's own good faith efforts to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

So, an award of punitive damages would be appropriate only if you find for the Plaintiff and then further find from a preponderance of the evidence (1) that a higher management official of the Defendant personally acted with malice or reckless indifference to the Plaintiff's federally protected rights, and (2) that the employer itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages.

1.2.1
Title VII - Civil Rights Act
Race And/Or Sex Discrimination
Discharge/Failure To Promote
Including "Same Decision" Defense

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was [discharged from employment] [denied a promotional opportunity] by the Defendant?

Answer Yes or No _____

2. That the Plaintiff's [race] [sex or gender] was a substantial or motivating factor that prompted the Defendant to take that action?

Answer Yes or No _____

[Note: If you answered No to either Question No. 1 or Question No. 2 you need not answer the remaining question.]

3. That the Plaintiff would have been [discharged from employment] [denied a promotional opportunity] for other reasons even in the absence of consideration of the Plaintiff's [race] [sex or gender]?

Answer Yes or No _____

[Note: If you answered Yes to Question No. 3, you need not answer the remaining questions.]

[4. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____]

5. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

6(a). That a higher management official of the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights?

Answer Yes or No _____

(b) If your answer to 6(a) is Yes, do you further find that the Defendant itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace?

Answer Yes or No _____

(c) If your answers are Yes, to both 6(a) and (b), what amount of punitive damages, if any, should be assessed against the Defendant?

$_____.

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

In Palmer v. Board of Regents of The University System of Georgia, 208 F.3d 969, 974-75 (11th Cir. 2000), a panel of the Court suggested that the Committee review this instruction to determine whether it might be clarified by adding a clause to the effect that the jury may infer discriminatory intent if the Defendant's proffered reason for an adverse employment action is proven false. In its history, however, the

Committee has consistently strived to avoid the formulation of instructions on permissible inferences on the ground that such an inference - - and the question of whether one might or might not be drawn in a particular case - - is best left to the argument of counsel. Discussion of permissible inferences in the Court's jury instructions often resembles a comment on the evidence and is potentially more confusing than helpful to the jury. See Annotations and Comments, Basic Instruction 9.1, Eleventh Circuit Pattern Jury Instructions (Criminal Cases 2003). After careful consideration, therefore, the Committee has elected not to include in this instruction any admonition to the jury concerning the permissible inference that might be drawn from evidence that the Defendant's explanation is false. Whether such an inference is justified is a core factual issue, not a question of law, and is more properly a matter for argument of counsel.

In Frederick v. Sprint/United Management Co., 246 F.3d 1305 (11th Cir. 2001), the Eleventh Circuit made the statement that "courts should no longer use the labels "quid pro quo" and "hostile environment" to analyze whether an employer should be held liable on an employee's Title VII claim concerning a supervisor's sex-based harassment." 246 F.3d at 1311. Thus, while the nature of proof a Plaintiff is required to present in a Title VII harassment case has not changed, the terms used in distinguishing between the different types of actionable harassment have been altered. The labels "quid pro quo" and "hostile environment" had previously been used to differentiate cases in which employers could be held vicariously liable from those cases in which employers could not be held responsible. In Frederick the Eleventh Circuit said that "courts should separate these cases into two groups: (1) harassment which culminates in a "tangible employment action," such as discharge, demotion or undesirable reassignment, and (2) harassment in which no "tangible employment action" is taken but which is sufficient to constructively alter an employee's working conditions." Id. Accordingly, following that admonition, the Committee has slightly revised the Pattern Instructions as they existed in the previous edition of this work. Federal Claims Instruction 1.2.1 deals with the straightforward case in which an employee claims a discriminatory adverse employment action not preceded or accompanied by illegal harassment. Federal Claims Instruction 1.2.2 addresses cases involving acts of illegal harassment in which no other tangible employment action is taken (so that a Faragher defense may be available); and Federal Claims Instruction 1.2.3 addresses cases in which acts of illegal harassment culminate in some additional tangible employment action such as demotion, discharge or the like (and no Faragher defense may be asserted).

Following the Civil Rights Act of 1991, a prevailing plaintiff in a Title VII action may recover back pay, other past and future pecuniary losses, damages for pain and suffering, punitive damages (except that no punitive damages may be awarded against government agencies or political subdivisions), and reinstatement or front pay.

Title 42 USC § 2000e-5(g)(1) specifically provides for the award of back pay from the date of judgment back to two years prior to the date the plaintiff files a complaint

with the Equal Employment Opportunity Commission. This section also provides that interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. See Nord v. United States Steel Corp., 758 F.2d 1462, 1470-73 (11th Cir. 1985) (The purpose behind Title VII is to "make whole" the complainant, therefore back pay is recoverable up to the date judgment is entered); Crawford v. Western Elec. Co., Inc., 614 F.2d 1300 (5th Cir.1980). (Back pay relief under this subchapter is limited to the two years preceding the filing of a charge with the Commission, but liability of the employer for back pay may be based on acts occurring outside the two-year period if a current violation is shown).

Back pay encompasses more than just salary, it also includes fringe benefits such as vacation, sick pay, insurance and retirement benefits. Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974); see also Crabtree v. Baptist Hosp. of Gadsden, Inc., 749 F.2d 1501 (11th Cir.1985); EEOC v. Joe's Stone Crab, Inc., 15 F. Supp.2d 1364 (S.D. Fla. 1998).

In an after-acquired evidence case, the calculation of back pay is from the date of the unlawful discharge to the date the defendant discovers evidence of employee misconduct. See Wallace v. Dunn Constr. Co. Inc., 62 F.3d 374 (11th Cir. 1995) (back pay from date of unlawful discharge to date after-acquired evidence that she lied in employment application was discovered).

The award of compensatory and punitive damages in a Title VII employment discrimination action (exclusive of back pay, interest on back pay, or any other type of equitable relief authorized under 42 USC § 2000e-5(g)) is governed by 42 USC § 1981a. See 42 USC §§ 1981a(a)(1), (b)(2). Specifically, 42 USC § 1981a(b)(1) authorizes a prevailing plaintiff to receive compensatory and punitive damages if the plaintiff demonstrates that the employer engaged in a discriminatory practice "with malice or with reckless indifference to the plaintiff's federally protected rights of an aggrieved individual." Thus, a plaintiff must demonstrate some form of reckless or egregious conduct, such as: (1) a pattern of discrimination; (2) spite or malevolence; or (3) a blatant disregard for civil obligations. Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322-23 (11th Cir. 1999). In the Eleventh Circuit, punitive damages will ordinarily not be assessed against employers with only constructive knowledge of the violations. Id.; Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279-80 (11th Cir. 2002); Splunge v. Shoney's, Inc., 97 F.3d 488, 491 (11th Cir. 1996). To get punitive damages a Title VII plaintiff must "show either that the discriminating employee was 'high[] up the corporate hierarchy,' or that 'higher management' countenanced or approved [his] behavior." Dudley, 166 F.3d at 1323 (internal citations omitted). In Dudley, the Eleventh Circuit held that a store comanager and store manager were not sufficiently high enough up the employer's corporate hierarchy to allow their discriminatory acts to be the basis for punitive damages against the corporation. Id.

The award of such damages, however, is limited by § 1981a(b)(3) which provides caps on the amount of noneconomic compensatory and punitive damages awardable for Title VII actions as follows:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

A major limitation on the recovery of punitive damages is the Supreme Court's recent announcement that few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process. See State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

If a plaintiff seeks compensatory or punitive damages, either party may demand a trial by jury. See 42 USC § 1981a(c). Pursuant to this provision, the jury would determine the appropriate amount of compensatory and punitive damages to be awarded (without being instructed of the statutory caps), and the court would then reduce the amount in accordance with the limitations stated in § 1981a if necessary. See 42 USC § 1981a(c)(2).

It is clear that back pay is only recoverable through § 2000e-5(g)(1) of Title VII and does not fall within the purview of § 1981a limitations. See 42 USC § 1981a(b)(2); Landgraf v. USI Film Products, 511 U.S. 244, 253-55, 114 S.Ct. 1483, 1491, 128 L.Ed.2d 229 (1994) (stating § 1981a provides that award of compensatory damages excludes back pay to prevent double recovery). Because under 42 USC § 1981a(b)(2) back pay is specifically exempted from the definition of compensatory damages, there is a question as to whether back pay is really a legal remedy and thus determined by the jury, or an equitable remedy determined by the court. There is no Eleventh Circuit case since the 1991 amendment which answers the question. But see U.S.E.E.O.C. v. W&O, Inc., 213 F.3d 600, 618 (11th Cir. 2000) (considering the issue of whether the question of front pay goes to the jury within the purview of Title VII as amended by the Pregnancy Discrimination Act, the court cites various

circuit courts holding that front pay and back pay are equitable remedies to which no right to a jury trial attaches); Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228 1239 (11th Cir. 2000) (discussing case law expressing the view that back pay has long been characterized an equitable form of relief under Title VII). Obviously the parties could agree for the issue to be decided by the jury. Some judges might prefer to submit back pay (and even front pay) claims to the jury, ruling that the jury verdict will be treated as advisory under Federal Rule of Civil Procedure 39(c) should it be determined on appeal or otherwise that any part of the pay claims are equitable and not subject to jury trial as of right. This instruction has been prepared to permit the option that the claim for back pay will be submitted to the jury. Should a judge decide not to submit the issue to the jury, the jury should be told that should the jury find in favor of the plaintiff, the court will award pay lost as a result of defendant's discrimination, and the jury should not make any award for lost pay.

The Eleventh Circuit has held that front pay, because it is only awarded when reinstatement is impractical and only when the award of compensatory damages and back pay do not make the plaintiff "whole," is an equitable remedy to be determined by the court at the conclusion of the jury trial. U.S.E.E.O.C. v. W & O, Inc., 213 F.3d 600 (11th Cir. 2000).

Title VII also explicitly authorizes the award of attorney's fees to "the prevailing party." See 42 USC § 2000e-5(k). Thus, in Title VII cases, a district court "may in its discretion award attorney's fees to a prevailing defendant ... upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978).

If the Defendant prevails on a "same decision" defense, the jury should award no compensatory or punitive damages, even though Plaintiff has proven that "race, color, religion, sex or national origin was a motivating factor." See 42 USC § 2000e-5(g)(2)(B). Section 2000e-5(2)(B) provides that in such cases, the court may grant declaratory relief, limited injunctive relief and limited attorney fees and costs.

In a failure to promote or failure to hire case where the defendant has presented evidence of a legitimate nondiscriminatory reason for its decision but there is a question of fact as to the relative qualifications of plaintiff and the comparator, the court may consider adding a special interrogatory. In Cofield v. Goldkist, Inc., 267 F.3d 1264 (11th Cir. 2001), the Eleventh Circuit stated that a plaintiff cannot establish pretext by simply establishing that he or she was more qualified than the person chosen for the position. Id. at 1268. Instead, the Court held that plaintiff "must adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" Id. (quoting Deines v. Texas Dep't of Protective & Regulatory Serv., 164 F.3d 277, 280 (5th Cir. 1999)). The Court continued by explaining that "[t]he relevant inquiry . . . is not to judge which employee was more qualified but to determine whether any disparity . . . [in] qualifications is so great that a reasonable fact-finder could infer that [defendant] did not believe [plaintiff] to be better qualified." Id. Although Cofield was on appeal to

the Eleventh Circuit after a grant of summary judgment, the court may find it useful in considering post-judgment motions. A similar situation could exist where there is a factual dispute regarding knowledge of plaintiff's race, sex, religion, etc. See Lubetsky v. Applied Card Systems, Inc., 296 F.3d 1301, 1305-06 (11th Cir. 2002) (holding plaintiff must demonstrate that the decisionmaker was aware of the plaintiff's religion to hold employer liable for intentional discrimination).

1.2.2
Title VII - Civil Rights Act
Race And/Or Sex Discrimination
Workplace Harassment
No Tangible Employment Action Taken
(With Affirmative Defense By Employer)

In this case the Plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against their employees in the terms and conditions of their employment because of the employee's [race] [sex or gender].

More specifically, the Plaintiff claims that [he] [she] was subjected to a hostile or abusive work environment because of [racial] [sexual] harassment which is a form of prohibited employment discrimination.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was subjected to a hostile or abusive work environment, as hereafter defined, because of [his] [her] [race] [sex or gender];

Second: That such hostile or abusive work environment was [created] [permitted] by a supervisor with immediate or successively higher authority over the Plaintiff; and

Third: That the Plaintiff suffered damages as a proximate or legal result of such hostile or abusive work environment.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

A work environment is hostile or abusive because of [racial] [sexual] harassment only if (1) the Plaintiff was subjected to [racially] [sexually] offensive acts or statements; (2) such acts or statements were unwelcome and had not been invited or solicited, directly or indirectly, by the Plaintiff's own acts or statements; (3) such acts or statements resulted in a work environment that was so permeated with discriminatory intimidation, ridicule or insult of sufficient severity or pervasiveness that it materially altered the conditions of the Plaintiff's employment; (4) a reasonable person, as distinguished from someone who is unduly sensitive, would have found the workplace to be hostile or abusive; and (5) the Plaintiff personally believed the workplace environment to be hostile or abusive.

Whether a workplace environment is "hostile" or "abusive" can be determined only by looking at all the circumstances including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating; and whether it unreasonably interfered with the employee's work performance. The effect on the

employee's mental and emotional well being is also relevant to determining whether the Plaintiff actually found the workplace environment to be hostile or abusive; but while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Conduct that only amounts to ordinary socializing in the workplace such as occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing, does not constitute an abusive or hostile environment. Only extreme conduct amounting to a material change in the terms and conditions of employment is actionable.

When a hostile or abusive work environment is created by the conduct of a supervisor with immediate or successively higher authority over the Plaintiff, the Defendant employer is responsible under the law for such behavior and the resulting work environment.

[When a hostile or abusive work environment is created and carried on by nonsupervisory fellow workers of the Plaintiff, the Defendant, as the Plaintiff's employer, will be responsible or liable for permitting such behavior only if the Plaintiff proves by a preponderance of the evidence that the Plaintiff's supervisor or successively higher

authority knew (that is, had actual knowledge), or should have known (that is, had constructive knowledge), of the hostile or abusive work environment and permitted it to continue by failing to take remedial action.

To find that a supervisor had constructive knowledge of a hostile or abusive work environment - - that is, that the supervisor should have known of such environment - - the Plaintiff must prove that the hostile or abusive environment was so pervasive and so open and obvious that any reasonable person in the supervisor's position would have known that the harassment was occurring. Even though you may have already determined that the Plaintiff was in fact exposed to a hostile or abusive work environment, that alone is not determinative of the issue of the supervisor's knowledge; rather, you must find that the discriminatory harassment to which the Plaintiff was exposed was so pervasive and unconcealed that knowledge on the part of the supervisor may be inferred.]

Finally, in order for the Plaintiff to recover damages for having been exposed to a discriminatorily hostile or abusive work environment because of [race] [sex], the Plaintiff must prove that such damages were proximately or legally caused by the unlawful discrimination. For

damages to be the proximate or legal result of unlawful conduct, it must be shown that, except for such conduct, the damages would not have occurred.

If you find that the Plaintiff has proved each of the things [he] [she] must prove in support of [his] [her] claim, you will then consider the Defendant's affirmative defense to that claim.

In order to prevail on the affirmative defense, the Defendant must prove each of the following facts by a preponderance of the evidence:

FIRST OPTION

[First: That the Defendant exercised reasonable care to prevent and correct promptly, any sexually harassing behavior in the workplace; and

Second: That the Plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the Defendant to avoid or correct the harm [or otherwise failed to exercise reasonable care to avoid harm].]

SECOND OPTION

[First: That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace; and

Second: That the Defendant took reasonable and prompt corrective action after the Plaintiff took advantage of the preventative or

corrective opportunities provided by Defendant].]

THIRD OPTION

First: That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace; and

Second: That the Plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the Defendant to avoid or correct the harm [or otherwise failed to exercise reasonable care to avoid harm] **or** that, if the Plaintiff did take advantage of preventive or corrective opportunities, the Defendant responded by taking reasonable and prompt corrective action].]

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

[Ordinarily, proof of the following facts will suffice to establish the exercise of "reasonable care" by the employer: (a) that the employer had promulgated an explicit policy against sexual harassment in the workplace; (b) that such policy was fully communicated to its employees; and (c) that such policy provided a reasonable avenue for the Plaintiff to make a complaint to higher management. Conversely,

proof that an employee did not follow a complaint procedure provided by the employer will ordinarily suffice to establish that the employee "unreasonably failed" to take advantage of a corrective opportunity.]

If you find that the Plaintiff has proved [his] [her] claim [and that the Defendant has not proved its affirmative defense], you must then determine the amount of damages the Plaintiff has sustained.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

[On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the

Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

[(a) Net lost wages and benefits to the date of trial;]

(b) Emotional pain and mental anguish.

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been

reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

In some cases punitive damages may be awarded for the purpose of punishing the Defendant for its wrongful conduct and to deter others from engaging in similar wrongful conduct. However, an employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where those acts by such employees are contrary to the employer's own good faith efforts to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

So, an award of punitive damages would be appropriate only if you find for the Plaintiff and then further find from a preponderance of the evidence (1) that a higher management official of the Defendant personally acted with malice or reckless indifference to the Plaintiff's federally protected rights, and (2) that the employer itself had not acted

in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages.]

1.2.2
Title VII - Civil Rights Act
Race And/Or Sex Discrimination
Workplace Harassment
No Tangible Employment Action Taken
(With Affirmative Defense By Employer)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was subjected to a hostile or abusive work environment because of [his] [her] [race] [sex or gender]?

Answer Yes or No _____

2. That such hostile or abusive work environment was [created] [permitted] by a supervisor with immediate or successively higher authority over the Plaintiff?

Answer Yes or No _____

3. That the Plaintiff suffered damages as a proximate or legal result of such hostile or abusive work environment?

Answer Yes or No _____

[Note: If you answered No to any one of the preceding three questions, you need not answer the remaining questions.]

OPTION NO. 1

[4. That the Defendant exercised reasonable care to prevent and correct promptly any sexually harassing behavior in the workplace?

Answer Yes or No _____

5. That the Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Defendant to avoid or correct the harm?

Answer Yes or No _____]

OPTION NO. 2

[4. That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace?

Answer Yes or No _____

5. That the Defendant took reasonable and prompt corrective action after the Plaintiff took advantage of the preventive or corrective opportunities provided by the Defendant?

Answer Yes or No _____]

OPTION NO. 3

[4. That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace?

Answer Yes or No _____

5. That - -

(a) The Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Defendant to avoid or correct the harm?

Answer Yes or No _____

OR

(b) The Plaintiff took advantage of the preventive or corrective opportunities provided by the Defendant and the Defendant then responded by taking reasonable and prompt corrective action?

Answer Yes or No _____]

[6. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____]

7. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

8(a). That a higher management official of the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights?

Answer Yes or No _____

(b) If your answer is Yes, that the Defendant itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace?

Answer Yes or No _____

(c) If your answer is Yes, what amount of punitive damages, if any, should be assessed against the Defendant? $_____.

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

That part of this instruction dealing with the proof necessary to establish the existence of a hostile or abusive work environment is derived from Meritor Savings

Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) and Harris v. Fork Lift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

The remainder of the instruction is derived from Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), overruling Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir. 1997) (en banc) and holding that where the hostile work environment was generated by the conduct of a supervisor with immediate (or successively higher) authority over an employee, the employer is vicariously liable for the supervisor's conduct (subject to an affirmative defense where there is no tangible employment action causally linked to any sexual harassment committed by a supervisor). See Frederick v. Sprint/United Management Co., 246 F.3d 1305 (11th Cir. 2001). If there is a factual dispute over the presence of an adverse employment action causally linked to the sexual harassment, appropriate modifications to the instruction and the special interrogatories should be considered.

It is unclear what effect the Supreme Court believed an employer's taking of prompt corrective action, upon notification of a complaint, should have on that employer's ability to assert an affirmative defense. The articulated rationale for the Court's decision in Faragher suggests that an employer who takes prompt remedial action should not be subject to "automatic" vicarious liability and hence should be able to assert the affirmative defense. One of the central veins of the Supreme Court's reasoning in both Faragher and Ellerth is the goal of encouraging employers to provide a clear policy that encourages immediate reporting by a victim enabling the employer to promptly eliminate sexual harassment. Absent a recognition of an affirmative defense where both parties act as intended, the affirmative defense fails to further the purpose of which it has been created. In other words, if there is no affirmative defense where the victimized employee immediately invoked the employer's complaint procedure and the employer then took prompt reasonable action to eliminate the existing harassment and prevent future harassment, the affirmative defense would fail to reward, and thus encourage, the type of employee-employer interaction held out as the intended goal of Title VII. Indeed, when adopting the affirmative defense, the Supreme Court clearly identified this as the desired goal:

> "indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive."

Faragher, 524 U.S. at 806, 118 S.Ct. at 2292. Accord, Burlington Indust. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

Nevertheless, the language of the two prong test in Faragher is written in the disjunctive, which, if read literally, means that as long as an employee has not unreasonably failed to take advantage of the procedures provided by the employer - - that is presumably if the employee has lodged a complaint - - the employer may no longer assert an affirmative defense, even if the employer has instituted effective

anti-harassment procedures and has promptly corrected and eliminated harassing behavior upon receiving a complaint by the employee.

In Coates v. Sundor Brands, 164 F.3d 1361 (11th Cir. 1999), Judge Barkett's concurrence interpreted Farragher to mean that a prompt response by an employer to halt reported harassment is sufficient to satisfy the employer's affirmative defense and relieve the employer of liability for a hostile work environment under Title VII. Additionally in Madray v. Publix Supermarkets, Inc., 208 F.3d 1290 (11th Cir. 2000), the Court noted that "'the employer's notice of the harassment is of paramount importance [because] if the employer had notice of the harassment . . . then it is liable unless it took prompt corrective action.'" Id. at 1299 (quoting Dees v. Johnson Controls World Servs., 168 F.3d 417, 422 (11th Cir. 1999) (emphasis added). This seems to suggest that the second element of the Faragher affirmative defense may be established in either of two ways.

Three options are provided in the text, with corresponding interrogatories. The first option is the literal two prong Faragher defense. The second option is for use where it is shown that the Plaintiff took advantage of the preventive or corrective opportunities provided by the Defendant, and the Defendant claims the benefit of the Faragher affirmative defense because it took reasonable and prompt corrective action when it became aware of the Plaintiff's claim. The Third Option is a variation of the Second and applies where there is a dispute as to whether the Plaintiff took advantage of the preventive/corrective opportunities provided by the Defendant and/or whether the Defendant responded promptly and reasonably.

In Pennsylvania State Police v. Suders, _____ U.S. _____, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004), the Supreme Court resolved a split among the Circuits and held that a constructive discharge due to ongoing harassment and not resulting from some other tangible employment action such as a demotion or cut in pay, etc., is not itself a tangible employment action foreclosing the employer's affirmative defense under Faragher.

With regard to remedies, including lost pay (where a constructive discharge is claimed), see the Annotations and Comments following Federal Claims Instruction 1.2.1, supra. See also Federal Claims Instruction 1.9.2, infra.

Punitive damages will ordinarily not be assessed against employers with only constructive knowledge of the violations. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279-80 (11th Cir. 2002); Splunge v. Shoney's, Inc., 97 F.3d 488, 491 (11th Cir. 1996). To get punitive damages a Title VII plaintiff must "show either that the discriminating employee was 'high up the corporate hierarchy,' or that 'higher management' countenanced or approved [his] behavior." Dudley, 166 F.3d at 1323 (internal citations omitted). In Dudley, the Eleventh Circuit held that a store comanager and store manager were not sufficiently high enough up the employer's corporate hierarchy to allow their discriminatory acts to be the basis for punitive damages against the corporation. Id. With regard to the statutory standard for punitive damages requiring proof that the employer acted "with malice or reckless

indifference to [the employee's] federally protected rights," see Kolstad v. American Dental Association, 527 U. S. 526, 119 S.Ct. 2118 144 L.Ed.2d 494 (1999). A further limitation on recovery of punitive damages is the Supreme Court's recent announcement that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. See State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

1.2.3
Title VII - Civil Rights Act
Race And/Or Sex Discrimination
Workplace Harassment
Tangible Employment Action Taken

In this case the Plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of their employment because of the employee's [race] [sex or gender].

More specifically, the Plaintiff claims that [he] [she] was subjected to a form of [racial] [sexual] discrimination by [his] [her] supervisor that culminated in an adverse "tangible employment action."

The Defendant denies the Plaintiff's claim and asserts that [describe the Defendant's theory of defense].

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was subjected by [his] [her] supervisor to [racial harassment] [sexual harassment] [unwelcome sexual advances];

Second: That an adverse "tangible employment action" was imposed upon the Plaintiff [as a part of such racial harassment] [as a part of such sexual harassment] [because the Plaintiff rejected such unwelcome sexual advances]; and

Third: That the Plaintiff suffered damages as a proximate or legal result of such violation.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

When [racial] [sexual] harassment is carried out by a supervisor with immediate or successively higher authority over the Plaintiff culminating in an adverse tangible employment action against the Plaintiff, the Defendant employer is responsible under the law for such behavior. An adverse tangible employment action includes [describe the adverse tangible employment action at issue in the case].

Unlawful sexual harassment may take the form of unwelcome sexual advances and it is unlawful for a supervisor of an employee to either demand sexual favors from the employee in exchange for favorable treatment in the workplace, or to change - - or threaten to change - - the terms and conditions of a person's employment as a means of forcing or coercing, or attempting to force or coerce, sexual favors from the employee. In either case, however, the demand or the threat for sexual favors by the supervisor must be (1) such that a reasonable person would have regarded the demand or threat as a real or serious effort on the part of the supervisor to gain a sexual favor, and

it must be (2) unwelcome to the employee in the sense that the employee did not solicit or invite it, expressly or implicitly, and in the sense that the employee regarded the conduct as undesirable or offensive. [The fact that an employee may have consented to engaging in sex related conduct in response to a demand or threat does not, in and of itself, establish that such conduct was invited by or welcome to the consenting employee, but is one of the factors you may consider in deciding that issue.]

Finally, in order for the Plaintiff to recover damages for having been subjected to unlawful [racial] [sexual] discrimination culminating in an adverse tangible employment action, the Plaintiff must prove that such damages were proximately or legally caused by the unlawful discrimination. For damages to be the proximate or legal result of unlawful conduct, it must be shown that, except for such conduct, the damages would not have occurred.

In the event you find from a preponderance of the evidence that the Defendant did discriminate against the Plaintiff, you must then determine the amount of damages the Plaintiff has sustained.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by

a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

[On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

[(a) Net lost wages and benefits to the date of trial;]

(b) Mental and emotional humiliation or pain and anguish.

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

In some cases punitive damages may be awarded for the purpose of punishing the Defendant for its wrongful conduct and to deter others from engaging in similar wrongful conduct. However, an employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where those acts by such employees are contrary to the employer's own good faith efforts to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

So, an award of punitive damages would be appropriate only if you find for the Plaintiff and then further find from a preponderance of the evidence (1) that a higher management official of the Defendant personally acted with malice or reckless indifference to the Plaintiff's federally protected rights, and (2) that the employer itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages.]

1.2.3
Title VII - Civil Rights Act
Race And/Or Sex Discrimination
Workplace Harassment
Tangible Employment Action Taken

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was subjected by [his] [her] supervisor to [racial harassment] [sexual harassment] [unwelcome sexual advances] (as those terms are explained in the Court's instructions)?

Answer Yes or No _____

[Note: If you answered No to Question No. 1 you need not answer the remaining questions.]

2. That an adverse tangible employment action was imposed upon the Plaintiff [as a part of such racial harassment] [as a part of such sexual harassment] [because the Plaintiff rejected such unwelcome sexual advances]?

Answer Yes or No _____

[Note: If you answered No to Question No. 2 you need not answer the remaining questions.]

3. That the Plaintiff suffered damages as a proximate or legal result of such sexual demand or threat?

Answer Yes or No _____

If your answer is Yes, in what amount(s) for:

[(a) Net lost wages and benefits to the date of trial - - $_____]

(b) Mental and emotional humiliation or pain and anguish - - $_____]

[(c) Punitive damages, if any (as explained in the Court's instructions) - - $_____]

4(a). That a higher management official of the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights?

Answer Yes or No _____

(b) If your answer is Yes, that the Defendant itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace?

Answer Yes or No _____

(c) If your answer is Yes, what amount of punitive damages, if any, should be assessed against the Defendant? $_____.

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

The elements of a quid pro quo form of unlawful sexual harassment were set out in Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). See also Virgo v. Riviera Beach Associates, Ltd., 30 F.3d 1350 (11th Cir. 1994). In the case of a quid pro quo violation (as distinguished from a hostile or abusive environment case), the employer is strictly liable for the offending supervisor's unlawful conduct. Henson, 682 F.2d at 910.

In Frederick v. Sprint/United Management Co., 246 F.3d 1305, 1311 (11th Cir. 2001), the Court observed that the Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), has stated that courts should avoid using the labels "quid pro quo" and "hostile environment" in analyzing whether an employer should be held vicariously liable for a supervisor's discriminatory acts. However, the Committee does not read Frederick to foreclose the use of those terms as convenient short hand references when properly defined in describing for the jury the elements of the Plaintiff's claim in a particular case.

In Palmer v. Board of Regents of the University System of Georgia, 208 F.3d 969, 974-75 (11th Cir. 2000), a panel of the Court suggested that the Committee review this instruction to determine whether it might be clarified by adding a clause to the effect that the jury may infer discriminatory intent if the Defendant's proffered reason for an adverse employment action is proven false. In its history, however, the Committee has consistently strived to avoid the formulation of instructions on permissible inferences on the ground that such an inference - - and the question of whether one might or might not be drawn in a particular case - - is best left to the argument of counsel. Discussion of permissible inferences in the Court's jury instructions often resembles a comment on the evidence and is potentially more confusing than helpful to the jury. See Annotations and Comments, Basic Instruction 9.1, Eleventh Circuit Pattern Jury Instructions (Criminal Cases 2003). After careful consideration, therefore, the Committee has elected not to include in this instruction any admonition to the jury concerning the permissible inference that might be drawn from evidence that the Defendant's explanation is false. Whether such an inference is justified is a core factual issue, not a question of law, and is more properly a matter for argument of counsel.

The Eleventh Circuit has clarified the test for recovering punitive damages in a Title VII hostile work environment action. An aggrieved plaintiff must demonstrate some form of reckless or egregious conduct, such as: (1) a pattern of discrimination; (2) spite or malevolence; or (3) a blatant disregard for civil obligations. Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322-23 (11th Cir. 1999). Punitive damages will ordinarily not be assessed against employers with only constructive knowledge of the violations. Id.; Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279-80 (11th Cir. 2002); Splunge v. Shoney's, Inc., 97 F.3d 488, 491 (11th Cir. 1996). To get punitive damages, a Title VII plaintiff must "show either that the discriminating employee was 'high[ ] up the corporate hierarchy,' or that 'higher management' countenanced or approved [his] behavior." Dudley, 166 F.3d at 1323 (internal citations omitted). In Dudley, the Eleventh Circuit held that a store comanager and store manager were not sufficiently high enough up the employer's corporate hierarchy to allow their discriminatory acts to be the basis for punitive damages against the corporation. Id. A further limitation on punitive damages is the Supreme Court's recent announcement that few awards exceeding a single digit ratio between punitive damages and compensatory damages will satisfy due process. See State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

Because an employer is strictly liable for an offending supervisor's unlawful conduct in a quid pro quo violation, the question remains whether the standard enunciated in Dudley applies in the quid pro quo cause of action. As of this printing, no decisions in this Circuit have addressed this issue.

1.3.1
Civil Rights Act
42 USC § 1981
Race Discrimination In Employment
Discharge/Failure To Promote

In this case the Plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against employees [including applicants for employment] in the terms and conditions of their employment because of race.

More specifically, the Plaintiff claims that [he] [she] was [denied employment] [discharged from employment] [denied a promotional opportunity] by the Defendant because of the Plaintiff's race.

The Defendant denies that the Plaintiff was discriminated against in any way and asserts that [describe the Defendant's theory of defense or affirmative defenses, if any].

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was [denied employment] [discharged from employment] [denied a promotional opportunity] by the Defendant; and

Second: That the Plaintiff's race was a substantial or motivating factor that prompted the Defendant to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

You should be mindful that the law applicable to this case requires only that an employer not discriminate against an employee [applicant] because of the employee's [applicant's] race. So far as you are concerned in this case, an employer may [deny employment] [discharge] [fail to promote] an employee [applicant] for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the Plaintiff to lead you to substitute your own judgment for that of the Defendant even though you personally may not favor the action taken and would have acted differently under the circumstances. Neither does the law require an employer to extend any special or favorable treatment to employees [or applicants] because of their race.

On the other hand, it is not necessary for the Plaintiff to prove that the Plaintiff's race was the sole or exclusive reason for the Defendant's decision. It is sufficient if the Plaintiff proves that race was a determinative consideration that made a difference in the Defendant's decision.

[If you find in the Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendant has shown by a preponderance of the evidence that the Plaintiff would [not have been employed] [have been dismissed] [not have been promoted] for other reasons apart from the Plaintiff's race. If you find that the Plaintiff would [have been denied employment] [have been dismissed] [not have been promoted] for reasons apart from race, then your verdict should be for the Defendant.]

If you find for the Plaintiff and against the Defendant on its defense, you must then decide the issue of the Plaintiff's damages:

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

[On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical

aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial;

(b) Emotional pain and mental anguish.

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

In some cases punitive damages may be awarded for the purpose of punishing the Defendant for its wrongful conduct and to deter others from engaging in similar wrongful conduct. However, an employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where those acts by such employees are contrary to the employer's own good faith efforts to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

So, an award of punitive damages would be appropriate only if you find for the Plaintiff and then further find from a preponderance of the evidence (1) that a higher management official of the Defendant personally acted with malice or reckless indifference to the Plaintiff's federally protected rights, and (2) that the employer itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

1.3.1
Civil Rights Act
42 USC § 1981
Race Discrimination In Employment
Discharge/Failure To Promote

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was [denied employment] [discharged from employment] [denied a promotional opportunity] by the Defendant?

Answer Yes or No _____

2. That the Plaintiff's race was a substantial or motivating factor that prompted the Defendant to take that action?

Answer Yes or No _____

[Note: If you answered No to either Question No. 1 or Question No. 2 you need not answer the remaining questions]

3. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

4. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

5(a). That a higher management official of the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights?

Answer Yes or No _____

(b) If your answer is Yes, that the Defendant itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace?

Answer Yes or No _____

(c) If your answer is Yes, what amount of punitive damages, if any, should be assessed against the Defendant? $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

42 USC §1981(a) states that all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts. The Civil Rights Act of 1991 expanded the applicability of § 1981 itself to include not only the formation of contracts but the "making, performance, modification and termination of contracts." 42 USC §1981(a). See Vance v. Southern Bell Telephone and Telegraph, 983 F.2d 1573 (11th Cir. 1993). Section 1981, like 42 USC § 1983, does not contain its own damages provisions. Rather, the remedies available have been judicially determined. Plaintiffs may recover punitive and compensatory damages (including pain and suffering), back pay, reinstatement or future earnings, and attorney's fees. The statutory caps, contained in the Civil Rights Act of 1991 and placed on damages in Title VII claims, do not apply to § 1981 claims.

See Goodgame v. American Cast Iron Pipe Co., 75 F.3d 1516 (11th Cir. 1996). See also Olmstead v. Taco Bell Corp., 141 F.3d 1457 (11th Cir. 1998) (noting difference between claims filed under Title VII, where damages are limited by the statutory caps in § 1981a, and claims filed under § 1981(a) that have no such caps). However, a major limitation on recovery of punitive damages is the Supreme Court's

recent announcement that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. See State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

A plaintiff cannot recover punitive damages from a governmental agency or municipality under 42 USC § 1981. Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986); Spinks v. City of St. Louis Water Division, 176 F.R.D. 572 (E.D. Mo. 1997). See also City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (holding that punitive damages are not recoverable against a governmental agency or political subdivision under 42 USC § 1983).

In a failure to promote or failure to hire case where the defendant has presented evidence of a legitimate nondiscriminatory reason for its decision but there is a question of fact as to the relative qualifications of plaintiff and the comparator, the court may consider adding a special interrogatory. In Cofield v. Goldkist, Inc., 267 F.3d 1264 (11th Cir. 2001), the Eleventh Circuit stated that a plaintiff cannot establish pretext by simply establishing that he or she was more qualified than the person chosen for the position. Id. at 1268. Instead, the Court held that plaintiff "must adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" Id. (quoting Deines v. Texas Dep't of Protective & Regulatory Serv., 164 F.3d 277, 280 (5th Cir. 1999)). The Court continued by explaining that "[t]he relevant inquiry . . . is not to judge which employee was more qualified but to determine whether any disparity . . . [in] qualifications is so great that a reasonable fact-finder could infer that [defendant] did not believe [plaintiff] to be better qualified." Id. Although Cofield was on appeal to the Eleventh Circuit after a grant of summary judgment, the court may find it useful in considering post-judgment motions.

See Annotations and Comments for Federal Claims 1.2.1, supra, some of which may be relevant to a § 1981 claim.

1.4.1
Age Discrimination In Employment Act
29 USC §§ 621-634

In this case the Plaintiff claims that the Defendant discriminated against the Plaintiff by [describe adverse employment action] because of the Plaintiff's age.

The Defendant denies that [describe the disputed act and Defendant's defenses, if any].

Under federal law, it is unlawful for an employer to discharge or lay off or otherwise discriminate against any employee because of that employee's age, when the employee is at least 40 years of age.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was within the protected age group, that is, being at least 40 years of age;

Second: That the Plaintiff was employed by the Defendant and was subsequently [describe adverse employment action] by the Defendant; and

Third: That the Plaintiff's age was a substantial or motivating factor that prompted the Defendant to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

You should be mindful that the law applicable to this case requires only that an employer not discriminate against an employee because of the employee's age. So far as you are concerned in this case, an employer may discharge, refuse to promote or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the Defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances. Neither does the law require an employer to extend any special or favored treatment to employees in the protected age group.

On the other hand, it is not necessary for the Plaintiff to prove that age was the sole or exclusive reason for the Defendant's decision. It is sufficient if the Plaintiff proves that age was a determining consideration that made a difference in the Defendant's decision.

[If you find that the Plaintiff has established this claim, you will then consider the Defendant's defenses, as to which the Defendant

bears the burden of proof by a preponderance of the evidence. The Defendant claims [that age is a part of a bona fide occupational qualification] [that the treatment of the Plaintiff was in accordance with the terms of a bona fide seniority system].]

[It is not unlawful for an employer to [describe the adverse action] any employee when such action is based upon [a bona fide occupational qualification] [the terms of a bona fide seniority system].]

[To establish a "bona fide occupational qualification," an employer has the burden of demonstrating reasonable cause to believe that all or substantially all of a class of applicants would be unable to perform a job safely and efficiently, and that the bona fide occupational qualification is "reasonably necessary to the essence" of the business operation.]

[In order to qualify as a bona fide seniority system, the system must use the length of service as a primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.]

To summarize, it is the burden of the Plaintiff to prove to your satisfaction by a preponderance of the evidence that the Defendant discriminated against the Plaintiff because of the Plaintiff's age.

[However, should the Defendant seek to justify its adverse action toward the Plaintiff on the basis of a bona fide [occupational qualification] [seniority system] then it is the burden of the Defendant to prove to your satisfaction by a preponderance of the evidence that the Defendant did in fact take that action on the basis of a bona fide [occupational qualification] [seniority system]. If you are so convinced by a preponderance of the evidence, then you will find for the Defendant.]

If you find that the Plaintiff has proved [his] [her] claim [and that the Defendant has not proved its affirmative defense], you must then determine the amount of damages the Plaintiff has sustained.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider only the following element[s] of damage, to the extent you find [it] [them] proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial;

[(b) Net lost wages and benefits in the future [reduced to present value].]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

If you find that the Defendant willfully violated the law, as claimed by the Plaintiff, then the Plaintiff is entitled to double damages. This

means that the Court would award the damages you have calculated plus an equal amount as liquidated damages. If the employer knew that its adverse employment action was a violation of the law, or acted in reckless disregard of that fact, then its conduct was willful. If the employer did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard as to whether its conduct was prohibited by the law, even if it acted negligently, then its conduct was not willful.

1.4.1
Age Discrimination In Employment Act
29 USC §§ 621-634

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was employed by the Defendant and was subsequently [describe adverse employment action] by the Defendant?

Answer Yes or No _____

2. That the Plaintiff's age was a substantial or motivating factor that prompted the Defendant to take that action?

Answer Yes or No _____

[Note: If you answered No to either Question No. 1 or Question No. 2 you need not answer the remaining questions.]

3. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes, in what amount? $_____

[4. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits in the future [reduced to present value]?]

Answer Yes or No _____

If your answer is Yes, in what amount? $_____

5. That the Defendant "willfully" violated the law (as that term is defined in the Court's instructions)?

Answer Yes or No _____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

The enforcement section of the ADEA, 29 USC § 621 et seq., incorporates the enforcement and damages provisions of the Fair Labor Standards Act, 29 USC § 201 *et seq.* Section § 216(b) of the Fair Labor Standards Act provides that:

> [a]ny employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

Section 216(b) further provides that the "court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Section 216(b)'s liquidated damages provision is limited by § 626(b)'s provision that liquidated damages shall only be awarded in cases involving willful violations. In addition, §217 provides that the court may issue an injunction to enjoin violations of the ADEA and the FLSA.

A court may award attorney's fees to a prevailing ADEA defendant only upon finding that plaintiff litigated in bad faith. See Turlington v. Atlanta Gas Light Co., 135 F.3d 1428 (11th Cir. 1998).

Lorilard v. Pons, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) held that jury trial is available under the ADEA.

The Supreme Court held in Kimel v. Florida Bd. Of Regents, 528 U.S. 62, 92, 120 S.Ct. 631, 650, 145 L.Ed.2d 522 (2000) that the ADEA does not abrogate the states' sovereign immunity.

Following the First, Third, Sixth, Seventh and Tenth Circuits, the Eleventh Circuit held in Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001) that disparate impact claims are not viable under the ADEA. Although the Supreme Court explicitly left open the question of whether a disparate impact theory is available under the ADEA in Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993), the Eleventh Circuit noted that language in the opinion suggests that it is not available. See Adams, 255 F.3d at 1326.

Damages for pain and suffering are not recoverable under the ADEA. Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977). Although the text of the ADEA makes available such legal and equitable relief as "may be appropriate", the explicit incorporation into the ADEA of the remedial provisions of the Fair Labor Standards Act limits the damages which may be awarded to the actual monetary losses arising from the employment action. Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir. 1985); Maleszewski v. United States, 827 F.Supp. 1553 (N.D. Fla. 1993). Thus, recovery is limited to lost wages and benefits;

compensatory damages for pain and suffering, emotional distress, etc. are not recoverable. Goldstein, 758 F.2d at 1446 (citing Dean, 559 F.2d at 1038 (no damages for pain and suffering)); Guthrie v. J. C. Penney Co., 803 F.2d 202, 208 (5th Cir. 1986) (same); Haskell v. Kaman Corp., 743 F.2d 113, 120-21 (2d Cir. 1984) (no damages for emotional distress). See also Mitchell v. Sisters of Charity of Incarnate Word, 924 F.Supp. 793, 802 (S.D. Tex. 1996) (holding that amounts owing include unpaid wages and benefits but do not include damages for pain and suffering).

Additionally, punitive damages are not recoverable under the ADEA. Goldstein, 758 F.2d at 1446; Dean, 559 F.2d at 1038-40. See also Brunnemann v. Terra Intern., Inc., 975 F.2d 175 (5th Cir. 1992) (The text of the statute itself, though it permits the recovery of liquidated damages in cases of "willful violation", does not provide for the recovery of punitive damages); Bruno v. Western Elec. Co., 829 F.2d 957 (10th Cir. 1987) (noting that all circuits which have ruled on this issue, have rejected punitive damages as a possible remedy under the ADEA). Courts have noted that the inclusion of the liquidated damages provision itself suggests that Congress foreclosed the possibility of punitive damages. See Bruno, 829 F.2d at 966; Dean, 559 F.2d at 1039.

The Eleventh Circuit slightly modified the plaintiff's prima facie case in a reduction-in-force (RIF) case and where a position is eliminated in its entirety. In these instances, the plaintiff establishes a prima facie case by demonstrating (1) that he was in a protected age group and was adversely affected by an employment decision, (2) that he was qualified for his current position or to assume another position at the time of discharge, and (3) evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of age in reaching that decision. See Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1329 (11th Cir. 1998); Jameson v. Arrow Co., 75 F.3d 1528, 1532 (11th Cir. 1996).

Corbin v. Southland Int'l. Trucks, 25 F.3d 1545 (11th Cir. 1994). Held, a terminated employee need not show that his or her replacement was under 40 (and, therefore, outside the ADEA's protected class), but rather only that such replacement was younger and that the difference in their ages, along with other any other relevant evidence, is sufficient for a finder of fact to infer age discrimination therefrom.

Similar to the Fair Labor Standards Act, the ADEA does not provide a cause of action for discrimination against an independent contractor. Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1495 n.13 (11th Cir. 1993). The Eleventh Circuit has held that whether an ADEA plaintiff was, in fact, an "employee" of a defendant is a question of material fact to be determined by the jury. Id.; Garcia v. Copenhaver, Bell & Associates, M.D.'s, 104 F.3d 1256 (11th Cir. 1997) (holding that whether a defendant is an "employer" for purposes of the ADEA is a necessary element of a claim brought pursuant to that act and a question for the jury to decide). See also Fountain v. Metcalf, Zima & Co., PA., 925 F.2d 1398 (11th Cir. 1991) (holding partner in an accounting firm was not an "employee" for purposes of bringing a claim under the ADEA).

In an ADEA claim, the employee bears the ultimate burden of proving that age was a determining or substantial motivating factor in the employer's decision to terminate the employee's employment. Walker v. NationsBank of Florida, N.A., 53 F.3d 1548 (11th Cir. 1995); Walls v. Button Gwinnett Bancorp, Inc., 1 F.3d 1198 (11th Cir. 1993); Young v. General Foods Corp., 840 F.2d 825 (11th Cir.1988).

Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 84 F.3d 1380 (11th Cir. 1996), superseded by Isenbergh, 97 F.3d 436 (11th Cir. 1996). Holding that a jury may not base its age discrimination determination on its sympathy for a particular plaintiff.

The Eleventh Circuit set forth the standard for determining whether an employer's violation of the ADEA was "willful," thereby allowing the recovery of liquidated damages in Formby v. Farmers and Merchants Bank, 904 F.2d 627, 631-32 (11th Cir. 1990). Citing the Supreme Court's decision in Trans World Airlines v. Thurston, 469 U.S. 111, 125-126 n.19, 105 S.Ct. 613, 624-25 n.19, 83 L.Ed.2d 523 (1985), the Eleventh Circuit held that liquidated damages cannot be imposed merely because an employer knew that the ADEA was potentially applicable or because the employer acted negligently in determining whether its conduct comported with the requirements of the ADEA. However, the plaintiff need not show evil motive, bad purpose, or intent to violate the ADEA in order to trigger liquidated damages. Rather, to prove entitlement to liquidated damages a plaintiff must establish that the employer knew its conduct was prohibited or showed reckless disregard for whether its conduct was prohibited by the Act. See also Day v. Liberty Nat.Life Ins. Co., 122 F.3d 1012 (11th Cir. 1997); Verbraeken v. Westinghouse Electric Corp., 881 F.2d 1041, 1048 (11th Cir.1989); Stanfield v. Answering Service, Inc., 867 F.2d 1290, 1296 (11th Cir. 1989); Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1561 (11th Cir.1988); Spanier v. Morrison's Management Services, 822 F.2d 975, 978 (11th Cir.1987); Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1099-1101 (11th Cir. 1987).

Whether or not a willful violation has occurred is a question for the jury. Day, 122 F.3d at 1016; Castle, 837 F.2d at 1561 (11th Cir.1988).

The existence of a jury issue on willfulness of age discrimination on the part of the employer "divests the district court of discretion to reduce an ADEA liquidated damages award." Spanier, 822 F.2d at 979.

Front pay should not be included in liquidated damages awards. See Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1340 (11th Cir. 1999). This is due to the fact that "while liquidated damages are intended to be punitive in nature, the express terms of the ADEA limit the calculation of liquidated damages to double the amount of lost pecuniary wages. Front pay, however, is equitable rather than compensatory relief." Id. (internal quotations omitted). Therefore, liquidated damages are limited to double the amount of full back pay and lost fringe benefits. See id.

Since the ADEA generally parallels the EPA and the FLSA, it is noteworthy that awarding both prejudgment interest awards and liquidated damages in an ADEA case does not constitute double compensation because the legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature. See Lindsey v. Am. Cast Iron Pipe Co., 810 F.2d 1094, 1101 (11th Cir. 1987), citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). Thus "ADEA liquidated damages awards punish and deter violators, while FLSA liquidated damages merely compensate for damages that would be difficult to calculate." Id.

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

1.5.1
Americans With Disabilities Act
(Disparate Treatment Claim)
42 USC §§ 12101-12117

In this case the Plaintiff claims that the Defendant discriminated against the Plaintiff by [refusing to hire the Plaintiff] [terminating the Plaintiff's employment] [failing to promote the Plaintiff] because the Plaintiff had a "disability" within the meaning of a federal law known as the Americans with Disabilities Act (the ADA).

The Defendant denies that it discriminated against the Plaintiff in any way and asserts that [describe the Defendant's theory of defense].

Under the ADA, it is unlawful for an employer to [refuse to employ] [discharge or lay off] [fail to promote] or otherwise discriminate against an employee because of that employee's disability if the employee is qualified to do the job.

In order to prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff had a "disability," as hereafter defined;

Second: That the Plaintiff was a "qualified individual," as hereafter defined;

Third: That the Plaintiff was [refused employment] [discharged from

employment] [not promoted] by the Defendant; and

Fourth: That the Plaintiff's disability was a substantial or motivating factor that prompted the Defendant to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

Definition of “Disability”

The first fact that the Plaintiff must prove by a preponderance of the evidence is that [he] [she] had a “disability.” An individual with a "disability" is a person who has a physical or mental impairment that substantially limits one or more major life activities [or a person who is "regarded" as having such an impairment] [or a person who has a record of having such an impairment.].

A "major life activity" refers to those activities that are of central importance to daily life as distinguished from tasks associated with a particular job. Examples of major life activities are caring for oneself, performing manual tasks around the home, walking, talking, seeing, hearing, breathing, learning, and essential capabilities necessary for working in a broad class of jobs.

The term “substantially” means considerable or to a large extent, and does not include an impairment that interferes in only a minor way with performing common tasks. Thus, an impairment substantially limits one or more major life activities if that impairment prevents or severely restricts the individual from doing the kinds of activities that are of central importance to most people’s daily lives.

Three factors you should consider in determining whether the Plaintiff’s alleged impairment substantially limits a major life activity are (1) its nature and severity; (2) how long it will last or is expected to last; and (3) its permanent or long term impact, or expected impact. Temporary injuries and impairments of limited duration are not disabilities under the ADA. [In addition, if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effect of those measures - - both positive and negative - - must be taken into account when judging whether that person is substantially limited in a major life activity.]

["To be regarded" as having such an impairment means a person who: (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as having such a limitation; (2) has a physical or mental impairment that substantially

limits major life activities only as a result of the attitudes of others toward such impairment; or (3) does not have an impairment but is treated by an employer as having a substantially limiting impairment.]

[Plaintiff has alleged that [his] [her] impairment substantially limited Plaintiff's ability to work. Working is a major life activity; however, an inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. Indeed, an individual is substantially limited in the major life activity of working only if [he] [she] is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.

In deciding whether the Plaintiff's impairment substantially limited [his] [her] ability to work, you should consider the three factors already mentioned relating to the severity, duration and lasting effect of the impairment. In addition, you may also consider: (1) the geographical area to which the individual has reasonable access; (2) the number and types of jobs, if any, utilizing similar training, knowledge, skill or abilities, within that geographical area, from which the individual is also disqualified because of the impairment; and (3) the number and types

of jobs, if any, not utilizing similar training, knowledge, skills or abilities, within that geographical area from which the individual is also disqualified because of the impairment.]

Definition of "Qualified"

The second fact that the Plaintiff must prove by a preponderance of the evidence is that [he] [she] was "qualified" for the job in question at the time of the challenged employment decision notwithstanding [his] [her] disability. The ADA does not require an employer to hire or retain or promote an individual who cannot perform the job.

In order to prove that [he] [she] was qualified, the Plaintiff must establish: (1) that the Plaintiff possessed the requisite skill, experience, education and other job-related requirements of the job in question; and (2) that the Plaintiff was capable of performing all of the essential functions of the job in question, despite any disability, with or without reasonable accommodation by Plaintiff's employer.

To the extent that the Plaintiff contends that a particular function is not essential to the job, the Plaintiff also bears the burden of proving that this function is not, in fact, essential.

The essential functions of a position are the fundamental job duties of that position. The term "essential functions" does not include

the marginal functions of the position. A job duty or function may be considered essential because, among other things, one of the reasons the job exists is to perform that function; or because there are a limited number of employees available among whom the performance of that job function can be distributed; or because the function is highly specialized and the incumbent in the position was hired for his or her expertise or ability to perform that particular function. Evidence of whether a particular function is essential includes, but is not limited to, the employer's own judgment as to which functions are essential; the existence of written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement, if applicable; the work experience of past incumbents in the job; and/or the current work experience of incumbents in similar jobs. [Further, in addition to the particular requirements of a specific job, an employer may have general requirements for an employee in any position. For example, the employer may expect employees to refrain from abusive or threatening conduct toward co-workers or the public, or

may require a regular and reliable level of attendance by the employee.].

Definition of “Substantial Or Motivating Factor”

Finally, the Plaintiff must prove that the Plaintiff’s disability was a substantial or motivating factor that prompted the Defendant to take the challenged employment action.

It is not necessary for the Plaintiff to prove that disability was the sole or exclusive reason for the Defendant's decision. It is sufficient if the Plaintiff proves that the alleged disability was a determining factor that made a difference in the employer’s decision.

You should be mindful, however, that the law applicable to this case requires only that an employer not discriminate against an employee because of the employee's disability. So far as you are concerned in this case, an employer may [discharge] [refuse to hire] [fail to promote] or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the Defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances.

If you find in favor of the Plaintiff and against the Defendant, you must then decide the issue of the Plaintiff's damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial;

(b) Emotional pain and mental anguish.

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

In some cases punitive damages may be awarded for the purpose of punishing the Defendant for its wrongful conduct and to deter others from engaging in similar wrongful conduct. However, an employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where those acts by such employees are contrary to the employer's own good faith efforts to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

So, an award of punitive damages would be appropriate only if you find for the Plaintiff and then further find from a preponderance of the evidence (1) that a higher management official of the Defendant personally acted with malice or reckless indifference to the Plaintiff's federally protected rights, and (2) that the employer itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages.]

1.5.1
Americans With Disabilities Act
(Disparate Treatment Claim)
42 USC §§ 12101 - 12117

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff had a "disability," as defined in the Court's Instructions?

Answer Yes or No _____

2. That the Plaintiff was a "qualified individual," as defined in the Court's Instructions?

Answer Yes or No _____

3. That the Plaintiff was [refused employment] [discharged from employment] [not promoted] by the Defendant?

Answer Yes or No _____

4. That the Plaintiff's disability was a substantial or motivating factor that prompted the Defendant to take that action?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not answer the remaining questions.]

5. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

6. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

7(a). That a higher management official of the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights?

Answer Yes or No _____

(b) If your answer is Yes, that the Defendant itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace?

Answer Yes or No _____

(c) If your answer is Yes, what amount of punitive damages, if any, should be assessed against the Defendant? $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

The definitions of the various terms given in this instruction were derived primarily from 29 CFR § 1630.2. Additionally, in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) the Supreme Court curtailed previous case law defining "major life activities," holding that "to be substantially limiting in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." 534 U.S. at 198, 122 S.Ct. at 691. Specifically, the Court stated that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." Id. 693. The Court noted that testimony that plaintiff could brush her teeth, wash her face, bathe, tend her garden, fix breakfast, do laundry and pick up around the house was the very type of evidence to be focused upon. As a result, this decision creates additional obstacles for many plaintiffs in disability cases, particularly those alleging discrimination in the workplace. Under Toyota it appears that courts now have greater discretion in determining what is a major life activity and what interference with that activity is substantial enough to constitute a disability.

In Sutton v. United Air Lines, Inc., 527 U.S. 471, 482, 119 S.Ct. 2139, 2146, 144 L.Ed.2d 450 (1999), the Supreme Court held that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures - - both positive and negative - - must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus

"disabled" under the Act. . In that case the Court found that severely myopic applicants, who were denied positions as global airline pilots because they failed to meet airline's minimum visual requirement, were not disabled within meaning of ADA, because applicants could fully correct their visual impairment with corrective lenses. See id.

The Eleventh Circuit has held that a plaintiff may maintain a claim under the ADA of being perceived as disabled without proof of actually being disabled. See Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002). The perceived impairment must be one that, if real, would limit substantially a major life activity of plaintiff. See Carruthers v. BSA Advertising Inc., 357 F.3d 1213 (11th Cir. 2004).

As with Title VII actions, a prevailing plaintiff in an action under the Americans With Disabilities Act may recover back pay, other past and future pecuniary losses, damages for pain and suffering, punitive damages, and reinstatement or front pay. This is due to 42 USC §12117(a) which states that the remedies and enforcement procedures available in 42 USC §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 apply to actions for disability discrimination under the ADA. Pursuant to this incorporation provision, a prevailing plaintiff is entitled to back pay, reinstatement, and/or front pay as provided in § 2000e-5(g)(1). See e.g., Ward v. Papa's Pizza To Go, Inc., 907 F. Supp. 1535 (S.D. Ga. 1995). (remedies under the ADA parallel those available for Title VII suits); Lewis v. Board of Trustees of Alabama State University, 874 F. Supp. 1299 (M.D. Ala. 1995) (case law applicable to enforcement procedures in Title VII cases is applicable to ADA cases as well because ADA incorporates enforcement procedures of Title VII). See Annotations and Comments, Federal Claims Instruction No. 1.2.1, supra, both generally and particularly with regard to the preparation of this charge with the option of submitting the claim for back pay to the jury.

A plaintiff may also recover compensatory (emotional pain and suffering) and punitive damages (exclusive of back pay and interest on back pay) pursuant to 42 USC § 1981a(a)(2). Further, the statutory caps on damages provided in 42 USC § 1981a(b)(3) apply equally to ADA employment discrimination actions, and either party may demand a jury trial when the complainant seeks compensatory or punitive damages. These caps are as follows:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 USC § 1981(b)(3). A further limitation on recovery of punitive damages is the Supreme Court's recent announcement that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. See State Farm Mutual Auto. Inc. Co. v. Campbell, No. 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

Compensatory and punitive damages under § 1981a may not be awarded "where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." 42 USC §1981a(a)(3).

As with Title VII actions in the Eleventh Circuit, back pay has usually been determined by the jury, and reinstatement or front pay has been determined by the court. See e.g., Kemp v. Monge, 919 F. Supp. 404 (M.D. Fla. 1996); Ward v. Papa's Pizza To Go, Inc., 907 F. Supp. 1535 (S.D. Ga. 1995) (front pay awards are given in employment discrimination cases when necessary to effectuate fully the make whole purposes of anti-discrimination laws, that is, when back pay does not fully redress a plaintiff's injuries, and reinstatement is not possible).

In addition, 42 USC § 12205 authorizes the court to award a reasonable attorney's fee to the prevailing party.

1.5.2
Americans With Disabilities Act
(Reasonable Accommodation Claim)
42 USC §§ 12101-12117

In this case the Plaintiff claims that the Defendant discriminated against the Plaintiff by [refusing to hire the Plaintiff] [terminating the Plaintiff's employment] [failing to promote the Plaintiff] because the Plaintiff had a "disability" within the meaning of a federal law known as the Americans with Disabilities Act (the ADA).

The Defendant denies that it discriminated against the Plaintiff in any way and asserts that [describe the Defendant's theory of defense].

Under the ADA, it is unlawful for an employer to [refuse to employ] [discharge or lay off] [fail to promote] or otherwise discriminate against an employee because of that employee's disability if the employee is qualified to do the job with a reasonable accommodation by the employer of the employee's disability.

In order to prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff had a "disability," as hereafter defined;

Second: That the Plaintiff was a "qualified individual," as hereafter defined;

Third: That the Plaintiff was [refused employment] [discharged from

employment] [not promoted] by the Defendant; and

Fourth: That the Plaintiff's disability was a substantial or motivating factor that prompted the Defendant to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

Definition of “Disability”

The first fact that the Plaintiff must prove by a preponderance of the evidence is that [he] [she] had a “disability.” An individual with a "disability" is a person who has a physical or mental impairment that substantially limits one or more major life activities [or a person who is "regarded" as having such an impairment] [or a person who has a record of having such an impairment].

A "major life activity" refers to those activities that are of central importance to daily life as distinguished from tasks associated with a particular job. Examples of major life activities are caring for oneself, performing manual tasks around the home, walking, talking, seeing, hearing, breathing, learning, and essential capabilities necessary for working in a broad class of jobs.

The term “substantially” means considerable or to a large extent, and does not include an impairment that interferes in only a minor way with performing common tasks. Thus, an impairment substantially limits one or more major life activities if that impairment prevents or severely restricts the individual from doing the kinds of activities that are of central importance to most people’s daily lives.

Three factors you should consider in determining whether the Plaintiff’s alleged impairment substantially limits a major life activity are (1) its nature and severity; (2) how long it will last or is expected to last; and (3) its permanent or long term impact, or expected impact. Temporary injuries and impairments of limited duration are not disabilities under the ADA. [In addition, if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effect of those measures - - both positive and negative - - must be taken into account when judging whether that person is substantially limited in a major life activity.]

[Plaintiff has alleged that [his] [her] impairment substantially limited Plaintiff’s ability to work. Working is a major life activity; however, an inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Indeed, an individual is substantially limited in the major life activity of working only if [he] [she] is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.

In deciding whether the Plaintiff's impairment substantially limited [his] [her] ability to work, you should consider the three factors already mentioned relating to the severity, duration and lasting effect of the impairment. In addition, you may also consider: (1) the geographical area to which the individual has reasonable access; (2) the number and types of jobs, if any, utilizing similar training, knowledge, skill or abilities, within that geographical area, from which the individual is also disqualified because of the impairment; and (3) the number and types of jobs, if any, not utilizing similar training, knowledge, skills or abilities, within that geographical area from which the individual is also disqualified because of the impairment.

Definition of "Qualified"

The second fact that the Plaintiff must prove by a preponderance of the evidence is that [he] [she] was qualified for the job in question at the time of the challenged employment decision notwithstanding [his]

[her] disability. The ADA does not require an employer to hire or retain or promote an individual who cannot perform the job.

In order to prove that [he] [she] was qualified, the Plaintiff must establish: (1) that the Plaintiff possessed the requisite skill, experience, education and other job-related requirements of the job in question; and (2) that the Plaintiff was capable of performing all of the essential functions of the job in question, despite any disability, with or without reasonable accommodation by Plaintiff's employer.

To the extent that the Plaintiff contends that a particular function is not essential to the job, the Plaintiff also bears the burden of proving that this function is not, in fact essential.

(a) Definition of "Essential Functions"

The essential functions of a position are the fundamental job duties of that position. The term "essential functions" does not include the marginal functions of the position. A job duty or function may be considered essential because, among other things, one of the reasons the job exists is to perform that function; or because there are a limited number of employees available among whom the performance of that job function can be distributed; or because the function is highly specialized and the incumbent in the position was hired for his or her

expertise or ability to perform that particular function. Evidence of whether a particular function is essential includes, but is not limited to, the employer's own judgment as to which functions are essential; the existence of written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement, if applicable; the work experience of past incumbents in the job; and/or the current work experience of incumbents in similar jobs. [Further, in addition to the particular requirements of a specific job, an employer may have general requirements for an employee in any position. For example, the employer may expect employees to refrain from abusive or threatening conduct toward co-workers or the public, or may require a regular and reliable level of attendance by the employee.]

(b) Definition of "Reasonable Accommodation"

Even if the Plaintiff was not able to perform all of the essential functions of the job due to limitations arising from a disability, the Plaintiff may still prove that [he] [she] was "qualified" for the job if the Plaintiff has proved (1) that the Plaintiff could have performed all of the essential functions of the position with a "reasonable accommodation;"

and (2) that the Plaintiff identified and requested this accommodation from the employer.

A "reasonable accommodation" is a change that can reasonably be made without undue hardship to the employer in the employer's ordinary work rules, facilities, or terms and conditions of employment.

In order to prove that [he] [she] would have been qualified for the job if the Plaintiff had received a reasonable accommodation, the Plaintiff must prove each of the following facts:

First: That the Plaintiff informed the Defendant of the substantial limitations arising out of the Plaintiff's disability;

Second: That the Plaintiff identified and requested an accommodation;

Third: That the requested accommodation was reasonable, was available and would have allowed the Plaintiff to perform the essential functions of the job; and

Fourth: That the Defendant unreasonably refused to provide that accommodation.

So, the first fact that the Plaintiff must prove is that [he] [she] informed the Defendant of the substantial limitations that arose out of [his] [her] disability. An employer is not required to assume that an employee with an impairment suffers from a particular limitation, but

may assume instead that the individual can perform [his] [her] job unless otherwise notified by the employee.

The second fact that the Plaintiff must prove is that the Plaintiff identified and requested an accommodation; and the third fact that the Plaintiff must prove is that the requested accommodation was reasonable, was available and would have allowed the Plaintiff to perform the essential functions of the job.

[The Plaintiff contends that the Defendant should have reasonably accommodated the Plaintiff by reassigning the Plaintiff to another position. Reassignment may constitute a reasonable accommodation under certain circumstances, but an employer is not required to create or re-establish a job where one would otherwise not exist. Moreover, an employer is not required to promote an employee with a disability as an accommodation; and, to show that lateral reassignment to another job would have been a reasonable accommodation, the Plaintiff must prove that the job was vacant or available and that [he] [she] was qualified for the vacant job to which [he] [she] requested reassignment.]

[The Plaintiff contends that the Defendant should have reasonably accommodated the Plaintiff by requiring another employee to perform those duties of the Plaintiff's job that [he] [she] could not perform

because of the Plaintiff's disability. Reallocation of marginal job duties can sometimes constitute a reasonable accommodation; however, an employer does not have to transfer any of the Plaintiff's essential job duties to another employee to perform. Essential job duties are those duties that the person holding the job would have to perform in order to be considered qualified for the position. Thus, if you conclude that the Plaintiff, in effect, is arguing that another employee should have been required to perform an essential function or functions of the Plaintiff's job, then the accommodation that the Plaintiff sought was not a reasonable accommodation. If, however, the Plaintiff only sought the reallocation of marginal job duties to another employee, and if you further find that it would have been reasonable for the employer to require another employee to perform these marginal duties without imposing an excessive burden on the employer or that employee, then you may conclude that the specified accommodation was a reasonable one.]

[The Plaintiff contends that the Defendant should have reasonably accommodated the Plaintiff by modifying the Plaintiff's work schedule. You must decide first whether the Plaintiff would have been able to perform the essential functions of the job with a modified work

schedule. Essential job duties are those duties that the person holding the job would have to perform in order to be considered qualified for the position. Second, you must determine whether it would have been reasonable to require the Defendant, under all of the circumstances, to modify the Plaintiff's work schedule; and, in that regard, I caution you that an employer's duty to reasonably accommodate a disabled employee does not require the employer to excessively burden other employees.] [Also, while an employer may be required to modify work schedules to accommodate a disabled employee, it is not required to wait an indefinite period of time for the employee to be able to perform the essential functions of the job.]

[The fact that an employer may have offered certain accommodations to the Plaintiff, in the past, as a temporary experiment or as an act of compassion toward the employee does not mean that the same accommodations must be forever extended to the Plaintiff as a matter of law, or that those accommodations are necessarily reasonable under the ADA. Otherwise, an employer would be reluctant to offer benefits or concessions to disabled employees for fear that, by once providing the benefit or concession, the employer would forever be required to provide that accommodation. Thus, the fact that an

accommodation that the Plaintiff argues for has been provided by the Defendant in the past to the Plaintiff, or to another disabled employee, does not necessarily mean that the particular accommodation is a reasonable one. Instead, you must determine its reasonableness under all the evidence in the case.]

[Also, you should be mindful that while the employer is required to provide reasonable accommodations that would allow the Plaintiff to perform the essential functions of the job, the employer does not have to provide the particular accommodation that the Plaintiff prefers or requests. There may be more than one reasonable accommodation, and if the Plaintiff refused to accept an accommodation that was offered by the Defendant that would have allowed the Plaintiff to perform the essential functions of the job, then the Plaintiff has failed in carrying [his] [her] burden of demonstrating that the Defendant refused to offer the Plaintiff a reasonable accommodation.]

Definition of "Substantial or Motivating Factor"

Finally, the Plaintiff must prove that the Plaintiff's disability was a substantial or motivating factor that prompted the Defendant to take the challenged employment action. It is not necessary for the Plaintiff to prove that disability was the sole or exclusive reason for the

Defendant's decision. It is sufficient if the Plaintiff proves that the alleged disability was a determining factor that made a difference in the employer's decision.

You should be mindful, however, that the law applicable to this case requires only that an employer not discriminate against an employee because of the employee's disability. So far as you are concerned in this case, an employer may [discharge] [refuse to hire] [fail to promote] or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the Defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances.

If you find in favor of the Plaintiff and against the Defendant you must then consider the issue of the Plaintiff's damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not

be imposed or increased to penalize the Defendant. Damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial;

(b) Emotional pain and mental anguish.

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

In some cases punitive damages may be awarded for the purpose of punishing the Defendant for its wrongful conduct and to deter others from engaging in similar wrongful conduct. However, an employer may not be held liable for punitive damages because of discriminatory acts

on the part of its managerial employees where those acts by such employees are contrary to the employer's own good faith efforts to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

So, an award of punitive damages would be appropriate only if you find for the Plaintiff and then further find from a preponderance of the evidence (1) that a higher management official of the Defendant personally acted with malice or reckless indifference to the Plaintiff's federally protected rights, and (2) that the employer itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

1.5.2
Americans With Disabilities Act
(Reasonable Accommodation Claim)
42 USC §§ 12101 - 12117

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff had a "disability," as defined in the Court's Instructions?

Answer Yes or No _____

2. That the Plaintiff was a "qualified individual," as defined in the Court's Instructions?

Answer Yes or No _____

3. That the Plaintiff was [refused employment] [discharged from employment] [not promoted] by the Defendant?

Answer Yes or No _____

4. That the Plaintiff's disability was a substantial or motivating factor that prompted the Defendant to take that action?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not answer the remaining questions.]

5. That the Plaintiff should be awarded damages to compensate for a net loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

6. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

7(a). That a higher management official of the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights?

Answer Yes or No _____

(b) If your answer is Yes, that the Defendant itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace?

Answer Yes or No _____

(c) If your answer is Yes, what amount of punitive damages, if any, should be assessed against the Defendant? $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

The definitions of the various terms given in this instruction were derived primarily from 29 CFR § 1630.2. Additionally, in Toyota Motor Mfg., Ky., Inc. v. Williams,

534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) the Supreme Court curtailed previous case law defining "major life activities," holding that "to be substantially limiting in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." 534 U.S. at 198, 122 S.Ct. at 691. Specifically, the Court stated that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." Id. at 693. The Court noted that testimony that plaintiff could brush her teeth, wash her face, bathe, tend her garden, fix breakfast, do laundry and pick up around the house was the very type of evidence to be focused upon. As a result, this decision creates additional obstacles for many plaintiffs in disability cases, particularly those alleging discrimination in the workplace. Under Toyota it appears that courts now have greater discretion in determining what is a major life activity and what interference with that activity is substantial enough to constitute a disability.

In Sutton v. United Air Lines, Inc., 527 U.S. 471, 482, 119 S.Ct. 2139, 2146, 144 L.Ed.2d 450 (1999), the Supreme Court held that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures - - both positive and negative - - must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act. In that case the Court found that severely myopic applicants, who were denied positions as global airline pilots because they failed to meet airline's minimum visual requirement, were not disabled within meaning of ADA, because applicants could fully correct their visual impairment with corrective lenses. See id.

The Eleventh Circuit has held that a plaintiff may maintain a claim under the ADA of being perceived as disabled without proof of actually being disabled. See Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002). The perceived impairment must be one that, if real, would limit substantially a major life activity of plaintiff. See Carruthers v. BSA Advertising Inc., 357 F.3d 1213 (11th Cir. 2004).

The Supreme Court recently held that an employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an accommodation is not reasonable. See U.S. Airways v. Barnett, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002). However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception in a particular case. Id. at 405-06.

In Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1280 (11th Cir. 2001), the Eleventh Circuit held that a person who poses a significant risk of communicating infectious disease to others in the workplace and reasonable accommodation will not eliminate the risk, that person will not be otherwise qualified for his or her job, and thus is not a "qualified individual" within the meaning of the ADA. To determine whether a person who carries an infectious disease poses a

significant risk to others, the Eleventh Circuit noted a list of facts that courts should consider including

> [findings of] facts, based on reasonable medical knowledge, about (a) the nature of the risk, (how the disease is transmitted), (b) the duration of the risk, (how long is the carrier infectious), (c) the severity of the risk, (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 288, 107 S.Ct. 1123, 1131, 94 L.Ed. 307 (1987).

See the Annotations and Comments following Federal Claims Instruction 1.5.1, supra.

1.6.1
Equal Pay Act
29 USC § 206(d)(1) and (3)

In this case the Plaintiff claims that the Defendant violated a federal law known as the Equal Pay Act.

Under that Act it is unlawful for an employer to discriminate between employees on the basis of sex or gender by paying different wages for equal work on jobs requiring equal skill, effort and responsibility, and which are performed under similar working conditions.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant is an "employer" within the meaning of the Equal Pay Act;

Second: That the Plaintiff and a member or members of the opposite sex have been employed by the Defendant in jobs requiring substantially equal skill, effort and responsibility;

Third: That the two jobs are performed under similar working conditions; and

Fourth: That the Plaintiff was paid a lower wage than a member of the opposite sex doing equal work.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[The parties have stipulated or agreed that the Defendant is an employer subject to the provisions of the Equal Pay Act, and you should consider that fact as proven.]

With respect to the second fact the Plaintiff must prove - - that the Plaintiff and members of the opposite sex have been employed on jobs requiring substantially equal skill, effort and responsibility - - your task is to compare the jobs, not the individual employees holding those jobs. You will note that it is not necessary that the two jobs be identical; the law requires proof that the performance of the two jobs demands "substantially equal" skill, effort and responsibility. Insignificant and insubstantial or trivial differences do not matter and may be disregarded. Job classifications, descriptions or titles are not controlling. The important thing is the actual work or performance requirements of the two jobs.

In deciding whether the jobs require substantially equal "skill," you should consider such factors as the level of education, experience,

training and ability necessary to meet the performance requirements of the respective jobs.

In deciding whether the jobs require substantially equal "effort," you should consider the amount of physical and mental exertion needed for the performance of the respective jobs. Duties that result in mental or physical fatigue and emotional stress, or factors that alleviate fatigue and stress, should be weighed together in assessing the relative effort involved. It may be that jobs require equal effort in their performance even though the effort is exerted in different ways on the two jobs; but jobs do not entail equal effort, even though they involve most of the same routine duties, if one job requires other additional tasks that consume a significant amount of extra time and attention or extra exertion.

In deciding whether the jobs involve substantially equal "responsibility," you should consider the degree of accountability involved in the performance of the work. You should take into consideration such things as the level of authority delegated to the respective employees to direct or supervise the work of others or to represent the employer in dealing with customers or suppliers; the consequences of inadequate or improper performance of the work in

terms of possible damage to valuable equipment or possible loss of business or productivity; and the possibility of incurring legal liability to third parties.

With respect to the third fact the Plaintiff must prove - - that the jobs are performed under similar working conditions - - you will note that the test here is whether the working conditions are "similar;" they need not be substantially equal. In deciding whether relative working conditions are similar, you should consider the physical surroundings or the environment in which the work is performed, including the elements to which employees may be exposed. You should also consider any hazards of the work including the frequency and severity of any risks of injury.

Finally, of course, it must be proved that the Plaintiff was paid a lower wage than a member of the opposite sex doing equal work.

[If you find that the Plaintiff has proved each of the things that must be established in support of the Plaintiff's claim, you will then consider the Defendant's defense as to which the Defendant has the burden of proof by a preponderance of the evidence. The Defendant contends that the differential in pay between the two jobs was the result of a bona fide [seniority system] [merit system] [system which measures

earnings by quantity or quality of production] [or describe factor other than gender upon which the Defendant relies]. If you so find, then your verdict will be for the Defendant].

If you find in favor of the Plaintiff concerning each of these issues, [and against the Defendant on the defenses] you will then consider the matter of the Plaintiff's damages. In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, measured by the amount of the pay differential between the two jobs from [date] to the date of this trial. These damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant.

1.6.1
Equal Pay Act
29 USC § 206(d)(1) and (3)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff and a member or members of the opposite sex have been employed by the Defendant in jobs requiring substantially equal skill, effort and responsibility?

Answer Yes or No _____

2. That the two jobs are performed under similar working conditions?

Answer Yes or No _____

3. That the Plaintiff was paid a lower wage than a member of the opposite sex doing equal work?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not answer either of the remaining questions.]

[4. That the differential in pay between the two jobs was the result of a bona fide [seniority system] [merit system] [system which measures earnings by quantity or quality of production] [or describe factor other than gender upon which the Defendant relies]?

Answer Yes or No _____

[Note: If you answered Yes to the preceding question you need not answer the remaining question.]]

[5. That the employer either knew or showed reckless disregard for whether its conduct was prohibited by the Equal Pay Act.

Answer Yes or No _____]

6. That the Plaintiff should be awarded $_____ as the Plaintiff's damages.

SO SAY WE ALL.

_____
Foreperson

DATED _____

ANNOTATIONS AND COMMENTS

Claims brought under the Equal Pay Act, 29 USC § 206(d)(1), are subject to the same analysis and treatment as claims brought under the wage and hour act. See 29 USC § 206(d)(3). Under the Equal Pay Act affected employees shall recover liquidated damages from their employer for violations of the Act unless the employer shows that it acted in good faith and with a reasonable belief that it was not violating the Act. Wallace v. Dunn Const. Co., Inc., 62 F.3d 374, 380 (11th Cir. 1995) (en banc). Where the employer shows its actions were in good faith and shows it had reasonable grounds for believing that those actions did not violate the Equal Pay Act, the court has the discretion to reduce or eliminate liquidated damages. See id.; see also E. E. O. C. v. White & Son Enterprises, 881 F.2d 1006, 1012 (11th Cir. 1989) (holding that where an employer does not offer sufficient evidence to establish that it acted in good faith, liquidated damages are recoverable) and Joiner v. City of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987) (noting that a district court must explicitly find that an employer acted in good faith in violating overtime provisions of the Fair Labor Standards Act before it may exercise its discretion to award less than the full amount of liquidated damages). As noted in the Annotations and Comments to Instruction 1.8.1., infra, this appears to be a decision for the judge, not the jury. If, however, the jury has made a finding of "willfulness" as to the statute of limitations, the court may have no discretion to deny liquidated damages. See E.E.O.C. v. City of Detroit Health Dept., 920 F.2d 355, 358 (6th Cir. 1990).

The statute of limitations for Equal Pay Act suits is two years but is increased to three years for "willful" violations. See 29 USC § 255(a); see also Marshall v. A & M Consol. Indep. Sch. Dist., 605 F.2d 186, 190 (5th Cir. 1979) (citing 29 USC § 255(a)) and Brennan v. J. M. Fields, Inc., 488 F.2d 443, 448 (5th Cir. 1973). To prove willfulness, the employee must show that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute in order to have the benefits of the three year statute of limitations. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S.Ct. 1677, 1681, 100 L.Ed.2d 155 (1988). This is a jury question. This charge does not include instructions or jury interrogatories covering the three-year statute of limitations matter. The effect of a willful violation would only change the date from which the pay differential is calculated by up to twelve more months. If relevant, it is suggested that an appropriate instruction be melded into the instruction on damages and that the relevant jury interrogatory precede the interrogatory covering the amount of damages. See 1.7.1, infra which contain a charge and a jury instruction under the Fair Labor Standards Act which would apply to the Equal Pay Act.

In an Equal Pay Act case the plaintiff demonstrates a prima facie case by showing that an employer pays different wages to employees of opposite sexes for equal work on jobs requiring substantially equal skill, effort and responsibility under similar conditions. See Steger v. Gen. Elec. Co., 318 F.3d 1066, 1077-78 (11th Cir. 2003). The burden then shifts to the employer to prove by a preponderance of the evidence that the pay differential is justified under one of the four statutory exceptions provided in 29 USC § 206(d)(1): (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . any other factor other than sex. "The burden to prove these affirmative defenses is heavy and must demonstrate that 'the factor of sex provided no basis for the wage differential.'" Id. at 1078 (quoting Irby v. Bittick, 44 F.3d 949, 954 (11th Cir. 1995). Further, the employer must show that none of the decision-makers, whether in middle or upper management, were influenced by gender bias. See Anderson v. WBMG-42, 253 F.3d 561, 566 (11th Cir. 2001). Although an employer may not rely on a "general practice" as a factor other than sex, "it may consider factors such as the 'unique characteristics of the same job; . . . an individual's experience, training or ability; or . . . special exigent circumstances connected with the business.'" Irby, 44 F.3d at 955 (quoting Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988)). An employer's evidence of its routine practices is relevant to prove that its conduct at a particular time conformed to its routine practices. Federal Rule of Evidence 406. Once the employer's burden is met, the employee "must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential." Irby v. Bittick, 44 F.3d 949, 954 (11th Cir. 1995); see also Schwartz v. Florida Bd. of Regents, 954 F.2d 620, 623 (11th Cir. 1991); Wright v. Rayonier, Inc., 972 F.Supp. 1474, 1480-81 (S.D. Ga. 1997).

"Comparison" employees must work in the same "establishment" as the plaintiff. Mulhall v. Advance Sec., Inc., 19 F.3d 586, 590 (11th Cir. 1994). The term

"establishment" is defined by the Secretary of Labor as "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business." 29 C.F.R. § 1620.9(a). A single establishment can include operations at more than one physical location. Id. at 591; Brennan v. Goose Creek Consol. Indep. Sch. Dist., 519 F.2d 53, 56 (5th Cir. 1975) (central control and administration of disparate job sites can support finding of single establishment). However, courts presume that multiple offices are not a single establishment unless unusual circumstances are demonstrated. See Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1017 (11th Cir. 1994); see also 29 C.F.R. §§ 1620.9(a) and (b) ("[U]nusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment. For example, a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions.").

In evaluating the Plaintiff's case, the Plaintiff is not required to prove that the jobs performed are identical; the test is one of substantiality, not identity. Thus, the jury should consider only the skills and qualifications needed to perform the job and should not consider the prior experiences or other qualifications of the other employees. Mulhall v. Advance Sec., Inc., 19 F.3d 586, 592 (11th Cir. 1994); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1533 (11th Cir. 1992). Prior experience of other employees may be relevant, however, in determining the employer's affirmative defense - - whether the fourth statutory exception (factors other than sex) applies. Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995); Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988).

Section 216(b) of the Fair Labor Standards Act is incorporated into the Equal Pay Act, and therefore "the court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action,"

Since the Equal Pay Act remedies parallel the Fair Labor Standards Act, an award of both liquidated damages and prejudgment interest would constitute double compensation, and therefore cannot be recovered. See Joiner v. City of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987).

1.7.1
Fair Labor Standards Act
29 USC § 201 et seq.

This case arises under the Fair Labor Standards Act, the federal law that provides for the payment of [minimum wages] [time-and-a-half overtime pay]. The Plaintiff claims that the Defendant did not pay the Plaintiff the [minimum wage] [overtime pay] required by law.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was employed by the Defendant during the time period involved;

Second: That the Plaintiff was an employee [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or in the production of goods for commerce]; and

Third: That the Defendant failed to pay the Plaintiff the [minimum wage] [overtime pay] required by law.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[The parties have stipulated or agreed to the first fact - - that the Plaintiff was employed by the Defendant - - and you should consider it as established.]

With respect to the second fact - - that the Plaintiff was employed by an enterprise engaged in commerce or in the production of goods for commerce - - the term "commerce" has a very broad meaning and includes any trade, transportation, transmission or communication between any place within a state and any place outside that state. The Plaintiff was engaged in the "production of goods" if the Plaintiff was employed in producing, manufacturing, mining, handling or transporting goods, or in any other manner worked on such goods or worked in any closely related process or occupation directly essential to the production of goods. [Finally, an enterprise engaged in commerce or the production of goods for commerce means an enterprise that has employees engaged in commerce or production of goods for commerce and has annual gross sales of at least $500,000.]

The minimum wage that the Act required to be paid during the period of time involved in this case was $_____ per hour.

[In determining whether an employer has paid the minimum wage it is entitled to a credit for the reasonable costs of furnishing certain

non-cash items [unless excluded under the terms of a union contract applicable to the Plaintiff], such as meals and lodging if furnished for the benefit of the employee and voluntarily accepted by the employee.]

[In addition to the minimum wage, the Act requires an employer to pay its employees at a rate of at least one and one-half times their regular rate for time worked in any one work week over 40 hours. This is commonly known as time-and-a-half pay for "overtime" work.]

[The employee's "regular rate" during a particular week is the basis for calculating any overtime pay due to the employee for that week. The "regular rate" for a week is determined by dividing the first 40 hours worked into the total wages paid for those 40 hours. The overtime rate, then, would be one and one-half of that rate and would be owing for each hour in excess of 40 hours worked during the work week.]

The Defendant claims that even if you should find that the Plaintiff has proved all the necessary facts that must be proved to establish this claim, the [minimum wage] [overtime pay] law does not apply because of an exemption from these requirements.

The particular exemption claimed by the Defendant is [insert applicable exemption].

In order to receive the benefit of this exemption, the Defendant has the burden of proving by a preponderance of the evidence [list or describe essential elements of the claimed exemption].

If you find that the Plaintiff has proved the claim, and that the Defendant has failed to establish an exemption, then you must turn to the question of damages which the Plaintiff is entitled to recover.

The measure of damages is the difference between what the Plaintiff should have been paid under the Act and the amount that you find the Plaintiff actually was paid.

The Plaintiff is entitled to recover lost wages from the present time back to no more than two years before this lawsuit was filed on _____ _____, unless you find the employer either knew, or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA. If you find that the employer knew, or showed reckless disregard for the matter of whether, its conduct was prohibited by the FLSA, the Plaintiff is entitled to recover lost wages from the present time back to no more than three years before this lawsuit was filed.

1.7.1
Fair Labor Standards Act
29 USC § 201 et seq.

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was an employee [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or in the production of goods for commerce]?

Answer Yes or No _____

2. That the Defendant failed to pay the Plaintiff the [minimum wage] [overtime pay] required by law]?

Answer Yes or No _____

[Note: If you answered No to either of the preceding questions you need not answer the remaining questions.]

[3. That the Plaintiff was exempt from the Fair Labor Standards Act as an [describe pertinent exemption, i.e., "administrative," "executive"] employee?

Answer Yes or No _____

[Note: If you answered Yes to the preceding question you need not answer the remaining questions.]]

[4. That the employer either knew or showed reckless disregard for whether its conduct was prohibited by the FLSA:

Answer Yes or No _____]

5. That the Plaintiff should be awarded $_____ as the Plaintiff's damages.

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

The Fair Labor Standards Act is found at 29 USC § 201 et seq.

Public employees who work overtime may be reimbursed either in the form of wages or compensatory time. Chesser v. Sparks, 248 F.3d 1117, 1120 n.1 (11th Cir. 2001). In Christensen v. Harris County, 529 U.S. 576, 588, 120 S.Ct. 1655, 1663, 146 L.Ed.2d 621 (2000), the Supreme Court upheld a public employer's policy of compelling its employees to use compensatory time they received in lieu of overtime pay.

The district court did not err in refusing to instruct the jury in accordance with the holding in Anderson v. Mt. Clemens Pottery Co., 328 U.S, 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) when the plaintiff's evidence revealed that the defendant had only lost one week's record of hours worked and had incorrectly recorded one shift in a year's time. Etienne v. Inter-County Security Corp., 173 F.3d 1372, 1375-76 (11th Cir. 1999). In Anderson, the Supreme Court held that when an employer's records are "inaccurate or inadequate and the employee cannot offer convincing substitutes," then an employee has carried his burden of proving that he has performed work for which he was not properly compensated. 328 U.S. at 687, 66 S.Ct. at 1192. The burden then shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." Id. at 687-88

Exemptions:
The elements of the exemptions usually claimed - - executive, professional and administrative - - may be found at 29 C.F.R. § 541.1 et seq.

In a suit under the FLSA, the employer carries the burden of proving an overtime pay exemption, and the Court of Appeals narrowly construes overtime provisions against the employer. Hogan v. Allstate Ins. Co., 361 F.3d 621 (11th Cir. 2004).

A commercial air carrier can qualify for the common carrier exemption to the Fair Labor Standards Act, 29 USC § 213(b)(3), if the carrier holds itself out to the public and offers its services indiscriminately to those interested in its services. Valdiviesco v. Atlas Air, Inc., 305 F.3d 1283, 1286 (11th Cir. 2002).

In a case involving county employees who serve in a dual role as both firefighters and emergency medical services personnel, the court should apply the reasoning of a 1995 Department of Labor opinion letter in which the Department explained that "firefighters who are cross-trained as EMS employees qualify for an exemption under [29 USC § 207(k)] as fire protection employees where they are principally engaged as firefighters meeting the four tests outlined in 29 C.F.R. § 553.210(a) . . . and where the EMS functions they perform meet the tests described in 29 C.F.R. § 553.215 for ambulance and rescue employees." Falken v. Glynn County, 197 F.3d 1341, 1349, 1353 (11th Cir. 1999) (quoting opinion letter). Under this rationale, time spent by the dual-role employees on ambulance and rescue activities that were incident to or in conjunction with fire protection activities would not count toward the limitation on nonexempt work. Id. at 1349. Employees engaged in fire protection activities can retain their exemption from the overtime provisions of the FLSA if no more than 20% of their work period is devoted to non-exempt work which is not incident to or in conjunction with fire protection activities. Id. at 1347.

Damages:
The FLSA provides for liquidated damages and states that such damages shall be paid unless the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act, in which case the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of the FLSA. 29 USC § 260. Under the plain language of the statute, this is a question for the court to determine not the jury. See Annotations and Comments following Federal Claims Instruction 1.8.1., Family and Medical Leave Act, infra.

A district court must find that an employer acted in good faith in violating the FLSA before it may award less than the full amount of liquidated damages. Joiner v. City of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987).

Statute of Limitations:
Employees must show that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute in order to have the benefits of the three year statute of limitations. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S.Ct. 1677, 1681, 100 L.Ed.2d 115 (1988). This is a jury question.

1.8.1
Family And Medical Leave Act
Substantive Claims And Retaliation Claims
29 USC §§ 2601-2654

In this case the Plaintiff claims that the Defendant violated a federal law known as the Family and Medical Leave Act. More specifically, the Plaintiff claims that [he] [she] was [entitled to a benefit under the Act which was interfered with or denied by Defendant] [refused employment] [discharged from employment] [refused reinstatement] because of [his] [her] [request for leave] [taking leave]. The Defendant denies that it violated the Act in any way and asserts that [describe the Defendant's theory of defense].

The Family and Medical Leave Act, or FMLA as it is commonly called, entitles eligible employees to take up to twelve weeks of leave during any twelve-month period for [a serious health condition] [the birth or adoption of a child] [the care of a spouse, child, or parent who has a serious health condition] and further gives the employee the right following leave either to be restored by the employer to the position held when the leave began, or to be given an equivalent position. The Act does not require the employer to pay the employee while on FMLA leave.

[Under the Act, if the Plaintiff required leave [because of a serious health condition making Plaintiff unable to perform the job functions] [to care for the [spouse, son, daughter or parent] who had a serious health condition], the Plaintiff is allowed to take the leave intermittently or on a reduced leave schedule when medically necessary. For example, an employee who undergoes cancer treatments every other week over the course of twelve weeks might want to work during the off-weeks, earning a paycheck, and saving six weeks of leave for later. This is perfectly acceptable under the FMLA. However a Plaintiff is not allowed more than a total of twelve weeks of leave in a one year period.]

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the [Plaintiff suffered from a "serious health condition," as hereafter defined] [Plaintiff's [spouse, son, daughter or parent] suffered from a "serious health condition," as hereafter defined] [gave birth and/or was caring for a newborn] [adopted a child or became a foster parent];

Second: That the Plaintiff was an "eligible employee," as hereinafter defined;

Third: That the Plaintiff gave Defendant the proper "notice" of the need to be absent from work, as hereafter defined; [and]

Fourth: That the Plaintiff was [entitled to a benefit denied by Defendant] [refused employment] [discharged from employment] [refused reinstatement at the same or an equivalent position]; [and]

Fifth: The Plaintiff's [absence from work] [request for leave] was a substantial or motivating factor that prompted the Defendant to take action.]

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues as well as other issues in the case.]

Definition of Serious Health Condition

The first fact that the Plaintiff must prove by a preponderance of the evidence is that [he] [she] [his] [her] [spouse, son, daughter or parent] suffered from a serious health condition. [This serious health condition must have prevented the Plaintiff from performing the functions of [his] [her] job]. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice or residential medical facility or continuing treatment by a healthcare provider. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are

examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.

Definition of Eligible Employee

The next fact that the Plaintiff must prove by a preponderance of the evidence is that [he] [she] is an "eligible employee." To be an eligible employee, the Plaintiff must have been employed with the Defendant for a total of at least twelve months on the date on which any FMLA leave was to begin and must have been employed for at least 1,250 hours of service with the Defendant during the previous twelve month period.

Definition of Notice

The next fact that the Plaintiff must prove by a preponderance of the evidence is that [he] [she] gave Defendant proper notice. If the Plaintiff's need for leave was foreseeable (for example, due to planned medical treatment for Plaintiff or a family member), the Plaintiff is required to provide not less than thirty days notice of the date the leave is to begin and of the Plaintiff's intention to take such leave. Should the circumstances require leave to begin in less than thirty days, the Plaintiff is required to provide such notice as practicable. The notice by Plaintiff must be sufficient for the Defendant to reasonably expect that

the absence might qualify as the type of leave provided for under the FMLA. However, the Plaintiff is not required to mention the Act in giving notice of the need for leave.

[Definition of "Substantial or Motivating Factor"

Finally, the Plaintiff must prove by a preponderance of the evidence that the Plaintiff's [leave] [requesting of leave] was a substantial or motivating factor that prompted the Defendant to take the challenged adverse employment action.

It is not necessary for the Plaintiff to prove that leave or the request for leave was the sole or exclusive reason for Defendant's decision. It is sufficient if the Plaintiff proves that [taking the leave] [requesting of leave] was a determining factor that made a difference to the employer's decision.

You should be mindful, however, that the law applicable to this case requires only that an employer cause an employee to suffer an adverse employment action because of an employee's [taking leave] [requesting leave]. So as far as you are concerned in this case, an employer may [discharge] [refuse to hire] [fail to reinstate] or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any

sympathy for the employee to lead you to substitute your own judgment for that of the Defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances.

[An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. The Defendant is not responsible under the Act if the Defendant can establish by a preponderance of the evidence that the Plaintiff would not otherwise have been employed at the time reinstatement is sought. For example, if the Defendant proves that the Plaintiff would have been laid off during the FMLA leave period regardless of the leave taken then the FMLA does not require Defendant to reinstate Plaintiff.]

If you find in favor of the Plaintiff and against the Defendant with regard to each of the above issues, you must then decide the issue of Plaintiff's damages.

[If the Plaintiff has proven by a preponderance of the evidence that [he] [she] lost pay or benefits because of the Defendant's alleged violation of the FMLA, then the Plaintiff may recover damages in an amount equal to the net pay or benefits shown by the evidence to have

been lost from the time of implementation of Defendant's employment decision which violated the FMLA until the date of your verdict.]

[If [Since] the Plaintiff has not directly lost pay or other employment benefits as a result of Defendant's alleged wrong, [he] [she] may recover any other actual monetary loss sustained as a direct result of the Defendant's actions, but the total of any such recovery cannot be greater than twelve weeks of Plaintiff's wages or salary. For example, the Plaintiff could recover the cost of providing care for twelve weeks to a [child] [sick family member], but the cost of providing that care cannot be greater than twelve weeks of Plaintiff's wages or salary.]

[Plaintiff may recover either lost wages and benefits or other expenses sustained due to the Defendant's actions but not both.]

You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

[For example, with regard to the Plaintiff's claim for lost pay, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity

that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's lost pay by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

1.8.1
Family And Medical Leave Act
Substantive Claims And Retaliation Claims
29 USC §§ 2601-2654

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the [Plaintiff suffered from a "serious health condition," as defined in the Court's instructions] [Plaintiff's [spouse, son, daughter or parent] suffered from a "serious health condition," as defined in the Court's instructions] [gave birth and/or was caring for a newborn] [adopted a child or became a foster parent]?

Answer Yes or No _____

2. That the Plaintiff was an "eligible employee," as defined in the Court's instructions?

Answer Yes or No _____

3. That the Plaintiff gave Defendant the proper "notice" of the need to be absent from work, as defined in the Court's instructions?

Answer Yes or No _____

4. That the Plaintiff was [entitled to a benefit denied by Defendant] [refused employment] [discharged from employment] [refused reinstatement at the same or an equivalent position]?

Answer Yes or No _____

[5. The Plaintiff's [absence from work] [request for leave] was a substantial or motivating factor that prompted the Defendant to take action?]

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not answer any of the remaining questions.]

[6. That the Plaintiff should be awarded damages to compensate for loss of wages and benefits to the date of trial?

Answer Yes or No _____

If your answer is Yes,
in what amount: $_____]

[7. That the Plaintiff should be awarded damages for actual monetary losses sustained as a direct result of Defendant's action?

Answer Yes or No _____

If your answer is Yes,
in what amount $_____]

SO SAY WE ALL.

_____
Foreperson

DATED_____

ANNOTATIONS AND COMMENTS

The definitions of the various terms given in this instruction were derived primarily from the statute itself and 29 C.F.R. § 825.800.

The FMLA provides leave for an employee to care for their spouse, minor child, disabled child or parent suffering from a serious health condition. See 29 USC §§ 2611(12) & 2612(1)(C). The definition of son or daughter includes a biological child, an adopted child, a foster child, a stepchild, a legal ward or a child of a person standing in loco parentis. See 29 USC § 2611(12).

The FMLA creates two types of claims: an interference claim, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights, and a retaliation claim, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act. See 29 USC § 2615(a)(1)&(2); 29 C.F.R. § 825.220(c). While 29 USC § 2615(b) creates an additional retaliation claim for interference with proceedings or inquiries, the Eleventh Circuit decisions only embody § 2615(a) claims and this instruction does not address a § 2615(b) retaliation claim. To state a claim of interference with a substantive right, an employee need only demonstrate by a preponderance of evidence that he was entitled to the benefit denied. See Strickland v. Water Works Bd. of the City of Birmingham, 239 F.3d 1199, 1206-08 (11th Cir. 2001); O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1353-54 (11th Cir. 2000). In order to state a claim of § 2625(a)(2) retaliation, an employee must allege that: (1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action; and (3) the decision was causally related to the protected activity. See Strickland, 239 F.3d at 1206-07; Parris v. Miami Herald Publ'g Co., 216 F.3d 1298, 1301 (11th Cir. 2000). A plaintiff bringing such a retaliation claim, therefore, "faces

the increased burden of showing that his employer's actions 'were motivated by an impermissible retaliatory or discriminatory animus.'" Strickland, 239 F.3d at 1207 (quoting King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999).

The Eleventh Circuit held that a former employee who alleges his former employer refused to rehire him based on his past use of FMLA leave qualifies as an employee under 29 USC § 2617(a)(2). See Smith v. BellSouth Telecommunications, Inc., 273 F.3d 1303, 1307 (11th Cir. 2001). The Court allowed plaintiff to pursue a retaliation claim under this theory.

A public official sued in his or her individual capacity is not an "employer" under the FMLA, and therefore there is no federal subject matter jurisdiction over such a claim. See Wascura v. Carver, 169 F.3d 683, 687 (11th Cir. 1999).

In the Supreme Court's only decision regarding the FMLA, the Court invalidated a regulation that provided that leave taken by an employee does not count against that employee's FMLA-leave if the employer does not designate leave as FMLA leave. See Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002). The Court highlighted the fact that § 2617 "provides no relief unless the employee has been prejudiced by the violation." Id. at 1161. In other words, an employee has the burden of proving a real impairment of rights and resulting prejudice. Id. at 1161-62. The Court also discussed the Act's right of intermittent leave when medically necessary. See Id.

An employer who is subject to the FMLA and also offers a paid sick leave policy has two options when an employee's leave qualified under both the FMLA and under the employer's paid leave policy: the employer may either permit the employee to use his FMLA leave and paid sick leave sequentially, or the employer may require that the employee use his FMLA leave entitlement and his paid sick leave concurrently. See Strickland v. Water Works Bd. of the City of Birmingham, 239 F.3d 1199, 1205 (11th Cir. 2001). This interpretation of the statute and accompanying regulations protects employers who offer paid sick leave benefits to their employees from having to provide both the statutory 12 weeks of leave required by the FMLA and the paid leave benefit separately. See Id.

During the leave an employer must maintain any existing health insurance coverage under a group health plan if the insurance would have been available had plaintiff not taken leave. See 29 USC § 2614(c)(1); 29 C.F.R. § 825.800. If an employee fails to return to work based on a voluntary choice, rather than continued health problems or other circumstances beyond the employee's control, then the employer can recover the premium paid during the leave. See 29 USC § 2614(c)(2); 29 C.F.R. § 825.100(b). Should this be the case, additional instructions and a special interrogatory may be appropriate.

If an employee is salaried and among the highest paid ten percent of all employees within a 75 mile radius, then the employer may refuse to restore a plaintiff to an equivalent position if it "is necessary to prevent substantial and grievous economic

injury" to the operations of the employer, notice is given to the employee, and if leave has commenced the employee elects not to return to employment after receiving such notice. See 29 USC § 1614(b). This is sometimes called the "key employee" defense. In explaining the "substantial and grievous economic injury: standard, the regulations implementing the FMLA state that restoration may be denied only when restoration itself - - not the employee's absence - - will cause substantial and grievous economic injury. See 29 C.F.R. § 825.218(a). "If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration." Id. § 825.218(b). Although there is no precise test for substantial and grievous economic injury, the standard is "different from and more stringent than the 'undue hardship' test under the ADA," 29 C.F.R. § 825.218(c) & (d). Finally, if restoration "threatens the economic viability of the firm" or "causes substantial, long-term economic injury," then the standard would be met, but "[m]inor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not" meet the standard 29 C.F.R. § 825.218(c)

While the FMLA does not expressly authorize a jury trial, the availability of a jury trial may be inferred by the Act's legislative history, which includes a reference to the Fair Labor Standards Act, which, although also not expressly providing for a right to jury trial, has been consistently interpreted as so providing. See Frizzell v. Southwest Motor Freight, 154 F.3d 641 (6th Cir. 1998) (holding that a request for damages under the FMLA triggers a statutory right to a jury trial). However, while a jury trial is appropriate to decide the issues of back pay, equitable issues such as reinstatement and front pay should be decided by the court.

An award of liquidated damages is required unless the employer shows to the satisfaction of the court that the act or omission giving rise to the violation was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act, in which case the court may, in its sound discretion, award no liquidated damages or award an amount not to exceed the amount allowable under the statute. 29 USC § 2617(a)(1)(A)(iii). As with the Equal Pay Act and the Fair Labor Standards Act, it appears from the language of the statute that this is a question for the judge, not the jury. See Medley v. Polk Co., 260 F.3d 1202, 1208-09 (10th Cir. 2001) (stating that trial court made the lack of good faith assessment in FMLA case and that on remand if there is a jury verdict there should be a hearing before the court to allow employer to present evidence of good faith); Taylor v. Invacare Corp., 64 Fed. Appx. 516, 521, 2003 WL 21212674, **3 (6th Cir. 2003) (trial court made bad faith inquiry after jury rendered its verdict); but see Nero v. Industrial Molding Corp. 167 F.3d 921, 929 (5th Cir. 1999) (although stating that FMLA borrows remedial provisions from FLSA, notes with apparent approval that jury was presented with question of good faith). Since this has not been addressed by the Eleventh Circuit, some judges may wish to submit the issue of good faith to the jury on an advisory basis and, if the jury finds the requisite "good faith" and reasonable grounds for belief, then exercise the discretion given to eliminate liquidated damages. See, e.g., Palma v. Phamedica

Communications, Inc, Civil No. 3:00cv1128, 2003 WL 22750600 (D. Conn. Sept. 30, 2003). In that case, the following may be added to the instructions:

> Under the FMLA an employee's compensatory damages will be doubled by the court as liquidated damages unless the employer can prove that it acted in good faith and had reasonable grounds to believe that its conduct was not in violation of the FMLA. Therefore, under the circumstances presented, you must determine if the employer has satisfied you by a preponderance of the evidence that it acted in good faith and had reasonable grounds to believe that its conduct was not in violation of the FMLA.

and the following may be added to the special interrogatories:

> 8. That the Defendant acted in good faith and had reasonable grounds to believe that its conduct was not a violation of the FMLA.

1.9.1
Employee Claim Against Employer And Union
(Vaca v. Sipes)

In this case the Plaintiff makes two claims. The first claim is that the Plaintiff was discharged by the employer without just cause in violation of the collective bargaining agreement governing the terms and conditions of the Plaintiff's employment. The second claim is that the Union breached its duty to fairly represent the Plaintiff, as one of its members, in failing to investigate or otherwise process the Plaintiff's grievance against the employer under the grievance procedure set forth in the collective bargaining agreement.

Under the law, an employer may not discharge an employee governed by a collective bargaining agreement, such as the one involved in this case, unless "just cause" exists for the employee's dismissal. The term "just cause" means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice; that is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.

On the first claim, therefore, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff was discharged from employment by the employer; and

Second: That such discharge was without "just cause."

If you find in favor of the Plaintiff on this first claim, you must then consider the second claim, namely, that the Union breached its duty of “fair representation,” that is, to represent fairly the Plaintiff as one of its members.

With regard to that claim you are instructed that a union does have a legal duty to represent fairly the interest of its members in protecting their rights under a collective bargaining agreement.

However, an individual employee does not have an absolute right to require the union to pursue a grievance against the employer. The test is basic fairness. So long as the union acts in good faith, the law permits a union to exercise broad discretion in determining whether a particular employee's grievance should be pursued against the employer under the collective bargaining agreement. The union may consider, for example, the cost of the proceeding weighed against its assessment of the likelihood of success if the grievance is pursued. So, even if an employee's grievance has merit, mere negligence or the exercise of poor judgment on the part of the union does not, in and of

itself, constitute a breach of its duty of fair representation. On the other hand, when a union acts arbitrarily or capriciously, or in bad faith and dishonestly, in refusing to process a meritorious grievance, it violates the duty it has to represent fairly the union member who lodged the grievance.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

If you find for the Plaintiff on either of (his) (her) claims, you must then consider the issue of damages. The amount of your verdict should be a sum that you find will justly compensate the Plaintiff for the damages the Plaintiff has incurred. The measure of such damages, if any, is the amount that the Plaintiff would have earned from employment with the employer if the discharge had not occurred, reduced by any earnings that the Plaintiff had, or could have reasonably had, from other employment. In other words, the Plaintiff has a duty to mitigate or minimize the damages and the Defendants are not responsible for lost earnings to the extent that such loss could have been avoided had the Plaintiff used reasonable care in seeking other employment to avoid or minimize the injury.

Once you have arrived at a figure for these lost wages or damages, if you have found for the Plaintiff and against both the employer and the union, you will then have the task of apportioning those damages between the employer and the union. In making the apportionment you should follow this guideline. The employer is liable for lost wages due solely to its breach of the collective bargaining agreement in discharging the Plaintiff. However, any increases in lost wages caused by the union's failure to process the Plaintiff's grievance should be charged to the union and not to the employer. Thus, if you find that the Plaintiff would have been reimbursed for lost wages and/or would have been reinstated to the job the Plaintiff held with the employer but for the breach by the union of its duty to fairly represent the Plaintiff, then you must apportion those lost wages between the Defendants according to the extent to which the union's breach of duty to fairly represent caused increases to the wages lost by the Plaintiff.

1.9.1
Employee Claim Against Employer And Union
(Vaca v. Sipes)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was discharged from employment by the Defendant?

Answer Yes or No _____

2. That such discharge was without "just cause" (as defined in the Court's instructions)?

Answer Yes or No _____

[Note: If you answered No to either of the preceding questions you need not answer any of the remaining questions.]

3. That the Union breached its duty of fair representation owed to the Plaintiff as one of its members?

Answer Yes or No _____

4. That the Plaintiff should be awarded $_____ as the Plaintiff's damages.

[Note: Answer Question 5 only if you answered Yes to both Question 2 and Question 3.]

5. That the Plaintiff's damages should be apportioned between the Defendants, _____% against the Defendant _____, and _____% against the Defendant Union.

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

This jury instruction applies when an employee or former employee files a hybrid breach of contract - breach of duty of fair representation suit against the employer and union. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). A Plaintiff may decide to sue one Defendant and not the other, but must prove the same case whether the suit is against one Defendant or both. Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 564, 110 S.Ct. 1339, 1344, 108 L.Ed.2d 519 (1990) (explaining that most collective bargaining agreements accord finality to grievance procedures established by the agreement).

In deciding whether to prosecute a grievance, the union may consider tactical and strategic factors such as its limited resources and consequent need to establish priorities, as well as its desire to maintain harmonious relations among the workers and between the workers and the employer. Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. (1997).

A union's actions are arbitrary only if, in light of the circumstances, its behavior is so far outside a "wide range of reasonableness" as to be irrational. Air Line Pilots Assn. Int'l. v. O'Neill, 499 U.S. 65, 67, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51 (1991). Bad faith on the part of the union requires a showing of fraud, deceitful action, or dishonest action. Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 531 (10th Cir. 1992) (citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 299, 91 S.Ct. 1909, 1924, 29 L.Ed.2d 473 (1971)). Personal hostility is not enough to establish unfair representation if the representation was adequate and there is no evidence that the personal hostility tainted the union's actions. VanDerVeer v. United Parcel Serv., Inc., 25 F.3d 403, 405 (6th Cir. 1994). A union owes the duty of fair representation only to members of its collective bargaining unit. Spenlau v. CSX Transp., Inc., 279 F.3d 1313, 1315-16 (11th Cir. 2002).

The limitations period for bringing a hybrid breach of contract - - breach of the duty of fair representation claim is six months from the date of the employer or union's final action, whichever is later. Coppage v. U. S. Postal Serv., 281 F.3d 1200, 1204 (11th Cir. 2002) (citing DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 169-71 103 S.Ct. 2281, 2293-94, 76 L.Ed.2d 476 (1983)).

Generally, damages are apportioned between the employer and union according to the damage caused by each. However, joint and several liability may be appropriate where the employer and union actively participated in each other's breach. Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138, 1145-46 (2d Cir. 1994); Aguinaga v. United Food & Com. Workers Int'l Union, 993 F.2d 1463, 1474-75 (10th Cir. 1993).

1.10.1
Miscellaneous Issues
Respondeat Superior
(Under 42 USC § 1983)

The rules of law that apply to the Plaintiff's claim against the [City] are different from the rules of law that apply to the Plaintiff's claims against the individual Defendant, and each claim must be considered separately. I will first explain the rules or principles of law you must apply in deciding the Plaintiff's claim against the [City] and will then discuss the Plaintiff's claims against the individual Defendant.

Ordinarily, a corporation - - including a public body or agency such as the [City of _____] - - is legally responsible for the acts of its employees carried out in the regular course of their job duties as employees. This is known in the law as the doctrine of "respondeat superior" which means "let the superior respond" for any losses or injuries wrongfully caused by its employees in the performance of their jobs. This doctrine does not apply, however, in a case such as this where the Plaintiff claims a violation of constitutional rights.

So, in this case, the [City of _____] can be held liable only if you find that the deprivation of the Plaintiff's constitutional rights was the direct result of the [City's] ordinance, regulation, decision, policy, or custom. A governmental entity is responsible only when an

injury is inflicted through the execution of its policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. It is not enough merely to show that a [City] employee caused the Plaintiff's injury.

[A policy or custom means a persistent, widespread, or repetitious course of conduct by policy makers with final authority to establish the [City's] policy with respect to the action ordered. It may be written, or it may be a consistent series of decisions and actions adopted or approved by the policy makers.]

[A policy or custom means a persistent, widespread or repetitious course of conduct by public employees which, although not authorized by, or which may even be contrary to written law or express municipal policy, is so consistent, pervasive and continuous that the [City] policy makers must have known of it, so that, by their acquiescence, such policy or custom has acquired the force of law without formal adoption or announcement.]

The Court has determined that the [City's] policy makers, within the meaning of this instruction, were the [City Manager and the City Council]. Therefore, if you find that the acts of the [official policy maker]

deprived the Plaintiff of constitutional rights, the [City of _____]

is liable for such deprivations.

ANNOTATIONS AND COMMENTS

In Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that municipalities may not be held liable under Section 1983 on a theory of respondeat superior, but may only be held liable for the execution of a government policy or custom.

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694, 98 S.Ct. at 2037-38. To establish a policy or custom, the Plaintiff must show a persistent and widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a custom or usage with the force of law." In other words, a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it." Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991) (internal citations omitted); Cuesta v. School Board of Miami-Dade County, 285 F.3d 962, 966 (11th Cir. 2002).

Later, in Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the Supreme Court modified the "policy or custom" requirement to include "a single decision by municipal policy makers under appropriate circumstances." Id. at 480, 106 S.Ct. at 1298. Specifically, "where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly," provided that "the decision maker possesses final authority to establish municipal policy with respect to the action ordered." Id. at 481, 106 S.Ct. at 1299.

Also, in City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed. 2d 107 (1988), the Supreme Court held that a municipal official does not have final policy making authority over a matter when that official's decisions are subject to meaningful administrative review. The Eleventh Circuit has held that:

> [T]he mere delegation of authority to a subordinate to exercise discretion is not sufficient to give the subordinate policy-making authority. Rather, the delegation must be such that the subordinate's

> discretionary decisions are not constrained by official policies and are not subject to review.

Mandel v. Doe, 888 F.2d 783, 792 (11th Cir. 1989) (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)). See also Matthews v. Columbia County, 294 F.3d 1294, 1297 (11th Cir. 2002); Brown v. Neumann, 188 F.3d 1289, 1291 (1999); Scala v. City of Winter Park, 116 F.3d 1396, 1399-1400 (11th Cir. 1997).

A private entity may become the functional equivalent of the municipality when it contracts with the municipality to perform functions traditionally within the exclusive prerogative of the State and therefore, may enjoy the protections afforded by Monell and its progeny. Buckner v. Toro, 116 F.3d 450 (11th Cir.1997).

In cases where a plaintiff presents a § 1983 claim against a municipality based on a hiring decision and inadequate screening of the particular municipal employee who caused the plaintiff's injury, the Supreme Court has stated the following:

> Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute deliberate indifference."

Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 411, 117 S.Ct. 1382, 1392, 137 L.Ed.2d 626 (1997). "It is not sufficient under this standard that a municipal actor's inadequate screening of an applicant's record reflects an 'indifference' to the applicant's background." Griffin v. City of Opa-Locka, 261 F.3d 1295, 1313 (11th Cir. 2001). "Rather a plaintiff must demonstrate that the municipal hiring decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." Id. "[C]ulpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff." Brown, 520 U.S. at 412, 117 S.Ct. at 1392 (emphasis in original).

1.10.2
Miscellaneous Issues
Constructive Discharge

In this case, with respect to the Plaintiff's claim for economic damages - - that is, lost wages, which I will discuss in a moment - - there is an issue as to whether the Plaintiff was constructively discharged (as the Plaintiff alleges) or whether the Plaintiff voluntarily resigned or quit (as contended by the Defendant).

To prove a constructive discharge the Plaintiff must demonstrate that working conditions were so intolerable because of a [sexually] [racially] hostile work environment that a reasonable person in like circumstances would have felt compelled to resign.

If you find from a preponderance of the evidence that, because of a [sexually] [racially] hostile work environment, the Plaintiff's conditions of employment were intolerable to that extent, then you may conclude that the Plaintiff was constructively discharged. If the Plaintiff has not proven such intolerable working conditions, then the Plaintiff's resignation may be considered voluntary and the Plaintiff would not be entitled to any economic damages as a result of the loss of employment.

ANNOTATIONS AND COMMENTS

Thomas v. Dillard Department Stores, Inc., 116 F.3d 1432, 1433-44 (11th Cir. 1997); Morgan v. Ford, 6 F.3d 750, 755 - 56 (11th Cir. 1993) (discussing elements of proof for constructive discharge claim).

In evaluating constructive discharge claims, the Eleventh Circuit does not consider the plaintiff's subjective feelings. Instead, it employs an objective standard. Hipp v. Liberty National Life Insurance Company, 252 F.3d 1208, 1231 (11th Cir. 2001).

This instruction refers to economic damages related to loss of employment because it is possible, even if the jury decides that the Plaintiff's resignation was voluntary and not the result of a constructive discharge, that the Plaintiff might still be able to prove, and recover for, other violations that occurred during the existence of the employment relationship (i.e. other claims). If the case being tried differs from that fact pattern, an appropriate modification of this instruction should be made.

When this instruction is used it may be necessary to expand the Interrogatories to the Jury.

1.10.3
Miscellaneous Issues
Retaliation

The Plaintiff alleges that the Defendant retaliated, that is, took revenge against the Plaintiff because the Plaintiff had previously taken steps seeking to enforce the Plaintiff's lawful rights under [describe the Act or Statute involved, e.g., Title VII of the Civil Rights Act.]

You are instructed that those laws prohibiting discrimination in the work place also prohibit any retaliatory action being taken against an employee by an employer because the employee has asserted rights or made complaints under those laws. So, even if a complaint of discrimination against an employer is later found to be invalid or without merit, the employee cannot be penalized in retaliation for having made such a complaint if you find that the employee made the complaint as a means of seeking to enforce what the employee believed in good faith to be [his] [her] lawful rights. To establish "good faith," however, it is insufficient for the Plaintiff to merely allege that [his] [her] belief in this regard was honest and bona fide; the allegations and the record must also establish that the belief, though perhaps mistaken, was objectively reasonable.

In order to establish the claim of unlawful retaliation, therefore, the Plaintiff must prove by a preponderance of the evidence:

First: That [he] [she] engaged in statutorily protected activity, that is, that [he] [she] in good faith asserted objectively reasonable claims or complaints of discrimination prohibited by federal law;

Second: That an adverse employment action then occurred;

Third: That the adverse employment action was causally related to the Plaintiff's statutorily protected activities; and

Fourth: That the Plaintiff suffered damages as a proximate or legal result of such adverse employment action.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

For an adverse employment action to be "causally related" to statutorily protected activities it must be shown that, but for the protected activity, the adverse employment action would not have occurred. Or, stated another way, it must be shown that the protected activity by the Plaintiff was a substantial, motivating cause that made a difference in the Defendant's decision.

On the other hand, it is not necessary for the Plaintiff to prove that the Plaintiff's [protected activity] was the sole or exclusive reason for the Defendant's decision. It is sufficient if the Plaintiff proves that [the protected activity] was a determinative consideration that made a difference in the Defendant's decision.

You should be mindful, however, that the law applicable to this case requires only that an employer not retaliate against an employee because the employee has engaged in statutorily protected activity. So far as you are concerned in this case, an employer may [discharge] [fail to promote] or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the Defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances.

[If you find in the Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendants have shown by a preponderance of the evidence that the Plaintiff would [have been dismissed] [not have been promoted] for other reasons even in the absence of the statutorily protected activity.

If you find that the Plaintiff would [have been dismissed] [not have been promoted] for reasons apart from the statutorily protected activity, then your verdict should be for the Defendant.]

ANNOTATIONS AND COMMENTS

Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993) (elements required to prove retaliation); Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002) (same).

With regard to the "good faith" requirement, the Eleventh Circuit has emphasized that "a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable." Little v. United Technologies, Carrier Transicold Division, 103 F.3d 956, 960 (11th Cir. 1997). It thus is not enough for a plaintiff to prove that his belief in this regard was honest and bona fide; the evidence must also indicate that the belief, though perhaps mistaken, was objectively reasonable. Id. See also Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491 (11th Cir.) (while plaintiff is not required to prove underlying claim of discrimination that led to initial complaint, plaintiff must have had an objectively reasonable good faith belief that discrimination existed).

The right to be free of retaliation also applies to those who have pursued rights protected by 42 USC § 1981. Andrews v. Lakeshore Rehabilitation Hosp., 140 F.3d 1405, 1412-13 (11th Cir. 1998); Webster v. Fulton County, 283 F.3d 1254, 1256 (11th Cir. 2002).

When this instruction is used it may be necessary to expand the Interrogatories to the Jury.

1.10.4.1
Miscellaneous Issues
Employee/Independent Contractor

It is not always clear under the law whether a person is an "employee" or not, or who the "employer" is. Some people, for example, perform services for others while remaining self employed as “independent contractors.”

So, a preliminary issue for your decision in this instance is the question whether [_____] was an employee of [_____ _____], or whether [_____] was, instead, an independent contractor. You should resolve this question in light of the economic realities of the entire relationship of the parties, and there are a number of factors you must consider, based on all the evidence in the case.

In an employer/employee relationship, the employer has the right to control the work of the employee, and to set the means and manner in which the work is done, as well as the hours of work. In contrast, an independent contractor generally must accomplish a certain work assignment within a desired time, but the details, means, and manner by which that assignment is accomplished are determined by the

independent contractor, normally using special skills necessary to perform that kind of work.

An employee is usually paid on a time worked, piecework, or commission basis, and usually has vacation or sick time allowed, as well as insurance, retirement, and other fringe benefits provided by the employer. An independent contractor is ordinarily paid an agreed or set amount, or according to an agreed formula, for a given task or job.

An independent contractor generally is one who has the opportunity to make a profit or faces a risk of taking a loss, while an employee generally is compensated at a predetermined rate, has no risk of loss, and has social security taxes paid by the employer.

An independent contractor usually provides the tools, equipment, and supplies necessary to do the job, while an employee usually does not. Independent contractors generally offer their services to the public or others in a particular industry, have procured necessary licenses for the carrying on of their activities, and may have a business name or listing in the phone book. Employees ordinarily work only for one or just a few employers, and do not have business names or listings.

The intent of the parties is, of course, always important, but the description the parties themselves give to their relationship is not controlling; substance governs over form.

Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the right to control the means and manner of the worker's performance is the most important factor.

ANNOTATIONS AND COMMENTS

The central issue in determining employee/independent contractor status is the hiring party's right to control the manner and means by which the work is accomplished. Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A., 104 F.3d 1256, 1266 (11th Cir. 1997). Whether a person is an employee or an independent contractor is a question of fact for the jury. Id.; see also Morrison v. Amway Corp., 323 F.3d 920 (11th Cir. 2003).

In cases under the Fair Labor Standards Act, the Court of Appeals has applied an "economic realities" test under which persons are considered employees if they "are dependent upon the business to which they render service." Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299-300 (5th Cir. 1975); see also Villareal v. Woodham, 113 F.3d 202, 205 (11th Cir. 1997). In other contexts the Court has adopted a standard that combines the "economic realities" test and the common law test. Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982). See also Wolf v. Coca-Cola Co., 200 F.3d 1337, 1340 (11th Cir. 2000) (the term "employee" as used in the ERISA statute refers to the common law analysis). This instruction is in that form.

See also Federal Claims Instruction No. 10.3, infra.

1.10.4.2
Miscellaneous Issues
Joint Employers

It is not always clear under the law whether a person is an "employee" or not, or who the "employer" is. Some people, for example, perform services for others while remaining self employed as independent contractors. Others are clearly "employees," but a question may arise as to who the employer is; and, in some instances, an employee may have joint employers, that is, more than one employer at the same time.

So, a preliminary issue for your decision in this instance is the question whether the Plaintiff was an "employee" of the Defendant [ABC Corporation] as well as, perhaps, an employee of _____.

You should resolve this question in light of the economic realities of the entire relationship between the parties, and should consider each of the following factors to the extent you find that a particular factor is applicable to the case:

(1) the nature and degree of control of the employee, and who exercises that control;

(2) the degree of supervision, direct or indirect of the employee's work, and who exercises that supervision;

(3) who exercises the power to determine the employee's pay rate or method of payment;

(4) who has the right, directly or indirectly, to hire, fire, or modify the employment conditions of the employee;

(5) who is responsible for the preparation of the payroll and the payment of wages;

(6) who made the investment in equipment and facilities used by the employee;

(7) who has the opportunity for profit and loss;

(8) the permanency and exclusivity of the employment;

(9) the degree of skill required to do the job;

(10) the ownership of the property or facilities where the employee works; and

(11) the performance of a speciality job within the production line integral to the business.

Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the right to control the means and manner of the worker's performance is the most important factor.

ANNOTATIONS AND COMMENTS

This instruction is derived from Aimable v. Long and Scott Farms, 20 F.3d 434 (11th Cir. 1994). See also Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996); Charles v. Burton, 169 F.3d 1322, 1328 (11th Cir. 1999).

The nature of the question of whether an employer is a single or joint employer under Title VII appears to be in dispute. In 1997, the Eleventh Circuit determined that the question of employer status under the ADEA intertwines jurisdiction and the merits and so must be resolved by the jury. Garcia v. Copenhaver, Bell & Assoc., 104 F.3d 1256 (11th Cir. 1997). In 1999, however, the Eleventh Circuit decided Scarfo v. Ginsberg, 175 F.3d 957 (11th Cir. 1999), which distinguished Garcia in a Title VII case. In Scarfo, the court determined that the defendants' challenge as to whether they were a single employer, rather than as to whether an individual was an employee, did not implicate an element of the claim and, therefore, was a jurisdictional issue to be decided by the court. Id. at 961.

In 2003, a panel of the Eleventh Circuit identified a conflict in these two cases. See Morrison v. Amway Corp., 323 F.3d 920 (11th Cir. 2003). The court concluded that although the Scarfo court purported to distinguish Garcia, it actually overruled it sub silentio, Id. at 929. The Morrison court reasoned that as a prior panel decision of the Eleventh Circuit is binding on subsequent panels and can be overruled only by the court sitting en banc, and as Garcia preceded Scarfo, it is the law of this circuit. Id. In Morrison, the court held that eligible employee status under the FMLA is not a jurisdictional issue, but is to be decided by a jury, or under F.R.C.P. 12(b)(6) or 56. Id. at 930.

1.10.5.1
Alter Ego
Miscellaneous Issues
Corporation As Alter Ego Of Stockholder

In this case the Plaintiff claims that [name of corporation] was a mere instrument or tool - - what the law calls the alter ego - - of the Defendant [name of stockholder] so that the separate status of [name of corporation] should be disregarded and the Defendant [name of stockholder] should be held legally responsible for the acts of the corporation.

Under our free enterprise economic system, the law permits, even encourages, the formation of corporations as a means of attracting investments by stockholders who can invest their money in the corporate enterprise without risking individual liability for corporate acts and transactions. In return, society gets the benefit of the jobs and other commercial activity generated by the business of the corporation. In most cases, therefore, the status of a corporation as a separate legal entity apart from its owners or stockholders must be respected and preserved.

This rule is not absolute, however, and the separate status of a corporation can be disregarded where a stockholder uses a corporation as a mere instrumentality or tool for the purpose of evading or violating

a statutory or other legal duty, or for accomplishing some fraud or illegal purpose.

In deciding whether [name of corporation] should be treated in this case as the alter ego of the Defendant [name of stockholder], you should consider:

(1) The purpose for which the corporation was formed or acquired by the stockholder;

(2) Whether corporate books and records were kept, regular meetings of the directors were conducted, and other corporate legal formalities were observed;

(3) Whether the funds of the corporation were intermingled or not intermingled with the funds of the stockholder;

(4) The activity or inactivity of others as officers or directors in the business affairs of the corporation; and

(5) Any other factors disclosed by the evidence and tending to show that the corporation was or was not operated as an entity separate and apart from its owner.

ANNOTATIONS AND COMMENTS

To prove that a defendant shareholder is the alter ego of a corporation, it must be shown that the shareholder disregarded the corporate entity and made it a mere instrumentality for the conducting of his own affairs, and that such control was used to commit fraud or perpetrate the violation of a statutory or other legal duty. United Steelworkers of America, AFL-CIO-CLC v. Connors Steel Co., 855 F.2d 1499, 1506-1507 (11th Cir. 1988). This requirement is typical under state law as well. See, e.g., Ex parte Thorn, 788 So.2d 140 (Ala. 2000); Acree v. McMahan, 574 S.E.2d 567 (Ga. App. 2002) aff'd in part and rev'd in part, 585 S.E.2d 873 (Ga. 2003); Dania Jai Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984).

1.10.5.2
Miscellaneous Issues
Alter Ego
Subsidiary As Alter Ego Of Parent Corporation

In this case the Plaintiff claims that [name of subsidiary] was a mere instrument or tool - - what the law calls the alter ego - - of its parent corporation, the Defendant [name of parent corporation], so that the separate status of [subsidiary] should be disregarded and the parent corporation [name], should be held legally responsible for the acts and transactions of its subsidiary, [name].

Under our free enterprise economic system, the law permits, even encourages, the formation of corporations as a means of attracting investments by stockholders, including other corporations, which can invest money in the subsidiary corporate enterprise without risking liability on its own part for the corporate acts and transactions of its subsidiary. In return, society gets the benefit of the jobs and other commercial activity generated by the business of the subsidiary. In most cases, therefore, the status of a subsidiary corporation as a separate legal entity apart from its parent corporation must be respected and preserved.

This rule is not absolute, however, and the separate status of a subsidiary corporation can be disregarded where the parent corporation

so controls the operation of the subsidiary corporation as to make the subsidiary a mere tool or instrumentality of the parent, and that control is used for the purpose of committing fraud or perpetrating the violation of a statutory or other legal duty. In deciding whether [name of subsidiary] should be treated in this case as the alter ego of its parent corporation, the Defendant [name], you should consider:

(1) Whether the parent caused the incorporation of the subsidiary;

(2) Whether the parent and subsidiary have common stock ownership and/or directors or officers;

(3) Whether the business purpose or function of the subsidiary is separate and distinct from the parent;

(4) Whether separate corporate books and records were kept (even though joint tax returns may have been filed as required by law);

(5) Whether the parent finances the subsidiary or pays the salaries and other expenses of the subsidiary;

(6) Whether the funds of the subsidiary were intermingled, or not intermingled, with the funds of the parent; and

(7) Any other factor disclosed by the evidence tending to show that the subsidiary was or was not operated as an entity separate and apart from its parent.

You should consider all of these factors. No one factor is determinative.

ANNOTATIONS AND COMMENTS

To prove that a subsidiary should be treated as the alter ego of its parent corporation, it must be shown that the corporation so controls the operation of the subsidiary as to make it a mere instrumentality of the corporation, and that such control is used for the purpose of committing fraud or perpetrating the violation of a statutory or other legal duty. United Steelworkers of America, AFL-CIO-CLC v. Connors Steel Co., 855 F.2d 1499, 1505-06 (11th Cir. 1988) (federal common law); United States of America v. Jon-T Chemicals, Inc. 768 F.2d 686, 691 (5th Cir. 1985).

2.1
Civil Rights
42 USC § 1983 Claims
First Amendment Claim
Prisoner Alleging Retaliation/Denial Of Access To Courts

In this case, the Plaintiff claims that the Defendant, while acting "under color" of state law, violated the Plaintiff's constitutional rights under the First Amendment to the Constitution of the United States.

Specifically, the Plaintiff claims that the Plaintiff's constitutional right of access to the courts was violated by the Defendant in making a disciplinary report against the Plaintiff because [he] [she] had communicated an intent to sue the Defendant concerning [the Plaintiff's continuation in a close confinement status].

In that regard, a convicted prisoner loses some constitutional rights upon being found guilty of a felony offense - - the right to liberty, for example - - but the prisoner keeps or retains other constitutional rights. One of those retained rights is the right under the First Amendment of access to the courts in order to litigate the lawfulness of the prisoner's conviction and the constitutionality of the conditions of confinement. Under the Eighth Amendment, for example, a prisoner has the right not to be subjected to cruel and unusual punishment; and, if a prisoner had no right to go to court to vindicate claims of Eighth Amendment violations, the guarantees of the Constitution would have

little or no meaning because there would be no effective way to enforce those guarantees. So, the First Amendment assures everyone, including convicted prisoners, of the right of access to the courts.

Furthermore, the right of access to the courts means that a prisoner not only has the right to file claims and other papers with the court, but that the exercise of that right, or plans to exercise that right, cannot be made the basis of a penalty or further punishment. This is true because, once again, if a prisoner could be punished afterward for exercising a constitutional right or for giving a good faith notice of an intent to do so, the right itself would be rendered meaningless.

On the other hand, in order to maintain discipline and security, prison authorities do have the right to impose reasonable restrictions even upon the exercise of constitutional rights.

The prohibition against the making of written threats by inmates is one such reasonable restriction upon the exercise of First Amendment rights; [and, in this case, the Defendant claims that the Plaintiff's communication to the Defendant concerning a lawsuit was nothing more than a written threat intended by the Plaintiff as an act of harassment of prison officials rather than a good faith notice of an intent

to sue given as a part of an effort to reach an amicable settlement with regard to a pending, legitimate dispute.]

In order to prevail on his claim, therefore, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the communication made to the Defendant about a lawsuit was not a threat intended in bad faith as an act of harassment, but was made by the Plaintiff in good faith as an exercise of First Amendment rights; and

Second: That the Plaintiff was intentionally retaliated against or punished by the Defendant because the Plaintiff exercised those rights.

If you find for the Plaintiff and against the Defendant on this issue, you will then consider the issue of Plaintiff's damages, if any, sustained as a proximate or legal result of the Defendant's violation of the Plaintiff's constitutional rights.

Because Plaintiff suffered no physical injury in this case, however, the Plaintiff is limited to recovery of nominal and, possibly, punitive damages. So if you find that the Defendant violated Plaintiff's First Amendment right, you should award the Plaintiff nominal damages such as $1.00.

The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's [federally protected] rights so as to entitle the Plaintiff to an award of punitive damages in addition to nominal damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's [federally protected] rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].

2.1
Civil Rights
42 USC § 1983 Claims
First Amendment Claim
Prisoner Alleging Retaliation/Denial Of Access To Courts

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the communication made by the Plaintiff to the Defendant about a lawsuit was not a threat intended in bad faith as an act of harassment, but was made by the Plaintiff in good faith as an exercise of First Amendment rights?

Answer Yes or No _____

[Note: If you answered No to Question No. 1, skip the remaining questions and have your foreperson sign this verdict form at the bottom of the next page.]

2. That the Defendant intentionally retaliated against or punished the Plaintiff for the exercise of those rights and should be awarded $1 in nominal damages?

Answer Yes or No _____

3. That the Defendant acted with malice or with reckless indifference to the Plaintiff's federally protected rights, and that punitive damages should be assessed against the Defendant?

Answer Yes or No _____

If your answer is Yes,
in what amount? $_____

SO SAY WE ALL.

Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

This instruction, and those that follow in this Chapter dealing with constitutional claims asserted by prisoners under 42 USC § 1983, involve causes of action as to which the Defendants will usually assert, on motion for summary judgment, a qualified immunity defense to be addressed by the court under the standards set forth in Cottone v. Jenne, 326 F.3d 1352, 1357-58 (11th Cir. 2003). These instructions assume, therefore, that the court has previously determined that the Defendants do not have a qualified immunity defense. If there is a fact issue preventing summary judgment on the qualified immunity defense (and that issue is not subsumed in the elements of the claim the Plaintiff must prove), it may be necessary to submit that issue to the jury in the form of a special interrogatory. In such a case, however, it should not be necessary to expand the instructions to the jury, i.e. the ultimate legal issue remains for the Court, not the jury.

It must also be determined in advance of trial whether the Prison Litigation Reform Act of 1995 (Pub.L. 104-134) forecloses claims for damages in cases where there is no physical injury to the Plaintiff's person. 42 USC § 1997e(e) provides:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

The Ninth Circuit has held that the statute is inapplicable to First Amendment claims. Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998); but see Searles v. Van Bebber, 251 F.3d 869, 875-81 (10th Cir. 2001) (holding that plaintiff's compensatory - - hence, emotional-injury based - - damages award on his First Amendment claim is barred by § 1997e(e), though he was still entitled to a nominal and punitive damages award for the constitutional violation itself).

Some cases combine First and Eighth amendment claims since prison officials can retaliate against litigious inmates by not only (as the instant pattern charge here suggests) generating bogus disciplinary actions against them, but also in other ways, such as harassing body searches. See Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (such a search may offend the Eighth Amendment's prohibition against the wanton infliction of psychological pain even if it does not cause physical injury).

Calhoun upheld § 1997e(e)'s emotional-injury bar while recognizing the nominal/punitive damages recovery option. Id. at 940-42 (§ 1997e(e) does not foreclose an action for nominal or punitive damages for an Eighth Amendment violation involving no physical injury). "Moreover, the rule seems to be that an award of nominal damages is mandatory upon a finding of a constitutional violation . . . ." Searles, 251 F.3d at 878 (cites omitted).

The Eleventh Circuit has expressed no view on whether § 1997e(e) bars an action for "nominal damages that are normally available for the violation of certain 'absolute' constitutional rights, without the showing of actual injury." Harris v. Garner, 190 F.3d 1279, 1288 n.9 (11th Cir. 1999), reh'g en banc granted and opinion vacated, 197 F.3d 1059 (11th Cir. 1999), opinion reinstated in pertinent part en banc, 216 F.3d 970 (11th Cir. 2000). It recently remanded a case for consideration of whether § 1997e(e) precludes nominal damages for a constitutional violation. Hughes v. Lott, 350 F.3d 1157, 1162 (11th Cir. 2003).

This pattern instruction is therefore premised upon the assumption that the Eleventh Circuit will conclude that nominal/punitive damages are available for constitutional violations, notwithstanding § 1997e(e). See also Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (collecting cases but misstating Hughes's holding); Mitchell v. Newryder, 245 F.Supp.2d 200, 205-06 n.4 (D.Me. 2003) (collecting cases). See also 3B Fed. Jury Prac. & Instr. § 166.61-62 (5th ed. 2001).

With respect to a prisoner's First Amendment right of access to the courts, see Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); and Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); and 3B Fed. Jury Prac. & Instr. § 166.24 (5th ed. 2001). For the elements of a First Amendment retaliation claim, see Farrow v. West, 320 F.3d 1235, 1248 (11th Cir. 2003).

2.2
Civil Rights
42 USC § 1983 Claims
Fourth Amendment Claim
Citizen Alleging
Unlawful Arrest - Unlawful Search - Excessive Force

In this case the Plaintiff claims that the Defendants, while acting "under color" of state law, intentionally deprived the Plaintiff of the Plaintiff's rights under the Constitution of the United States.

Specifically, the Plaintiff claims that while the Defendants were acting under color of state law [as members of the Police Department of the City of _____] they intentionally violated the Plaintiff's constitutional right [not to be arrested or seized without probable cause]; [not to be subjected to an unreasonable search of one's home or dwelling]; [and] [to be free from the use of excessive or unreasonable force during an arrest].

Under the Fourth Amendment to the Constitution of the United States, every citizen has the right [not to be seized or arrested without probable cause] [not to be subjected to an unreasonable search of one's home or dwelling] [not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer, even though the arrest is otherwise made in accordance with the law].

The law further provides that a person may sue in this Court for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates the Plaintiff's rights under the Constitution of the United States.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendants intentionally committed acts that violated the Plaintiff's federal constitutional right [not to be arrested or seized without probable cause] [not to be subjected to an unreasonable search of one's home or dwelling] [not to be subjected to excessive or unreasonable force during an arrest];

Second: That in so doing the Defendants acted "under color" of state law; and

Third: That the Defendants' acts were the proximate or legal cause of damages sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[In this case the parties have stipulated or agreed that the Defendants acted "under color" of state law and you should, therefore, accept that fact as proven.]

[A state or local official acts "under color" of state law not only when the official acts within the limits of lawful authority, but also when the official acts without or beyond the bounds of lawful authority. In order for unlawful acts of an official to be done "under color" of state law, however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of official duty; that is, the unlawful acts must be an abuse or misuse of power which is possessed by the official only because of the position held by the official.]

[The first aspect of the Plaintiff's claim is that the Plaintiff was seized or arrested without probable cause. Under state law, a police officer has the right to arrest a person without a warrant whenever the officer reasonably believes that such person has committed a misdemeanor offense in the presence of the officer. And, it is a misdemeanor offense for any person to be intoxicated and endanger the safety of another person or property.]

[The second aspect of the Plaintiff's claim is that there was an unreasonable search of the Plaintiff's home. As previously stated, the Constitution protects every citizen against "unreasonable" searches; and, ordinarily, this means that a search warrant must be obtained from

a judicial officer before any search of a home may be made. There are, however, certain exceptions to this requirement. One such exception is a search conducted by consent. If a person in lawful possession of a home freely and voluntarily invites or consents to a search, law enforcement officers may reasonably and lawfully conduct the search to the extent of the consent so given. Another exception is recognized in emergency situations in which a law enforcement officer, if the officer has a reasonable and good faith belief that there is a serious threat to the officer's safety or the safety of someone else, may enter and make a safety inspection for the purpose of insuring or protecting the well-being of the officer and others.]

[The third aspect of the Plaintiff's claim is that excessive force was used by the Defendants in effecting the Plaintiff's arrest. In that regard, as previously mentioned, every person has the constitutional right not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer, even though such arrest is otherwise made in accordance with the law. On the other hand, in making a lawful arrest, an officer has the right to use such force as is reasonably necessary under the circumstances to complete the arrest. Whether a specific use of force is excessive or unreasonable turns on

factors such as the severity of the crime, whether the suspect poses an immediate violent threat to others, and whether the suspect is resisting or fleeing. You must decide whether the force used in making an arrest was excessive or unreasonable on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances disclosed in this case.]

If you should find for the Plaintiff and against the Defendants, you must then decide the issue of the Plaintiff's damages. For damages to be the proximate or legal result of a constitutional deprivation, it must be shown that, except for that constitutional deprivation, such damages would not have occurred.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they also cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical or emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) The reasonable value of any property lost or destroyed during, or as a result of, the Defendant's unconstitutional acts;

(b) The reasonable cost of medical care and hospitalization;

(c) Physical or emotional pain and mental anguish;

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected

rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, you would be authorized to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

2.2
Civil Rights
42 USC § 1983 Claims
Fourth Amendment Claim
Citizen Alleging
Unlawful Arrest - Unlawful Search - Excessive Force

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant intentionally committed acts that violated the Plaintiff's federal constitutional right [not to be arrested or seized without probable cause] [not to be subjected to an unreasonable search of one's dwelling or home] [not to be subjected to excessive or unreasonable force during an arrest]?

Answer Yes or No _____

2. That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff?

Answer Yes or No _____

[Note: If you answered No to either Question No. 1 or Question No. 2, skip the remaining questions and have your foreperson sign this verdict form at the bottom of the next page.]

3. That the Plaintiff should be awarded damages to compensate for the reasonable value of any property lost or destroyed during, or as a result of, the Defendant's unconstitutional acts?

Answer Yes or No _____

If your answer was Yes,
in what amount? $_____

4. That the Plaintiff should be awarded damages to compensate for the reasonable cost of medical care and hospitalization?

Answer Yes or No _____

If your answer was Yes,
in what amount? $_____

5. That the Plaintiff should be awarded damages to compensate for physical as well as emotional pain and mental anguish?

Answer Yes or No _____

If your answer was Yes,
in what amount? $_____

6. That the Defendant acted with malice or with reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant.

Answer Yes or No _____

If your answer was Yes,
in what amount? $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

See the Annotations and Comments following Federal Claims Instruction 2.1, supra.

In Graham v. M.S. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court held that all claims of excessive force against law enforcement

officials in the course of making an arrest, investigatory stop, or other "seizure" of an individual's person are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under the substantive due process standard applied in pre-1989 cases like Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985), abrogation recognized by Nolin v. Isbell, 207 F.3d 1253 (11th Cir. 2000).

The Graham Court re-emphasized that a "seizure" triggering the Fourth Amendment's protections occurs only when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen." Id., 490 U.S. at 395 n. 10, 109 S.Ct. at 1871 n. 10 (quoting Terry v. Ohio, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968)). The court left unanswered the question of whether the Fourth Amendment continues to protect individuals against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins. However, the court did state that the Due Process Clause clearly protects a pretrial detainee from the use of excessive force that amounts to punishment, and that the Eighth Amendment is the primary source of protection for post-conviction incidents of excessive force. Id.; Bell v. Wolfish, 441 U.S. 520, 535-39, 99 S.Ct. 1861, 1871-74, 60 L.Ed.2d 447 (1979); Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

In the Eleventh Circuit, "[c]laims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause, instead of the Eighth Amendment's Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners." Lumley v. City of Dade City, Fla., 327 F.3d 1186, 1196 (11th Cir. 2003) (quotes and cite omitted); see also Whiting v. Tunica County, 222 F.Supp.2d 809, 822-23 (N.D. Miss. 2002) (collecting circuit-split cases); 3B Fed. Jury Prac. & Instr. § 165.20 at 601 (5th ed. 2001).

Accordingly, this instruction deals with the case in which a citizen is the complainant. Federal Claims Instruction 2.3.1, infra, deals with the case in which a convicted inmate is the complainant (asserting a claim under the Eighth Amendment); and Federal Claims Instruction 2.4.1, infra, deals with the case in which a pretrial detainee is the complainant (asserting a claim under the Due Process Clause of the Fourteenth Amendment).

Where a case is litigated under the first two sections of the foregoing pattern charge (i.e., that the plaintiff was seized or arrested and/or unreasonably searched without probable cause), a "pretext" instruction may be warranted. See Arkansas v. Sullivan, 532 U.S. 769, 772, 121 S.Ct. 1876, 1878, 149 L.Ed.2d 994 (2001) (so long as arrest is supported by probable cause, the Fourth Amendment is not violated, even if the officer had a pretextual subjective motive for stopping the driver for speeding); U. S. v. Bookhardt, 277 F.3d 558, 565 (D.C. Cir. 2002) (even if the stop is a pretext for a search, the officer's subjective intent is irrelevant so long as there was probable cause to believe the driver had committed a traffic violation); U. S. v. Dhinsa, 171 F.3d 721, 724-25 (2d Cir. 1998) (officer's use of traffic violation as

pretext to stop car in order to obtain evidence of more serious crime is of no constitutional significance).

If this charge is adapted for use in automobile-search cases, consider instructing that the Fourth Amendment's protections against "unreasonable searches and seizures" include searches conducted during "brief investigatory stops of persons or vehicles that fall short of traditional arrest." U. S. v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 750, 151 L.Ed.2d 740 (2002). But searches can follow arrests for minor offenses - - even those that are punishable only by a fine. Atwater v. City of Lago Vista, 532 U.S. 318, 354,121 S.Ct. 1536, 1557, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) (upholding custodial arrest for traffic violations); see also Brookins v. Rafferty, 59 Fed.Appx. 983 (9th Cir. 2003) ("window-tint" violation). And "[t]he existence of probable cause . . . is an absolute bar to a section 1983 action for false arrest." Marx v. Gumbinner, 905 F.2d 1503, 1505-06 (11th Cir. 1990).

Nominal damages are also available in this context. Briggs v. Marshall, 93 F.3d 355, 360 (7th Cir. 1996) (nominal damages available to remedy Fourth Amendment excessive force claim); Dawkins v. Huffman 25 Fed. Appx. 107 (4th Cir. 2001) (District Court was required to award nominal damages in § 1983 action in which plaintiff established violation of his Fourth Amendment rights, but did not prove actual injury); Shain v. Ellison 273 F.3d 56, 67 (2d Cir. 2001); 3B Fed. Jury Prac. & Instr. § 166.61 (5th ed. 2001). But they should not exceed $1.00, Carey v. Piphus, 435 U.S. 247, 267, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978); Familias Unidas v. Briscoe, 619 F.2d 391, 402 (5th Cir. 1980), and are waivable. See Oliver v. Falla, 258 F.3d 1277, 1282 (11th Cir. 2001) (waived by failing to request nominal damages instruction or object to lack of such an instruction).

2.3.1
Civil Rights
42 USC § 1983 Claims
Eighth Amendment Claim
Convicted Prisoner Alleging Excessive Force

In this case the Plaintiff claims that the Defendant, while acting "under color" of state law, intentionally deprived the Plaintiff of the Plaintiff's rights under the Constitution of the United States.

Specifically, the Plaintiff claims that while the Defendant was acting under color of state law [as a Correctional Officer at _____ _____ Corrections Facility] the Defendant intentionally violated the Plaintiff's constitutional right to be free of cruel and unusual punishment.

Under the Eighth Amendment to the Constitution of the United States, every person convicted of a crime or a criminal offense has the right not to be subjected to cruel and unusual punishment. This includes, of course, the right not to be assaulted or beaten without legal justification.

The law further provides that a person may sue in this Court for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates the Plaintiff's rights under the Constitution of the United States.

In order to prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant intentionally [describe the alleged conduct];

Second: That the Defendant's conduct amounted to the use of "excessive force" against the Plaintiff, as hereafter defined;

Third: That in so doing the Defendant acted "under color" of state law; and

Fourth: That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[The parties have stipulated or agreed that the Defendant acted "under color" of state law and you should, therefore, accept that fact as proven.]

[A state or local official acts "under color" of state law not only when the official acts within the limits of lawful authority, but also when the official acts without or beyond the bounds of lawful authority. In order for unlawful acts of an official to be done "under color" of state law, however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of official duty; that is, the unlawful acts must be an abuse or misuse of power which is

possessed by the official only because of the position held by the official.]

The constitutional right to be free of cruel and unusual punishment includes the right not to be subjected to excessive force while being detained in custody by a law enforcement or corrections officer. On the other hand, not every push or shove, even if it later seems unnecessary, will give rise to a constitutional violation; and an officer always has the right, and the duty, to use such reasonable force as is necessary under the circumstances to maintain order and assure compliance with prison regulations. Whether or not any force used in this instance was excessive is an issue for you to decide on the basis of whether such force, if any, was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. In making that decision you should consider the amount of force used in relationship to the need presented; the motive of the officer; the extent of the injury inflicted; and any effort made to temper the severity of the force used. Of course, when prison officials maliciously and sadistically use force to cause harm, the result would be cruel and unusual punishment regardless of the significance of the injury to the inmate.

If you should find for the Plaintiff and against the Defendant, you must then decide the issue of the Plaintiff's damages. For damages to be the proximate or legal result of a constitutional deprivation, it must be shown that, except for that constitutional deprivation, such damages would not have occurred.

In considering the issue of the Plaintiff's damages you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover the physical aspects of injury. Thus, no evidence of the value of physical pain has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Physical pain and suffering;

(b) Emotional injury if accompanied by more than minimal physical injury;

[(c) Nominal damages (as explained in these instructions);] and

[(d) Punitive damages, if any (as explained in the Court's instructions).]

[You are authorized to award $1 in nominal damages if you find for the Plaintiff but also find that Plaintiff's damages have no monetary value.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to

assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

2.3.1
Civil Rights
42 USC § 1983 Claims
Eighth Amendment Claim
Convicted Prisoner Alleging Excessive Force

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant intentionally committed acts that violated the Plaintiff's constitutional right not to be subjected to cruel and unusual punishment?

Answer Yes or No _____

[Note: If you answered No to Question No. 1, skip the remaining questions and have your foreperson sign this

verdict form at the bottom of the next page.]

2. That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff?

Answer Yes or No _____

3. That the Plaintiff should be awarded damages to compensate for physical pain and suffering?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

4. That the Plaintiff should be awarded damages to compensate for emotional injury (Note: This can be awarded only if it is accompanied by more than minimal physical injury)?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

5. That the Plaintiff should be awarded $1 in nominal damages?

Answer Yes or No _____

6. That the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

Prison officials use excessive force in violation of the Eighth Amendment when they act maliciously for the purpose of causing harm, whether or not significant injury is evident. Hudson v. McMillian, 503 U.S. 1, 9-10, 112 S.Ct. 995, 1000-01, 117 L.Ed.2d 156 (1992); Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986) (unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by Eighth Amendment). Thus, a court errs by dismissing a prisoner's excessive force claim on the ground that he suffered only de minimis injury. See Hudson, 503 U.S. at 9-10, 112 S.Ct at 1000-01; Oliver v. Keller, 289 F.3d 623, 626 (9th Cir. 2002).

But 42 USC § 1997e prevents a prisoner-plaintiff from seeking compensatory damages for deliberate infliction of emotional suffering in the absence of physical injury, though psychological torture in violation of the Eighth Amendment will permit recovery of nominal, if not also punitive damages. Calhoun v. DeTella, 319 F.3d 936, 940-42 (7th Cir. 2003). "[T]he rule seems to be that an award of nominal damages is mandatory upon a finding of a constitutional violation . . . ." Seales v. Van Bebber, 251 F.3d 869, 878 (10th Cir. 2001) (cites omitted); see also 3B Fed. Jury Prac. & Instr. § 166.61-62 (5th ed. 2001) (nominal and punitive damage instructions).

Where physical injuries are shown to defeat § 1997e(e)'s emotional-injury bar, they must be more than de minimis. Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1312-13 (11th Cir. 2002); Mitchell v. Horn, 318 F.3d 523, 532 (3d Cir. 2003). "Loss of food, water, and sleep are not themselves physical injuries. However, physical injuries could result from such deprivation after four days." Horn, 318 F.3d at 534.

Note the distinction between substantive due process and "regular" constitutional claims:

> Substantive due process analysis is appropriate in cases that involve excessive force where a specific constitutional provision - - such as the Fourth or Eighth Amendment - - does not apply. County of Sacramento v. Lewis, 523 U.S. 833, 843, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) ("'Graham [v. M.S. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)] simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.' Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment.") (quoting United States v. Lanier, 520 U.S. 259, 272 n.7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)).

Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1243 (10th Cir. 2003). "As a general rule, to prevail on a claim of a substantive due-process violation, a plaintiff must prove that a defendant's conduct 'shocks the conscience.'" Lumley v. City of Dade City, Fla., 327 F.3d 1186, 1196 (11th Cir. 2003) (quotes and cite omitted).

Government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial party by a desire to punish an individual for exercise of a constitutional right. Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003). Acts intended to injure with no justifiable government purpose may suffice. Waddell v. Hendry County Sheriff's Office, 329 F.3d 1300, 1304 (11th Cir. 2003).

Eighth Amendment claims entail both objective and subjective standards. See De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 5/27/03) (collecting cases delineating objective/subjective distinctions); see also Verdecia v. Adams, 327 F.3d 1171, 1175 (10th Cir. 2003). (To establish a cognizable Eighth Amendment claim for failure to protect, a prisoner must show that he is incarcerated under conditions posing a substantial risk of serious harm, the objective component, and that the defendant prison official was deliberately indifferent to his safety, the subjective component).

The Eleventh Circuit upheld a portion of the prior version of this charge in Johnson v. Breeden, 280 F.3d 1308, 1314 (11th Cir. 2002) (Jury instructions in prisoner's § 1983 action alleging that corrections officers used excessive force on him after altercation with prison guard in violation of the Eighth Amendment, which instructions stated that whether any force used was excessive turned on whether that force "was applied in a good faith effort to maintain or restore discipline, or whether it was used maliciously and sadistically to cause harm," were sufficient to inform jury that officers must have acted with specific intent before they could be found liable), cited in 3V Fed. Jury Prac. & Instr. § 166.23 (5th ed. 2001).

2.3.2
Civil Rights
42 USC § 1983 Claims
Eighth Amendment Claim
Convicted Prisoner Alleging Deliberate Indifference To Serious Medical Need

In this case the Plaintiff claims that the Defendant, while acting "under color" of state law, intentionally violated the Plaintiff's rights under the Constitution of the United States.

Specifically, the Plaintiff claims that while the Defendant was acting under color of state law as an employee of [_____ Corrections Facility] the Defendant intentionally violated the Plaintiff's right not to be subjected to cruel and unusual punishment under the Eighth Amendment to the Constitution.

More specifically, the Plaintiff claims that the Defendant was deliberately indifferent to the Plaintiff's serious medical needs.

Under the Eighth Amendment anyone who is convicted and detained under state law is entitled to necessary medical care, and a corrections officer would violate that right if the officer is deliberately indifferent to an inmate's serious medical need. Stated another way, to be deliberately indifferent to an inmate's serious medical need amounts to the imposition of cruel and unusual punishment in violation of the Eighth Amendment.

A "serious medical need" is one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a lay person would easily recognize the necessity for prompt medical attention.

Notice, however, that deliberate or intentional conduct on the part of the officer is required before any violation of the Constitution occurs. Mere negligence or a lack of reasonable care on the part of the officer is not enough; the Plaintiff must prove deliberate and intentional conduct resulting in a deprivation of the Plaintiff's constitutional rights through the infliction of cruel and unusual punishment.

In order to establish his claim, therefore, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff had a “serious medical need,” as previously defined;

Second: That the Defendant was aware of the Plaintiff’s serious medical need;

Third: That the Defendant with deliberate indifference, failed to provide the necessary medical care;

Fourth: That in so doing the Defendant acted “under color” of state law; and

Fifth: That the Defendant’s acts were the proximate or legal cause of the damages sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[With regard to the fourth required element of proof - - that the Defendant acted "under color" of state law - - that fact is not disputed in this case and you may accept that fact as proved.]

With regard to the fifth required element of proof - - that the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff - - remember that for damages to be the proximate or legal result of a constitutional deprivation, it must be shown that, except for the constitutional deprivation, such damages would not have occurred.

If you find for the Plaintiff and against the Defendant, you will then consider the Plaintiff's claim for damages.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be

based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they also cover both the mental and physical aspects of Plaintiff's injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Physical as well as emotional pain and mental anguish.

(b) Nominal damages (as explained in these instructions;

[(c) Punitive damages, if any (as explained in these instructions).]

You are authorized to award $1 in nominal damages if you find for the Plaintiff but also find that Plaintiff's damages have no monetary value.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

2.3.2
Civil Rights
42 USC § 1983 Claims
Eighth Amendment Claim
Convicted Prisoner Alleging Deliberate
Indifference To Serious Medical Need

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff had a "serious medical need," as defined in the Court's instructions?

Answer Yes or No _____

2. That the Defendant was aware of the Plaintiff's serious medical need?

Answer Yes or No _____

3. That the Defendant was deliberately indifferent to the Plaintiff's serious medical need?

Answer Yes or No _____

[Note: If you answered No to Question No. 1, 2, or 3, skip the remaining questions and have your foreperson sign this verdict form at the bottom of the next page.]

4. That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff?

Answer Yes or No _____

5. That the Plaintiff should be awarded damages to compensate for physical as well as emotional pain and mental anguish?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

6. That the Plaintiff should be awarded $1 in nominal damages?

Answer Yes or No _____

7. That the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

In order to establish an inadequate medical care claim in violation of the Eighth Amendment, a prisoner must demonstrate that the defendant acted, or failed to act, with "deliberate indifference to serious medical needs." Farmer v. Brennan, 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976)). Deliberate indifference is the reckless disregard of a substantial risk of serious harm; mere negligence will not suffice. See id. at 835-36; 3B Fed. Jury Prac. & Instr. § 166.21 (5th ed. 2001).

Both an objective and subjective standard must be met:

> To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry. First, a plaintiff must set forth evidence of an objectively serious medical need. Second, a plaintiff must prove that the prison official acted with an attitude of "deliberate indifference" to that serious medical need.

Farrow v. West, 320 F.3d 1235, 1242 (11th Cir. 2003); (cites omitted); Hill v. Dekalb County, 40 F.3d 1176, 1186 (11th Cir. 1994) (Deliberate indifference includes both an objective and a subjective component. The objective component is judged by contemporary standards of decency, while the subjective component requires proof of actual knowledge of the need for medical treatment and intentional refusal to provide it), abrogated on other grounds by Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 661 (2002).

In contrast to the "excessive-force" pattern charges (2.2; 2.3.1; 2.4.1), this charge assumes that the detainee will be able to show a substantial enough injury to qualify for "mental anguish" (hence, emotional-injury based) damages. Otherwise, such claims are barred by 42 USC § 1997e(e) ("[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury").

Medical neglect can constitute a § 1997e(e) physical injury. See Sealock v. Colorado, 218 F.3d 1205, 1210-11 (10th Cir. 2000) (where inmate alleged that sergeant was deliberately indifferent to his need for medical attention, heart attack satisfied § 1997e(e)'s physical injury requirement even though inmate presented no evidence that delay caused by sergeant resulted in any damage to his heart, where jury could find the delay prolonged inmate's pain and suffering); Wolfe v. Horn, 130 F.Supp.2d 648, 658 (E.D.Pa. 2001) (§ 1997e(e) physical injury requirement satisfied where pre-operative transsexual inmate alleged that after her hormone therapy was withdrawn, she suffered headaches, nausea, vomiting, cramps, hot flashes and hair loss, and that with the re-emergence of masculine physical characteristics (reduced breast size, increased body hair and lowered voice pitch), she became depressed and suicidal); Cole v. Artuz, No. 97CIV.0977(RWS), 2000 WL 760749 at *2,*4 n. 2, *5 (S.D.N.Y. June 12, 2000) (unpublished) (back condition "requiring aggressive treatment, therapy and most likely, surgery" satisfied § 1997e(e)'s physical injury requirement).

But de minimis injuries do not make the grade. See Siglar v. Hightower, 112 F.3d 191, 193-94 (5th Cir. 1997) (a sore bruised ear lasting for three days did not constitute a physical injury as required to state a claim for excessive force); Luong v. Hatt, 979 F.Supp. 481, 486 (N.D. Tex. 1997) (sore muscles, scratches, abrasions and bruises did not constitute a "physical injury" within the meaning of § 1997e(e)).

Note that § 1997e(e) analysis is fused with Eighth and Fourteenth Amendment analysis here. See Harris v. Garner, 190 F.3d 1279 (11th Cir.), vacated 197 F.3d 1059 (11th Cir. 1999), reinstated in relevant part by, 216 F.3d 970 (11th Cir. 2000); accord Siglar, 112 F.3d at 193 (Absent any definition of "physical injury" in § 1997e(e), court will be guided by established Eighth Amendment standards in determining whether prisoner has sustained necessary physical injury to support claim for mental or emotional suffering, and, thus, injury must be more than deminimis, but need not be significant).

2.4.1
Civil Rights
42 USC § 1983 Claims
Fourteenth Amendment Claim
Pretrial Detainee Alleging Excessive Force

In this case the Plaintiff claims that the Defendants, while acting "under color" of state law, intentionally deprived the Plaintiff of the Plaintiff's rights under the Constitution of the United states.

Specifically, the Plaintiff claims that while the Defendants were acting under color of state law [as corrections officers at the _____ _____ County Jail] they intentionally violated the Plaintiff's constitutional right under the Fourteenth Amendment to be free from the use of excessive force against [him] [her] while being detained as a pretrial detainee.

Under the due process of law clause of the Fourteenth Amendment, anyone who is arrested and detained under state law must not to be subjected to excessive force while being detained. This includes, of course, the right not to be assaulted or beaten without legal justification.

The law further provides that a person may sue in this court for an award of money damages against anyone who, "under color" of state law or custom, intentionally violates the Plaintiff's rights under the Constitution of the United States.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant intentionally [describe the alleged conduct];

Second: That the Defendant's conduct amounted to the use of "excessive force" against the Plaintiff, as hereafter defined;

Third: That in so doing the Defendant acted "under color" of state law; and

Fourth: That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[The parties have stipulated or agreed that the Defendant acted "under color" of state law and you should, therefore, accept that fact as proven.]

[A state or local official acts "under color" of state law not only when the official acts within the limits of lawful authority, but also when the official acts without or beyond the bounds of lawful authority. In order for unlawful acts of an official to be done "under color" of state law, however, the unlawful acts must be done while the official is

purporting or pretending to act in the performance of official duty; that is, the unlawful acts must be an abuse or misuse of power which is possessed by the official only because of the position held by the official.]

As previously stated, every pretrial detainee has the right not to be subjected to the use of excessive force against [him] [her]. On the other hand, not every push or shove, even if it later seems unnecessary, will give rise to a constitutional violation; and an officer always has the right, and the duty, to use such reasonable force as is necessary under the circumstances to maintain order and assure compliance with jail regulations. Whether or not any force used in this instance was excessive is an issue for you to decide on the basis of that degree of force, if any, that a reasonable and prudent corrections officer would have applied in the same circumstances disclosed in this case. You should also consider whether such force, if any, was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. In making that decision you should consider the amount of force used in relationship to the need presented; the motive of the officer; the extent of the injury inflicted; and any effort made to temper the severity of the force used. Of course, when jail

officials maliciously and sadistically use force to cause harm, the result would be unconstitutional regardless of the significance of the injury to the detainee.

If you should decide for the Plaintiff and against the Defendant, you must then decide the issue of the Plaintiff's damages. For damages to be the proximate or legal result of a constitutional deprivation, it must be shown that, except for that constitutional deprivation, such damages would not have occurred.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they also cover both the mental and physical aspects of Plaintiff's injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and

emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Physical pain and suffering.

(b) Emotional injury, if accompanied by more than minimal physical injury;

(c) Nominal damages (as explained in these instructions); and

[(d) Punitive damages, if any (as explained in the Court's instructions)]

You are authorized to award $1 in nominal damages if you find for the Plaintiff but also find that Plaintiff's damages are monetarily insignificant.

[The Plaintiff also claims that the acts of the Defendant were done with malice and reckless indifference to the Plaintiff's federally protected

rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

2.4.1
Civil Rights
42 USC § 1983 Claims
Fourteenth Amendment Claim
Pretrial Detainee Alleging Excessive Force

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant intentionally committed acts constituting the use of excessive force against the Plaintiff while the Plaintiff was in custody as a pretrial detainee?

Answer Yes or No _____

[Note: If you answered No to Question No. 1, skip the remaining questions and have your foreperson sign this verdict form at the bottom of the next page.]

2. That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff?

Answer Yes or No _____

3. That the Plaintiff should be awarded damages to compensate for physical pain and suffering?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

4. That the Plaintiff should be awarded damages to compensate for emotional injury (Note: This can be awarded only if it is accompanied by more than minimal physical injury.)?

Answer Yes or No _____

If you answered Yes,
In what amount? $_____

5. That the Plaintiff should be awarded $1 in nominal damages?

Answer Yes or No _____

6. That the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

In the Eleventh Circuit, "[c]laims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause, instead of the Eighth Amendment's Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners." Lumley v. City of Dade City, Fla., 327 F.3d 1186, 1196 (11th Cir. 2003) (quotes and cite omitted); 3B Fed. Jury Prac. & Instr. Chpt. 166 at 664 (5th ed. 2001). "However, the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees." Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); but see Pierce v. Multnomah County, 76 F.3d 1032, 1042 (9th Cir.

1996) ("the Eighth Amendment's prohibition against the malicious or sadistic use of force . . . does not apply until after conviction and sentence").

As with Pattern Instruction 2.3.1 then, the standard to be applied here is whether the Defendant caused the unnecessary and wanton infliction of pain. See Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986). To find that excessive force was applied in violation of the Eighth Amendment, the jury must determine whether such force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Hudson v. McMillian, 503 U.S. 1, 7, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992). This claim has both an objective and a subjective component. Farmer v. Brennan, 511 U.S. 825, 834-40, 114 S.Ct. 1970, 1977-81, 128 L.Ed.2d 811 (1994). The objective component requires that the pain be serious. Hudson, 503 U.S. at 9-10, 112 S.Ct. at 1000-01. The subjective component requires that the offending, non-penal conduct be wanton. See Wilson v. Seiter, 501 U.S. 294, 297-300, 111 S.Ct. 2321, 2323-25, 115 L.Ed.2d 271 (1991). This pattern instruction therefore incorporates both objective as well as subjective criteria as the standard to apply in determining "excessiveness" under the Fourteenth Amendment. See Wilson v. Williams, 83 F.3d 870 (7th Cir. 1996).

Consult Pattern Instruction 2.1 for nominal/punitive damages. Consult the Annotations and Comments following Pattern Instruction 2.1, (supra) and Pattern Instruction 2.4.2, infra, for 42 USC § 1997e(e) considerations.

2.4.2
Civil Rights
42 USC § 1983 Claims
Fourteenth Amendment Claim
Pretrial Detainee Alleging Deliberate Indifference To Serious Medical Need

In this case the Plaintiff claims that the Defendant, while acting "under color" of state law, intentionally violated the Plaintiff's rights under the Constitution of the United States.

Specifically, the Plaintiff claims that while the Defendant was acting under color of state law as an employee of [_____ Corrections Facility] the Defendant intentionally violated the Plaintiff's right to due process of law under the Fourteenth Amendment to the Constitution.

More specifically, the Plaintiff claims that the Defendant was deliberately indifferent to the Plaintiff's serious medical needs in violation of the Plaintiff's right, as a pretrial detainee, to necessary medical care and attention.

Under the due process of law clause of the Fourteenth Amendment anyone who is arrested and detained under state law is entitled to necessary medical care. Thus, a corrections officer would violate that constitutional right if the officer is deliberately indifferent to an inmate's serious medical need.

A "serious medical need" is one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a lay person would easily recognize the necessity for prompt medical attention.

Notice, however, that deliberate or intentional conduct on the part of the officer is required before any violation of the Constitution occurs. Mere negligence or a lack of reasonable care on the part of the officer is not enough; the Plaintiff must prove deliberate and intentional conduct resulting in a deprivation of the Plaintiff's constitutional rights.

In order to prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Plaintiff had a “serious medical need,” as previously defined;

Second: That the Defendant was aware of the Plaintiff’s serious medical need;

Third: That the Defendant with deliberate indifference, failed to provide the necessary medical care;

Fourth: That in so doing the Defendant acted “under color” of state law; and

Fifth: That the Defendant’s acts were the proximate or legal cause of the damages sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[With regard to the fourth required element of proof - - that the Defendant acted "under color" of state law - - that fact is not disputed in this case and you may accept that fact as proved.]

With regard to the fifth required element of proof - - that the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff - - remember that for damages to be the proximate or legal result of a constitutional deprivation, it must be shown that, except for the constitutional deprivation, such damages would not have occurred.

If you find for the Plaintiff and against the Defendant, you will then consider the Plaintiff's claim for damages.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be

based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Physical and emotional pain and mental anguish.

(b) Nominal damages (as explained in these instructions); and

[(c) Punitive damages, if any (as explained in the Court's instructions)]

[You are authorized to award $1 in nominal damages if you find for the Plaintiff but also find that Plaintiff's damages have no monetary value.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

2.4.2
Civil Rights
42 USC § 1983 Claims
Fourteenth Amendment Claim
Pretrial Detainee Alleging Deliberate
Indifference To Serious Medical Need

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff had a "serious medical need," as defined in the Court's instructions?

Answer Yes or No _____

2. That the Defendant was aware of the Plaintiff's serious medical need?

Answer Yes or No _____

3. That the Defendant was deliberately indifferent to the Plaintiff's serious medical need?

Answer Yes or No _____

Note: If you answered No to Question No. 1, 2 or 3, skip the remaining questions and have your foreperson sign this verdict form at the bottom of the next page.]

4. That the Defendant's acts were the proximate or legal cause of the damages sustained by the Plaintiff?

Answer Yes or No _____

5. That the Plaintiff should be awarded damages to compensate for physical as well as emotional pain and mental anguish?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

6. That the Plaintiff should be awarded $1 in nominal damages?

Answer Yes or No _____

7. That the Defendant acted with malice or reckless indifference to the Plaintiff's federally protected rights and that punitive damages should be assessed against the Defendant?

Answer Yes or No _____

If you answered Yes,
in what amount? $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

In the Eleventh Circuit, "[c]laims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause, instead of the Eighth Amendment's Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners." Lumley v. City of Dade City, Fla., 327 F.3d 1186, 1196 (11th Cir. 2003) (quotes and cite omitted). "However, the

applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees." Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); Lancaster v. Monroe County, 116 F.3d 1419, 1425 n.6 (11th Cir. 1997). Therefore, consult the Annotations to Pattern Instruction 2.3.1, supra.

In contrast to the preceding "excessive-force" pattern instructions, supra, this charge assumes that the detainee will be able to show a substantial enough injury to qualify for "mental anguish" (hence, emotional-injury based) damages. Otherwise, such claims are barred by 42 USC § 1997e(e) ("[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury").

Medical neglect can constitute a § 1997e(e) physical injury. See Sealock v. Colorado, 218 F.3d 1205, 1210-11 (10th Cir. 2000) (where inmate alleged that sergeant was deliberately indifferent to his need for medical attention, heart attack satisfied § 1997e(e)'s physical injury requirement even though inmate presented no evidence that delay caused by sergeant resulted in any damage to his heart; where jury could find the delay prolonged inmate's pain and suffering); Wolfe v. Horn, 130 F.Supp.2d 648, 658 (E.D. Pa. 2001) (§ 1997e(e) physical injury requirement satisfied where pre-operative transsexual inmate alleged that after her hormone therapy was withdrawn, she suffered headaches, nausea, vomiting, cramps, hot flashes and hair loss and that with the re-emergence of masculine physical characteristics (reduced breast size, increased body hair and lowered voice pitch), she became depressed and suicidal); Cole v. Artuz, No. 97CIV.0977(RWS), 2000 WL 760749 at *2,*4 n.2, *5 (S.D.N.Y. June, 12, 2000) (unpublished) (back condition "requiring aggressive treatment, therapy and most likely, surgery" satisfied § 1997e(e)'s physical injury requirement).

But deminimis injuries do not make the grade. See Siglar v. Hightower, 112 F.3d 191, 193-94 (5th Cir. 1997) (a sore bruised ear lasting for three days did not constitute a physical injury as required to state a claim for excessive force); Luong v. Hatt, 979 F.Supp. 481, 486 (N.D. Tex. 1997) (sore muscles, scratches, abrasions and bruises did not constitute a "physical injury" within the meaning of § 1997e(e)).

Note that § 1997e(e) analysis is fused with Eighth and Fourteenth Amendment analysis here. See Harris v. Garner, 190 F.3d 1279 (11th Cir.), vacated by 197 F.3d 1059 (11th Cir. 1999), reinstated in relevant part by 216 F.3d 970 (11th Cir. 2000); accord Siglar, 112 F.3d at 193 (Absent any definition of "physical injury" in § 1997e(e), court will be guided by established Eighth Amendment standards in determining whether prisoner has sustained necessary physical injury to support claim for mental or emotional suffering, and, thus, injury must be more than de minimis, but need not be significant).

3.1
Antitrust Sherman Act
Section 1, Per Se Violation
Conspiracy To Fix Prices
(Includes Alternative "Rule Of Reason" Instruction)

In this case the Plaintiff claims that the Defendants violated Title 15, United States Code, Section 1, commonly known as Section 1 of the Sherman Act, which is part of the antitrust laws of the United States.

The purpose of the antitrust laws is to preserve our system of free and open competition, the most important part of our private enterprise system. The law promotes the concept that free competition results in the best allocation of economic resources; but, the law does not guarantee success to those who enter into business because it also recognizes that in the natural operation of our economic system, some competitors are going to lose business, or even go out of business, while others gain and prosper.

Acts become unlawful, therefore, only when they constitute an unreasonable restraint on interstate commerce.

The specific conduct that the Plaintiff claims violated Section 1 of the Sherman Act is an alleged conspiracy between [describe the alleged conspirators and the nature of the conspiracy claimed].

There are four specific facts that the Plaintiff must prove by a preponderance of the evidence in order to establish its antitrust claim:

First: That there was a combination or conspiracy between or among the Defendants to fix the prices of _____ _____;

Second: That such combination or conspiracy constituted an "unreasonable" restraint on interstate commerce as hereafter defined;

Third: That the Defendants' business activities had a substantial effect or the potential of causing a substantial effect on interstate commerce and the Defendants' challenged activities involve a substantial amount of interstate commerce; and

Fourth: That the Plaintiff suffered injury in its business or property as a proximate result of the combination or conspiracy.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

(1) Existence of a Combination or Conspiracy. The first thing that the Plaintiff must prove is the existence of a "combination or conspiracy."

A combination or conspiracy is formed whenever two or more persons or corporations knowingly join together to accomplish an unlawful purpose by concerted action. The essence of a combination

or conspiracy is an agreement between two or more persons or corporations to violate or disregard the law. However, the evidence in the case need not show that the members of an alleged conspiracy entered into any express or formal agreement.

What a preponderance of the evidence in the case must show is that the Defendants knowingly came to a common and mutual understanding to accomplish, or to attempt to accomplish, an unlawful purpose.

To act "knowingly" means to act voluntarily and intentionally, and not because of mistake or accident.

You will note that there must be at least two separate persons or corporations who reach an agreement or understanding in order to find that a conspiracy was formed.

[One cannot conspire with one's self, and a single corporation cannot agree, combine, or conspire with its own officers or employees. Unincorporated divisions of a single corporation retain their overall legal identity as a single entity incapable of conspiring with itself. The same is normally true with respect to parent and subsidiary corporations subject to the same ownership and control; they will be regarded as a single business entity incapable of conspiring with itself. On the other

hand, affiliated companies may be capable of conspiring together when there is sufficient proof of a separation of activities and interests so that the two companies act, in reality, as separate business enterprises. It is for you to determine on the basis of all the facts and circumstances whether the Defendants constituted separate and distinct corporate entities, or a single, integrated business enterprise.]

You should also bear in mind that mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have met together and discussed common aims and interests, does not necessarily establish the existence of a conspiracy. Also, a mere similarity of business practices on the part of a Defendant and others, or even the fact that they may have charged identical prices for the same goods and services, does not necessarily establish a conspiracy because those things may be the natural result of ordinary competitive behavior in a free and open market. In order to be evidence of a combination or a conspiracy, such a similar business practice must have been contrary to the Defendants' individual economic self-interest such that they would not have engaged in the practice if they were not conspiring to fix prices or otherwise restrain trade.

In your consideration of the evidence you should first decide whether the alleged conspiracy existed. If you conclude that the conspiracy did exist, you should next decide whether each Defendant was a knowing member of that conspiracy.

If you decide that the alleged conspiracy was knowingly formed, and that the Defendant under consideration knowingly became a member of the conspiracy, either at the beginning or later on, then the ultimate success or failure of the conspiracy to accomplish its purpose does not matter, so long as the Plaintiff sustained some damage as a result of the conspiracy.

(2) "Unreasonable" Restraint on Interstate Commerce. The second fact the Plaintiff must prove is that the alleged conspiracy resulted in an "unreasonable" restraint on interstate commerce.

[(A)A per se Violation]

[You are instructed that a conspiracy to fix prices of the type alleged by the Plaintiff is treated by the law as a "per se" violation and is, in and of itself, an "unreasonable" restraint of trade. Whether the prices agreed to be fixed were reasonable or unreasonable does not matter. So, a common plan or understanding knowingly made, or

arranged, or entered into, between two or more competitors engaged in interstate trade or commerce, to adopt or follow any pricing formula that will result in raising, or lowering, or maintaining prices charged for goods or services sold in interstate trade or commerce would automatically constitute a price fixing conspiracy and an "unreasonable" restraint on interstate commerce in violation of the federal antitrust laws.]

[Note: The Rule of Reason instruction below should be given if the Court determines the alleged price-fixing conspiracy is not of the type susceptible to analysis under a per se rule.]

[(B) A Rule of Reason Violation]

[Certain types of price fixing are unreasonable in and of themselves. However, other types of price fixing only violate the antiitrust laws when they impose an unreasonable restraint on interstate commerce. Since this case involves [an industry in which restraints on competition are essential if the industry's product (or service) is to be available at all] [an agreement between a supplier and retailer to set a maximum resale price], the question of whether the alleged conspiracy constituted an unreasonable restraint on interstate commerce must then be determined on the basis of full consideration of all the facts and

circumstances disclosed by the evidence. The Plaintiff must prove that (1) the Defendants' conduct had an anticompetitive effect on the relevant market, and (2) the conduct had no justification or competitive benefit.

In order to prove that the Defendants' arrangement had an anticompetitive effect on the market, the Plaintiff must prove either that competition has actually suffered adverse effects due to the Defendants' arrangement or that the Defendants' arrangement has the potential for genuine adverse effects on competition, such as an increase or decrease in total output.

To prove potential adverse effects on competition by the Defendants' conduct, the Plaintiff must define the relevant product and geographic markets, and also establish that the Defendants possessed sufficient market power in the relevant markets to adversely affect competition in those markets. Market power includes the ability to control price, exclude competition, or restrict output. You may consider the Defendants' share or portion of the relevant market; whether there are any barriers to entry by new firms in the market; and evidence concerning the intensity of competition within that market when

determining if a company possesses sufficient market power to affect competition adversely.

Your analysis should concern the actual or likely effects of the Defendants' behavior to determine if the conduct is unreasonable, whether that was the intended result or not. However, when considering the effect of the alleged restraint on competition, you may consider whether its purpose was proper or improper. Remember that good intentions and a proper purpose do not make a restraint with unreasonable anticompetitive effects lawful, and proof of an improper purpose is simply one factor that may help support, but does not by itself establish, a finding of unreasonable restraint.

When deciding if the Plaintiff has met its burden, you may consider: the facts relating to the nature of the particular industry or the product or service involved; any facts that you find to be peculiar to that industry, product, service, or market area; the nature of the alleged restraint; the history of the circumstances surrounding the alleged restraint; and the reasons for adopting the particular practice that is alleged to constitute the restraint.]

(3) Substantial Effect Upon a Substantial Amount of Interstate Commerce. The third fact the Plaintiff must prove is that the

Defendants' business activities substantially affected or have substantial potential effects on interstate commerce and that the alleged combination or conspiracy involved a substantial amount of interstate commerce. The term "interstate commerce" refers to business transacted across state lines or between persons or corporations having their residences or businesses in different states. It differs from intrastate commerce, which is business done within a single state. There can be no violation of the Sherman Act unless you decide that the activities of the Defendants have actually occurred in interstate commerce or, if done within one state, that these local activities adversely affected or had potential adverse effects on interstate commerce and involved a substantial amount of such commerce. In other words, it is not necessary that the disputed transactions be shown to be interstate transactions so long as the Defendants' local activities within one state are shown to have affected interstate commerce in a substantial way and involve a substantial amount of such commerce.

(4) Plaintiff's Injury was Proximately Caused by the Combination or Conspiracy. The fourth fact the Plaintiff must prove is that the Plaintiff suffered injury in its business or property as a "proximate result" of the alleged combination or conspiracy. Please keep in mind that, in

the normal course of lawful competition, some businesses frequently suffer economic losses, or even go out of business. However, the antitrust laws only protect competition, not a competitor's losses and are only violated when those losses are caused by unlawful anticompetitive practices.

An injury to a business is the "proximate result" of an antitrust violation only when the violation directly and in natural and continuous sequence produces, or contributes substantially to producing, such injury. In other words, the alleged violation must be a direct, substantial, and identifiable cause of the injury that the Plaintiff claims, so that, "but for" the antitrust violation, the injury would not have occurred.

(5) Damages. If you should find that the Plaintiff has established each of the four elements described above, the law provides that the Plaintiff should be fairly compensated for all damage, if any, to its business and property that was proximately caused by the Defendants' violation of the antitrust laws. In arriving at the amount of the award, you should include any damages suffered by the Plaintiff because of lost profits. The circumstance that the precise amount of the Plaintiff's damages may be difficult to ascertain should not affect the Plaintiff's

recovery, particularly if the Defendants' wrongdoing has caused the difficulty in determining the precise amount.

On the other hand, you are not allowed to award purely speculative damages. An allowance for lost profits may be included in the damages awarded only when there is some reasonable basis in the evidence for determining that the Plaintiff has in fact suffered a loss of profits, even though the amount of such loss is difficult to ascertain.

3.1
Antitrust Sherman Act
Section 1, Per Se Violation
Conspiracy to Fix Prices

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That there was a combination or conspiracy between [or among] the Defendants to fix the prices of _____?

Answer Yes or No _____

2. That such combination or conspiracy constituted an "unreasonable" restraint (as defined in the Court's Instructions) on interstate commerce?

Answer Yes or No _____

3. That the Defendants' business activities had a substantial effect, or the potential of causing a substantial effect, on interstate commerce, and that the Defendants' challenged activities involve a substantial amount of interstate commerce?

Answer Yes or No _____

4. That the Plaintiff suffered injury in its business or property as a proximate result of the combination or conspiracy?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not answer the remaining question.]

5. That the Plaintiff should be awarded $_____ as damages for the injury it suffered to its business or property.

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

15 USC § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Whether a particular restraint is properly analyzed under the rule of reason or a per se rule is a question of law for the court to decide. State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S.Ct. 275, 279, 139 L.Ed.2d 199 (1997) ("Per se treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'") (emphasis added) (quoting Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 344, 102 S.Ct. 2466, 2473, 73 L.Ed.2d 48 (1982)). If a case involves a per se violation, the "rule of reason" instruction need not be given. United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); Larry V. Muko, Inc. v. Southeastern Penn. Bldg. & Const. Trades Council, 670 F.2d 421, 426 (3d Cir. 1982). In order for the court to apply the per se violation rule, Plaintiff must prove that the Defendants' challenged practice "always or almost always tend[s] to restrict competition and decrease output." Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538, 1549 (11th Cir.1996) (quoting Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979)). Horizontal price fixing is per se illegal unless the price fixing occurs in "an industry in which horizontal restraints on competition are essential if the product is to be available at all," in which case, the restraint is to be analyzed under the rue of reason. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 100-03, 104 S.Ct. 2948, 2959-61, 82 L.Ed.2d 70 (1984); cf. State Oil Co. v. Khan, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1927) (holding vertical price fixing agreement setting maximum resale prices is not per se illegal and is subject to rule of reason). Other practices have also been declared per se illegal due to their demonstrable anticompetitive effect. Nynex Corp. v. Discon, Inc., 525 U.S. 128, 134-35, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998) (discussing precedent where certain group boycotts were held per se illegal but holding that an agreement by a single buyer to purchase goods or services from one supplier rather than another was not per se illegal); Palmer v. BRG of Ga.,Inc., 498 U.S. 46, 49-50, 111 S.Ct. 401, 402-03, 112 L.Ed.2d 349 (1990) (per curiam) (horizontal market division per se illegal)

The rule of reason standard is presumed to apply in cases brought under Section 1 of the Sherman Act. Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567 (11th Cir. 1991) (citing Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724, 108 S.Ct. 1515, 1520, 99 L.Ed.2d 808 (1988)). In the past, the rule of reason has been a general inquiry balancing various competitive factors that bear on the determination of whether a particular practice is unreasonably restrictive on competitive conditions. Standard Oil of New Jersey v. United States, 221 U.S. 1, 65, 31 S.Ct. 502, 517-18, 55 L.Ed.2d 619 (1911); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S.Ct. 2613, 2616-17, 86 L.Ed.2d 202 (1985). However, the Eleventh Circuit has established a more specific burden of proof analysis, which is reflected in the alternative "Rule of Reason" provision in this instruction. Levine, 72 F.3d at 1550-55; Graphic Prods. Distribs., Inc, v. ITEK Corp., 717 F.2d 1560, 1573 (11th Cir. 1983). There is no need for a rigorous analysis of the market and the Defendants' market power if there is proof of actual detrimental effects on outcome or price. FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 2019, 90 L.Ed.2d 445 (1986).

Concerted action between at least two persons or entities must be proven. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). A corporation cannot conspire with its officers, employees or agents. Similarly, a parent company and a wholly owned subsidiary are not capable of combining or conspiring under Section 1 of the Sherman Act. Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). However, a hospital can conspire with members of its staff. Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810 (11th Cir.1990), overruled on other grounds by, City of Columbia v. Omni Outdoor Advt., Inc., 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991).

The jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" (or "affecting commerce") theory. McLain v. Real Estate Bd. of New Orleans Inc., 444 U.S. 232, 242, 100 S.Ct. 502, 509, 62 L.Ed.2d 441 (1980); United States v. Fitapelli, 786 F.2d 1461, 1462 (11th Cir. 1986). Beyond this general understanding, there is ongoing debate concerning the exact test to be applied in deciding whether the plaintiff has made the necessary showing for federal jurisdiction to prohibit challenged conduct under the Sherman Act. The "affecting commerce" test is more commonly used than the "in commerce" test and is known as the principal test. Shahawy v. Harrison, 778 F.2d 636, 640-41 (11th Cir. 1985), modified by, 790 F.2d 75 (11th Cir. 1986); see also United States v. Aquafredda, 834 F.2d 915, 918 (11th Cir. 1987). Technically, the "affecting commerce" or "effect on commerce" test has two components: (1) a substantial amount of interstate commerce is involved and (2) having a "not insubstantial effect" or substantial effect on interstate commerce. Aquafredda, 834 F.2d at 918, n. 4. The terms "substantial effect" or "not insubstantial effect" are interchangeable in this context. El Shahawy, 778 F.2d at 641. The United States Supreme Court has broadened the "affecting commerce" test to include not only actual effects on interstate commerce, but also potential effects likely to occur as a "matter of practical economics" if the conspiracy is successful, and "indirect" or "fortuitous" effects on interstate commerce. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 328-33, 111 S.Ct. 1842, 1846-49, 114 L.Ed.2d 366 (1991).

Though not discussed as often, the Eleventh Circuit continues to acknowledge an alternative showing that defendants' challenged activities are "in the flow of" interstate commerce as sufficient to prove jurisdiction. United States v. Fitapelli, 786 F.2d 1461, 1462 (11th Cir. 1986). To meet the "in the flow of" interstate commerce test, plaintiff must show that the defendants' challenged activity involved a substantial amount or volume of interstate commerce and was an essential part of the transaction and inseparable from its interstate aspects. See Aquafredda, 834 F.2d at 918 n.3.

The continuing debate centers around what the court should look to as having a substantial or not insubstantial effect on interstate commerce. Since the Supreme Court's opinion in McLain v. Real Estate Bd. of New Orleans, courts have grappled with whether it is the alleged restraint (challenged conduct of the defendants), the defendants' general business activities, or only the business activities of the

defendants "infected by" the alleged restraint that must be analyzed. See generally, 1 ABA Section of Antitrust Law, Antitrust Law Developments at 39 (5th ed. 2002). The Eleventh Circuit has stated that Section 1 of the Sherman Act "does not require that the 'unlawful conduct itself [have] an effect on interstate commerce' or that a plaintiff must quantify the adverse impact of a defendant's anti-competitive activities for jurisdictional purposes." El Shahawy v. Harrison, 778 F.2d 636, 639 (11th Cir. 1985), modified by, 790 F.2d 75 (11th Cir. 1986) (quoting McLain, 444 U.S. at 243, 100 S.Ct. at 509); Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 766, n.30 (11th Cir. 1983).

Generally, the Eleventh Circuit has interpreted the McLain opinion as defining the "affecting commerce" test in a way that requires the plaintiff to demonstrate that the local activities of the defendants have a substantial (or not insubstantial) effect on interstate commerce. El Shahawy, 778 F.2d at 639; Construction Aggregate Transport, 710 F.2d at 767 (11th Cir. 1983). After describing the test for "affecting commerce" as tied to local activities of the defendants, the Construction Aggregate Transport court noted that "such an analysis is too restrictive and is not supported by the case law. . . the proper inquiry is one which focuses on the interstate markets involved in both the defendant's and the plaintiff's operations, and seeks to determine whether the defendant's business conduct will likely make its presence known in those markets." 710 F.2d at 767, n. 31.

In a later opinion the Eleventh Circuit appears to take a middle-of-the-road approach in holding that "in this circuit Sherman Act jurisdiction requires a focus on the interstate markets involved in the defendant's business activities." El Shahawy, 778 F.2d at 640-41. Some have also interpreted the McLain opinion as suggesting that the test does not relate to the defendant's business activities generally, but whether plaintiff has shown that the activities of the defendant[s] that were "infected" by the alleged unlawful conduct have a not insubstantial effect on interstate commerce. See generally 1 ABA Section of Antitrust Law, Antitrust Law Developments at 39 (5th ed. 2002).

3.2
Antitrust Sherman Act
(Section 1, Per Se Violation)
Tying Agreement
Defense Of Justification

In this case the Plaintiff claims that the Defendant violated Title 15, United States Code, Section 1, commonly known as Section 1 of the Sherman Act, which is a part of the antitrust laws of the United States.

The purpose of the antitrust laws is to preserve our system of free and open competition, the most important part of our private enterprise system. The law promotes the concept that free competition yields the best allocation of economic resources; but the law does not guarantee success to all of those who enter into business because it also recognizes that in the natural operation of our economic system some competitors are going to lose business, or even go out of business, while others gain and prosper.

Acts become unlawful, therefore, only when they constitute an unreasonable restraint on interstate commerce.

The specific conduct that the Plaintiff claims violated Section 1 of the Sherman Act is an alleged "tying" arrangement arising out of the business dealings between the Plaintiff and the Defendant.

A "tying" arrangement is an agreement by one party to sell a primary product or service (known as the "tying" product) but only on

the condition that the buyer must also purchase a different or secondary product (known as the "tied" product) from the seller, or from a supplier designated by the seller. Such agreements are inherently anti-competitive and are automatically unlawful under Section 1 of the Sherman Act because a seller with market dominance in one product is able to force the purchase of another product in a different market thereby foreclosing competition in that second market for the second or "tied" product.

There are four specific facts that the Plaintiff must prove by a preponderance of the evidence in order to establish its antitrust claim:

First: That there was a contract or agreement whereby the Defendant agreed to sell one item (the "tying" product) only on the condition that the Plaintiff also purchase a separate and distinct item (the "tied" product) from the Defendant or a supplier designated by the Defendant;

Second: That the Defendant had sufficient market economic power or market leverage in the relevant geographic or product market for the “tying” product to appreciably restrain or foreclose free competition in the market for the "tied" product;

Third: That the alleged tying arrangement involved a substantial amount of commerce; and

Fourth: That the Plaintiff suffered injury or damage to its business or property as a "proximate result" of the Defendant's violation of the antitrust laws in making the alleged illegal "tying" agreement.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

The first fact the Plaintiff must prove is that there was a contract for the sale of two separate and distinct products, one of which was "tied" to the other. The Plaintiff must show that the Defendant, through coercive use of its market power in the “tying” product, forced the Plaintiff to purchase the “tied” product which the Plaintiff may have either not wanted or might have preferred to purchase elsewhere on different terms. The Plaintiff contends that the [describe the Plaintiff’s tying claim].

The second fact the Plaintiff must prove is that the Defendant had sufficient economic power or leverage in the market for the “tying product” to appreciably restrain or foreclose free competition in the market for the "tied" products. In evaluating the Defendant’s market power, you may consider the Defendant’s market share in the “tying” product’s relevant market, whether the Defendant owns a patent,

copyright, or trademark in the “tying” product, and whether the “tying” product is a unique product that competitors are incapable of providing.

[You are instructed that the existence of a registered trademark in association with the alleged "tying" product gives rise to a presumption under the law that such product does possess economic power or significant market leverage since, under the trademark laws, no one else may sell the goods bearing that trademark without permission of the owner of the trademark.

The Defendant contends, however, notwithstanding such presumption, that the trademark did not in fact enjoy any economic power or significant market leverage in the [describe relevant geographic or product market] enabling the Defendant to use or employ the trademark as an effective means of foreclosing competition in the market for the "tied" products. In order to overcome the presumption favoring the Plaintiff on this issue, you are instructed that the Defendant must prove its contention in this respect by a preponderance of the evidence.]

With regard to the third fact that the Plaintiff must prove - - that the alleged tying arrangement involved a substantial amount of commerce - - you must look to the total dollar volume of sales in

interstate commerce by the Defendant to the Plaintiff of the products, if any, that you find to have been tied to the alleged "tying" product.

Finally, as to the fourth fact that must be established, the Plaintiff must prove that its injury or damage was appreciable, that is, sufficient to be recognized as having occurred; and, such injury or damage must have been a proximate result, that is, a direct and natural consequence, of the illegal "tying" arrangement.

Now, if you find that the Plaintiff has failed to prove any of these essential facts, then, of course, your verdict will be for the Defendant.

On the other hand, if you find that the Plaintiff has proved the antitrust claim, you must then consider the Defendant's defenses to that claim.

In other words, even if you find that an illegal "tying" agreement existed, the Defendant will not be liable for such violation if the Defendant has established, by a preponderance of the evidence, the affirmative defense of "justification."

The law recognizes that, in some circumstances, there may be a legitimate reason or justification for an otherwise illegal "tying" arrangement.

Justification Defense: Trademark Owner

[One such possible justification arises from the duties imposed upon a trademark owner by the United States trademark laws. As the owner of the trademark [insert name of trademark] the Defendant had a duty to the public to assure that, in the hands of its licensee, the trademark continued to represent that which it purported to represent. In other words, for the owner of a trademark, in licensing its use, to permit inferior or non-genuine products to be presented to the public under the registered trademark might well constitute a mis-use of the trademark under the law.

On the other hand, the use of a "tying" arrangement as an alleged means of protecting a trademark and preventing its mis-use is justified only in the absence of any other, less restrictive, alternative method or means of accomplishing the same objective.]

Justification Defense: Promotion of New Business

[Also, an otherwise illegal "tying" arrangement may be justified when it is used as a necessary tool in establishing a new business. For example, a franchiser may be warranted in imposing restrictions on purchasing and other practices by its franchisees at the inception of the business, and for a reasonable time thereafter, to establish good will

and gain customer recognition in the market. Here again, however, the utilization of a "tying" arrangement for this purpose may be justified only if it is shown to be necessary to accomplish that purpose and that there was no other, less restrictive, alternative method or means of accomplishing the same objective.]

[If you find, therefore, that the Defendant has proved by a preponderance of the evidence that the Plaintiff was required to purchase the trademarked goods from the Defendant because of an honest and reasonable desire and purpose on the part of the Defendant to guard against and prevent any mis-use of the Defendant's trademark; or, that such requirement was the result of an honest and reasonable desire and purpose on the part of the Defendant to establish good will and customer recognition incident to the establishment of a new business; and if you further find, as to either of these alleged justifications, that there was no other less restrictive, alternative means of accomplishing the same objectives, then your verdict will be for the Defendant on this issue.]

If you find for the Plaintiff on the antitrust claim, and against the Defendant on the affirmative defense to that claim, you will then

consider the issue of the amount of monetary or pecuniary damages to be awarded to the Plaintiff.

You are instructed that a violation of the antitrust laws does not give rise to a right of recovery unless the Plaintiff has established, by a preponderance of the evidence, that the Plaintiff was injured or damaged in its business or property as a direct and proximate result of such violation. That is, the Plaintiff is not entitled to recover any losses it may have sustained as a result of poor business practices or management, unfavorable business conditions generally, or other such causes, if any.

With regard to the amount of damages, in dollars, it is not necessary that the Plaintiff prove the exact or precise extent of such damages with arithmetic certainty. On the other hand, the Plaintiff is not entitled to an award of damages based upon speculation or conjecture. Rather, you should award an amount shown by a preponderance of the evidence in the case to be a just and reasonable sum sufficient to fairly and adequately compensate the Plaintiff for the injury or damages sustained.

3.2
Antitrust, Sherman Act
Section 1, Per Se Violation
Tying Agreement
Defense of Justification

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That there was a contract or agreement whereby the Defendant agreed to sell one item (the "tying" product) only on the condition that the Plaintiff also purchase a separate and distinct item (the "tied" product) from the Defendant or a supplier designated by the Defendant?

Answer Yes or No _____

2. That the Defendant had sufficient economic power or market leverage in the relevant geographic market for the "tying" product [describe relevant geographic and product market] to appreciably restrain or foreclose free competition in the market for the "tied" products?

Answer Yes or No _____

3. That the alleged tying arrangement involved a substantial amount of commerce?

Answer Yes or No _____

4. That the Plaintiff suffered injury or damage to its business or property as a "proximate result" of the Defendant's violation of the antitrust laws in making the alleged illegal "tying" agreement?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not consider any of the remaining questions.]

5. That the alleged "tying" agreement was justified under the law [as a means of protecting, or preventing misuse of, the Defendant's trademark on the "tied" goods] [as a means of promoting a new business, establishing customer good will and recognition in the market]?

Answer Yes or No _____

[Note: If you answered Yes to Question No. 5 you need not consider the remaining question.]

6. That the Plaintiff should be awarded $_____ as damages for the injury it suffered to its business or property.

SO SAY WE ALL.

_____
Foreman

DATED:_____

ANNOTATIONS AND COMMENTS

The formulation of the elements of an illegal tying agreement under the Sherman Act was derived from Integon Life Ins. Corp. v. Browning, 989 F.2d 1143, 1150 (11th Cir. 1993); Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia, 815 F.2d 1407, 1414 (11th Cir. 1987); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502-03 (11th Cir. 1985).

For a tying arrangement to exist, the tying product must be separate and distinct from the tied product such that the two have separate product markets. "For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts." Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 462, 112 S.Ct. 2072, 2080, 119 L.Ed.2d 265 (1992); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22, 104 S.Ct. 1551, 1563, 80 L.Ed.2d 2 (1984).

"To establish that two products are in fact 'tied,' a plaintiff must show something more than just that two products were sold together in the same package." Tic-X-Press, 815 F.2d at 1415. Jefferson Parish, 466 U.S. at 11-12, 13-15, 104 S.Ct. at 1558.

"If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." Jefferson Parish, 466 U.S. at 16, 104 S.Ct. at 1560; Tic-X-Press, 815 F.2d at 1419; Amey, 758 F.2d at 1503.

"Sellers in an illegal tying arrangement must possess some special ability to force a purchaser to do something that he would not do in a competitive market, which is usually called 'market power.'" Tic-X-Press, 815 F.2d at 1420; Jefferson Parish, 466 U.S. at 13-14, 104 S.Ct. at 1558-59; Eastman Kodak, 504 U.S. at 464 n. 9, 112 S.Ct. at 2081 n.9.

"Economic or market power over the tying product can be sufficient even though the seller does not dominate the market or the seller only exercises the power with respect to some of the buyers in the market." Tic-X-Press, 815 F.2d at 1420; Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I), 394 U.S. 495, 503, 89 S.Ct. 1252, 1258, 22 L.Ed.2d 495 (1969).

"The Supreme Court has held that for purposes of determining whether the amount of commerce foreclosed in the tied market is 'insubstantial,' the volume of commerce must be 'substantial enough in terms of dollar-volume so as not to be merely de minimus.'" Tic-X-Press, 815 F.2d at 1419 (quoting Fortner Enterprises, 394 U.S. at 501, 89 S.Ct. at 1257-58).

4.1
Securities Act 15 USC § 78j(b)
Rules 10b-5(a), 10b5-1, 10b5-2
17 C.F.R. §§ 240.10b-5(a), .10b5-1, .10b5-2
Device, Scheme, Or Artifice To Defraud
Insider Trading

The Plaintiff's [first] claim in this case is asserted under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that, among other things, allows the Securities Exchange Commission to promulgate, in the public interest or for the protection of investors, rules and regulations prohibiting certain conduct in the purchase or sale of securities. Among such regulations is Rule 10b-5(a) which makes it unlawful for anyone to employ any device, scheme, or artifice to defraud in connection with the purchase or sale of any security. [Other such regulations are Rules 10b5-1(a) and 10b5-2, which prohibit what is commonly known as "insider trading."]

A "security" is commonly defined as a stock, bond, note, convertible debenture, warrant, or other document representing a share of stock in a company or a debt owed by a company.

In order to prevail on the claim under Rule 10b-5(a)[or Rules 10b5-1 and 10b5-2], the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant used an "instrumentality of interstate commerce" [a facility of a national securities exchange] in connection with the securities transaction involved in the case;

Second: That the Defendant's conduct in connection with such transaction violated Rule 10b-5(a) [or Rules 10b5-1 and 10b5-2] through the use of a device, scheme, or artifice to defraud in connection with the purchase or sale of a security;

Third: That the Defendant acted "knowingly";

Fourth: That the Plaintiff "justifiably relied" upon the Defendant's conduct; and

Fifth: That the Plaintiff suffered damages as a proximate result of Defendant's wrongful conduct.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

With regard to the first of these facts - - that an "instrumentality of interstate commerce" was used in some phase of the transaction - - the term "instrumentality of interstate commerce" means, for example, the use of the mails, the telephone, e-mail or some other form of electronic communication, or some interstate delivery system like Federal Express or UPS, [or a facility of a national securities exchange].

The second fact that the Plaintiff must prove is that the Defendant engaged in conduct that violated Rule 10b-5(a) which, as said before, makes it unlawful for anyone to employ any device, scheme or artifice to defraud in connection with the purchase or sale of a security.

[In this instance the Plaintiff claims that the Defendant employed the fraudulent "device" of engaging in "insider trading." Rules 10b5-1 and 10b5-2 make it unlawful for anyone to purchase or sell a security on the basis of material, non-public information in breach of a duty of trust or confidence owed directly, indirectly, or derivatively to the corporation that issued the security, the corporation's shareholders, or to the source of the information. This rule prohibits what is known as "insider trading."]

[Under the "classical theory" of insider trading, Rule 10b-5(a) is violated when a corporate insider trades in the securities of [his] [her] corporation on the basis of material, non-public information. "Material" information is any information that would be important for a reasonable investor to know in making the decision to buy or sell a security. Non-public information is that information which is not available to the public. Corporate "insiders" are the officers, directors, and other permanent employees of the corporation. Additionally, accountants, attorneys,

consultants, and others who temporarily become fiduciaries of the corporation are also corporate insiders.

Because corporate insiders have a relationship of trust and confidence with the shareholders of the corporation, they have a duty to abstain from trading shares of the corporation's stock based upon material and confidential information they have obtained by reason of their positions with the corporation. The purchase or sale of a security is made "on the basis" of material, non-public information when the person was aware of the information when [he] [she] made the purchase or sale. If an insider wishes to trade in [his] [her] corporation's securities [he] [she] must first disclose that information to the public.

In order to prove that the Defendant violated Rules 10b-5(a), 10b5-1, and 10b5-2, the Plaintiff must prove by a preponderance of the evidence that the Defendant was aware of material, non-public information and did not disclose that information to the public before trading. Mere possession of material, non-public information without engaging in a securities transaction on the basis of that information is not sufficient to establish a violation.]

[Under the "misappropriation theory" of insider trading, a person commits fraud in connection with a securities transaction, and thus

violates Rules 10b-5(a) and 10b5-1, when [he] [she] misappropriates material and confidential information for securities trading purposes in breach of a duty owed to the source of the information. Under that theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities in breach of a duty of loyalty and confidentiality defrauds the principal of the exclusive use of that information.

A duty of loyalty or confidence arises between a recipient of material, non-public information and the source of the information when the recipient agrees to maintain information in confidence or when the recipient and the source have a history of sharing confidential information such that a reasonable person would expect the recipient to maintain the confidentiality of the information. [In this case, the recipient of the information was the [spouse] [parent] [child] [sibling] of the source of the information. A duty of loyalty or confidence usually arises in such situations.] [However, Defendant has offered evidence that, due to the facts and circumstances surrounding the relationship between [himself] [herself] and [his] [her] [spouse] [parent] [child] [sibling], [he] [she] neither knew nor reasonably should have known that [his] [her] [spouse] [parent] [child] [sibling] expected Defendant to keep

the information confidential. It is for you to decide whether such a duty of loyalty or confidence did, in fact, exist regarding the sharing of the material, non-public information at issue in this case.

In order to prove that the Defendant violated Rules 10b-5(a) and 10b5-1, Plaintiff must show, by a preponderance of the evidence, that Defendant misappropriated information from someone to whom he or she owed a fiduciary duty, and that the Defendant then traded on that information.]

[The law also forbids a person from indirectly violating Rules 10b-5(a) and 10b5-1 by doing any prohibited act by means of another person. A person who receives material and confidential information [as an insider] [through a fiduciary relationship with the source of the information] may not provide that information to another person (i.e. a "tip") in breach of the duty owed [to the shareholders of the corporation] [to the source of the information] with the expectation that [he] [she] will personally benefit, directly or indirectly, from the disclosure. A personal benefit may arise from an express or implied expectation of either payment for the tip or a reciprocal tip in the future. It may also arise from an intention to enhance the person's reputation with others in a

manner likely to lead to future earnings or from a desire to confer a benefit on a trading relative or friend.

In order to prove that the Defendant violated Rules 10b-5(a) and 10b5-1, Plaintiff must show, by a preponderance of the evidence, that Defendant provided material and confidential information to another person in breach of a fiduciary duty and with the expectation of a personal benefit, and that another person then traded on that information.]

[The securities laws prohibit a person who receives improperly obtained material and confidential information from purchasing or selling securities on the basis of that improperly obtained information. Information is "improperly obtained" if the information was knowingly received from a person who breached a duty of trust and confidentiality [to the shareholders of the corporation] [to the source of the information] by disclosing the information.

In order to prove that the Defendant violated Rules 10b-5(a) and 10b5-1, Plaintiff must show, by a preponderance of the evidence, that Defendant received material and confidential information from another person who breached a fiduciary duty, and that Defendant then traded on that information.]

The third fact that the Plaintiff must prove under Rule 10b-5(a) is that the Defendant acted "knowingly." It is not enough to show that the Defendant acted accidentally or merely made a mistake or even that the Defendant was negligent. Rather, it must be shown that the Defendant acted with a mental intent to deceive, manipulate, or defraud; [that the Defendant deliberately used material, confidential information in order to obtain an unfair advantage.]

The fourth essential part of the Plaintiff's claim under Rule 10b-5(a) is the requirement of proof that the Plaintiff "relied" upon the Defendant's alleged fraud and was "justified" in doing so. If you find that the Plaintiff did not rely directly upon any fraudulent conduct by the Defendant, but relied instead on the integrity and regularity of the market in which the securities were traded so that, but for the fraud or deception of the Defendant, the security would not have been marketed at the same price, that finding would satisfy the Plaintiff's obligation of proving justifiable reliance upon the Defendant's conduct.

[If you find, in other words, that the Defendant knowingly traded upon secret and material information of the kind normally used and relied upon by those engaged in the purchase or sale of securities in an established market, and that the Plaintiff relied upon the integrity and

regularity of the market itself, then the Defendant may be held liable even though the Plaintiff did not directly rely upon the specific conduct of the Defendant.]

The fifth and last essential part of the Plaintiff's claim under Rule 10b-5(a) is the requirement that the Plaintiff prove injury or damage to the Plaintiff as a proximate result of the Defendant's alleged fraud. For damage to be the proximate result of a fraud, the Plaintiff does not have to prove that the fraud was the only cause of the injury or damage. Rather, the Plaintiff must prove that the fraud was a substantial or significant contributing cause, so that, except for the fraud such damage would not have occurred.

If you find for the Plaintiff on the claim under Rule 10b-5(a), you will then consider the issue of the amount of money damages to be awarded to the Plaintiff.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as punishment and must not be imposed or increased to penalize the Defendant. Also,

compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) [Describe Plaintiff's theory of recoverable compensatory or economic damages]

(b) Punitive damages, if any (as explained in the Court's instructions)

4.1
Securities Act 15 USC § 78j(b)
Rules 10b-5(a), 10b5-1, 10b5-2
17 C.F.R. §§ 240.10b-5(a), .10b5-1, .10b5-2
Device, Scheme, Or Artifice To Defraud
Insider Trading

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant used an "instrumentality of interstate commerce" in connection with the securities transaction involved in this case?

Answer Yes or No _____

2. That the Defendant's conduct in connection with such transaction violated Rule 10b-5(a) [10b5-1 or 10b5-2] (as explained in the Court's instructions)?

Answer Yes or No _____

3. That the Defendant acted "knowingly" (as that term is defined in the Court's instructions)?

Answer Yes or No _____

4. That the Plaintiff "justifiably relied" upon the Defendant's conduct (as that term is defined in the Court's instructions)?

Answer Yes or No _____

5. That the Plaintiff suffered damages as a proximate result of the Defendant's wrongful conduct?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not consider the remaining question.]

6. That the Plaintiff should be awarded $_____ in compensatory damages.

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

The instruction is drafted for general application to all cases under Rule 10b-5(a), which broadly prohibits the use of "any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of a security." Insider trading is one specific, and common, form of 10b-5(a) case, and the bracketed portions of the instruction may be used in such cases.

Section 10(b) of the Securities Exchange Act of 1934 [15 USC § 78j(b)] provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

With respect to the definition of "security," see S.E.C. v. Edwards, 540 U.S. 389, 124 S.Ct. 892, 157 L.Ed.2d 813 (2004).

In Gower v. Cohn, 643 F.2d 1146, 1151 (5th Cir. Unit B, May, 1981), the former Fifth Circuit held that a single interstate telephone call satisfied the jurisdictional requirement of use of any means or instrumentality of interstate commerce as long as the telephone call was made in connection with the fraudulent scheme and was an important step in the scheme.

S.E.C. Manipulative and Deceptive Devices and Contrivances Rule, 17 C.F.R. § 240.10b-5 (2004):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

S.E.C. Trading "on the basis of" material nonpublic information in insider trading cases is governed by Rule 10b5-1, 17 C.F.R § 240.10b5-1 (2004):

> (a) General. The "manipulative and deceptive devices" prohibited by Section 10(b) of the Act (15 USC 78j) and § 240.10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.
> (b) Definition of "on the basis of." Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is "on the basis of" material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.

Note that 17 C.F.R § 240.10b5-1(c) provides for certain affirmative defenses where the purchase or sale of securities was made pursuant to the terms of a contract, instruction to another person, or written plan that was made or given prior to the person's becoming aware of the material nonpublic information. Where such an affirmative defense is raised, these instructions should be modified to incorporate the asserted defense.

Insider Trading, Classical Theory: The language of this charge comes directly from the leading cases on insider trading - - United States v. O'Hagan, 521 U.S. 642, 117 S.Ct. 2199, 138 L.Ed.2d 724, 741 (1997) and Chiarella v. United States, 445 U.S. 222, 228, 100 S.Ct. 1108, 1114, 63 L.Ed.2d 348 (1980). In O'Hagan the Supreme Court held that trading on material non-public information is a "device" within the meaning of § 10(b) of the Securities Exchange Act and Rule 10b-5. O'Hagan, at 655-56, 2209-10. Additionally, the Eleventh Circuit had held that mere possession of material, non-public information is insufficient to establish a 10b-5 violation. Rather, the Plaintiff must show that the Defendant actually used that information in trading with an intent to defraud. S.E.C. v. Adler, 137 F.3d 1325, 1337 (11th Cir. 1998). In a footnote in Adler, the Eleventh Circuit noted that the S.E.C. could adopt a different standard by rule. Id. at 1337 n. 33. Subsequent to the Eleventh Circuit's decision in Adler, the S.E.C. adopted Rule 10b5-1(b), quoted above, which establishes an "awareness" standard more closely analogous to the "knowing possession" standard adopted by the Second Circuit in United States v. Teicher, 987 F.2d 112, 120-21 (2d Cir. 1993), and rejected by the Eleventh Circuit in Adler. In adopting Rule 10b5-1(b), the S.E.C. explained that, "The awareness standard reflects the common sense notion that a trader who is aware of inside information when making a trading decision inevitably makes use of the information." 65 Fed. Reg. 51716-01, 51727 (Aug. 24, 2000) (to be codified at C.F.R. pt. 240, 243, 249). Answering commenters' criticisms regarding the imprecision of the awareness standard, the SEC stated, "'Aware' is a commonly

used and well-defined English word, meaning 'having knowledge; conscious; cognizant.'" Id. n.105. Since the amendment of Rule 10b-5 in 2000, the Eleventh Circuit has reaffirmed the "use" requirement previously set forth in Adler. S.E.C. v. Ginsburg, 362 F.3d 1292, 1297-98 (11th Cir. 2004). Thus, despite Rule 10b-5's "awareness" standard, the Eleventh Circuit continues to interpret Rule 10b-5 as requiring the plaintiff to prove that the defendant not only possessed the material, non-public information, but also that the defendant used the information in trade.

Insider Trading, Misappropriation Theory: O'Hagan answered the question of whether someone in possession of inside information can violate 10b-5 when he trades in another company's stock - - traditional insider trading occurs when the insider trades in his own company's stock and is derived from breach of fiduciary duty concepts. The Court held that trading in any securities based upon information as a result of a fiduciary duty violates 10b-5. Under O'Hagan, the Defendant violates Rule 10b-5 when he trades on any information obtained in violation of a fiduciary duty. Probably the most common application of misappropriation theory occurs where corporate insiders know that their company is about to launch a takeover of another company. Under the classical theory, they cannot trade in shares of their own company and under the misappropriation theory they cannot trade in the target's shares.

In August of 2000, the S.E.C. adopted Rule 10b-5-2 [17 C.F.R. § 250.10b5-2] to clarify when a duty of trust or confidence arises between a source of material nonpublic information and an alleged misappropriator. Such a duty arises in three circumstances: (1) where the person agrees to maintain the information in confidence; (2) where the source and recipient have a history, pattern, or [practice of sharing confidences such that the recipient knew or reasonably should have known the source expected the information to be kept in confidence; and (3) where the source is the parent, child, spouse, or sibling of the recipient. In the latter case, Rule 10b5-2(b)(3) establishes a presumption that, a duty of trust or confidence arises, which may be rebutted by showing that, based on the circumstances surrounding the relationship, the source reasonably would not have expected the recipient to keep the information confidential. In a case whose events occurred prior to the adoption of Rule 10b5-2 (to which the new rule was inapplicable), S.E.C. v. Yun, 327 F.3d 1263, 1273 (11th Cir. 2003), the Eleventh Circuit held that a duty of trust or confidence arises between spouses only where there was "a history or practice of sharing business confidences." The Yun court conceded that the Rule 10b5-2 "goes farther than we do in finding a relationship of trust and confidence." Id. at 1273 n. 23.

Tipper-Tippee Liability: In Dirks v. S.E.C., 463 U.S. 646, 662, 103 S.Ct. 3255, 3265, 77 L.Ed.2d 911 (1983), the Supreme Court held that in order for a tippee to be liable, the tipper (in that case a corporate insider) must have intended to benefit personally from his or her disclosure of the confidential information to the tippee. In S.E.C. v. Yun, 327 F.3d 1263 (11th Cir. 2003), the Eleventh Circuit held that a tipper who is an outsider-misappropriator must also intend to benefit from the tip in order for the tippee to be liable. Thus, in a case seeking to hold a tippee liable,

regardless of whether the source of the information is an insider or an outsider-misappropriator, the plaintiff must prove that the tipper intended to personally benefit from the disclosure.

4.2
Securities Act - Rule 10b-5(b)
17 C.F.R. § 240,10b-5(b)
Misrepresentations/Omissions
Of Material Facts

The Plaintiff's first claim in this case is asserted under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that, among other things, allows the Securities Exchange Commission to promulgate, in the public interest or for the protection of investors, rules and regulations prohibiting certain conduct in the purchase or sale of securities. Among such regulations is Rule 10b-5(b) which makes it unlawful for anyone to commit a fraud in connection with the purchase or sale of a security.

A “security” is commonly defined as a stock, bond, note, convertible debenture, warrant or other document representing a share of stock in a company or a debt owed by a company.

In order to prevail on the claim under Rule 10b-5(b), the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant used an "instrumentality of interstate commerce" [a facility of a national securities exchange] in connection with the securities transaction involved in the case;

Second: That the Defendant's conduct in connection with such transactions violated Rule 10b-5(b) by making a false representation of a material fact, or omitting a material fact;

Third: That the Defendant acted "knowingly";

Fourth: That the Plaintiff "justifiably relied" upon the Defendant's conduct; and

Fifth: That the Plaintiff suffered damages as a result of the Defendant's wrongful conduct.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

With regard to the first of these facts - - that an "instrumentality of interstate commerce" was used in some phase of the transaction - - the term "instrumentality of interstate commerce" means, for example, the use of the mails, the telephone, email, some other form of electronic communication, or some interstate delivery system like Federal Express or UPS [or a facility of a national securities exchange]. It is not necessary, however, that any misrepresentation or omission actually occur during the use of the interstate instrumentality of communication. What is required is that the interstate instrumentality of communication

be used in some phase of the transaction; but it need not be that part of the transaction in which the fraud occurs.

[Some facility of a national securities exchange may include a computer trading program or an online discount brokerage service that was used in some phase of the transaction. Again, it is not necessary that the facility of an exchange be the means by which any misrepresentation was transmitted, but only that such facility was used in some phase of the transaction.]

The second fact the Plaintiff must establish is that the Defendant engaged in conduct that violated Rule 10b-5(b). Included in the list of prohibited acts in Rule 10b-5(b) is the making of any untrue statement of material fact, or omitting the statement of a material fact, which would tend to mislead the prospective buyer or seller of securities.

In this instance the alleged misrepresentations [or omissions] asserted by the Plaintiff are as follows:

> **[Here describe the specific statements or omissions claimed to have been fraudulently made.]**

So, in order to establish the second essential part of the claim under Rule 10b-5(b), the Plaintiff must prove first, that the Defendant made one or more of those alleged misrepresentations of fact [or

omitted to state facts that would be necessary to make other statements by the Defendant not misleading to the Plaintiff] and second, that the misrepresentation [or omission] involved "material" facts.

A "misrepresentation" is simply a statement that is not true.

[Predictions, expressions of opinion, and other forward-looking statements, so long as they are not worded as guarantees, are not representations of material facts, and thus do not require revision or amendment, unless the speaker does not have a basis to reasonably believe them. If, at the time the predictions, expressions of opinion or projections were made, and the speaker actually believed them or there was a reasonable basis for making them, then the statements are not materially misleading statements of fact. The focus is on whether the statements were false or misleading at the time they were made. Subsequent events proving the forward-looking statement to have been erroneous will not give rise to a violation of Rule 10b-5.]

[With regard to an omission to state facts that would be necessary to know in order to keep other statements from being materially misleading, the Defendant's duty is a continuing one. That is to say that, if the Defendant has made statements regarding material facts in the past such as statements made in reports filed with the Securities

Exchange Commission, or information which was sent out to investors, or statements made in press releases issued by the company, there is a duty to correct statements of material fact if it is learned that the statement, though correct at the time it was made, would be misleading if left unrevised. Likewise, a Defendant has a duty to update prior statements when, though the statement was reasonable when made, subsequent events have rendered the statement materially misleading.]

The third fact the Plaintiff must prove under Rule 10b-5(b) is that the Defendant acted "knowingly." It is not enough to show that the Defendant acted accidentally or merely made a mistake or even that the Defendant was negligent. Rather, it must be shown that the Defendant acted intentionally with a mental purpose to deceive, manipulate, or defraud; that the Defendant stated material facts that were known by the Defendant to be false [or stated untrue facts with reckless disregard for their truth or falsity] [or knew of the existence of material facts that were not disclosed although the Defendant knew that knowledge of those facts would be necessary to make the Defendant's other statements not misleading].

The fourth essential part of the Plaintiff's claim under Rule 10b-5(b) is the requirement of proof that the Plaintiff "relied" upon the

alleged misrepresentations [or omissions] and was "justified" in doing so.

In other words, if you find that the Plaintiff would have engaged in the transactions anyway, and that the misrepresentation [or omission] had no effect upon the Plaintiff's decision, then there was no reliance and there can be no recovery. Further, the Plaintiff must prove that reliance upon the Defendant was justified; that the Plaintiff did not intentionally ignore suspicious circumstances and refuse to investigate them in disregard of a risk that was either known to the Plaintiff or so obvious that the Plaintiff should have been aware of it, and so great as to make it highly probable that harm would follow.

[In considering whether the Plaintiff justifiably relied on the Defendant's alleged misrepresentations, you should consider the presence or absence of all relevant factors including:

1. the sophistication and expertise of the Plaintiff in financial and securities matters;

2. the existence of long-standing business or personal relationships between the Plaintiff and the Defendant;

3. the Plaintiff's access to relevant information;

4. the existence of a fiduciary relationship owed by the Defendant to the Plaintiff;

5. concealment of fraud by the Defendant;

6. whether the Plaintiff initiated the stock transaction or sought to expedite the transaction; and

7. the generality or specificity of the misrepresentations.

No single factor is dispositive and all must be considered in determining whether reliance was justified.]

[In the case of omissions or non-disclosures of material facts, if such an omission is proved, then the matter of reliance on the part of the Plaintiff may be presumed. The law infers or assumes that the Plaintiff would have relied upon facts that are shown to be material and intentionally withheld. The Defendant, however, may rebut or overcome this presumption if the Defendant is able to prove, by a preponderance of the evidence, that even if the material facts had been disclosed, the Plaintiff's decision concerning the transaction would have been the same.]

The fifth and last essential part of the plaintiff's claim under rule 10b-5(b) is the requirement that the Plaintiff prove injury or damage to the Plaintiff as a proximate result of the misrepresentations [or omissions]. For damage to be the proximate result of a misrepresentation [or omission] the Plaintiff does not have to prove that

the misrepresentation [or omission] was the only cause of the injury or damage. Rather, the Plaintiff must prove that the misrepresentation [or omission] was a substantial or significant contributing cause, so that, except for the misrepresentation [or omission], such damage would not have occurred.

If you find for the Plaintiff on the claim under Rule 10b-5(b), you will then consider the issue of the amount of money damages to be awarded to the Plaintiff.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) [Describe Plaintiff's theory of recoverable compensatory or economic damages]

4.2
Securities Act - Rule 10b-5(b)
17 C.F.R. § 240.10b-5(b)
Misrepresentations/Omissions
Of Material Facts

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant used an "instrumentality of interstate commerce" in connection with the securities transactions involved in this case?

Answer Yes or No _____

2. That the Defendant's conduct in connection with such transactions violated Rule 10b-5(b) by making a false representation of a material fact, or omitting a material fact (as explained in the Court's instructions)?

Answer Yes or No _____

3. That the Defendant acted "knowingly" (as that term is defined in the Court's instructions)?

Answer Yes or No _____

4. That the Plaintiff "justifiably relied" upon the Defendant's conduct (as that term is defined in the Court's instructions)?

Answer Yes or No _____

5. That the Plaintiff suffered damages as a result of the Defendant's wrongful conduct?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not consider the remaining question.]

6. That the Plaintiff should be awarded $_____ in compensatory damages.

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

Section 10(b) of the Securities Exchange Act of 1934 [15 USC § 78j(b)] provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

In Gower v. Cohn, 643 F.2d 1146, 1151 (5th Cir. Unit B, May, 1981), the former Fifth Circuit held that a single interstate telephone call satisfied the jurisdictional requirement of use of any means or instrumentality of interstate commerce as long as the telephone call was made in connection with the fraudulent scheme and was an important step in the scheme.

"To succeed on a Rule 10b-5 fraud claim, a plaintiff must establish (1) a false statement or omission of material fact; (2) made with scienter; (3) upon which the plaintiff justifiably relied; (4) that proximately caused the plaintiff's injury." Robbins v. Koger Properties, Inc., 116 F.3d 1441, 1447 (11th Cir. 1997) (citing Bruschi v.

Brown, 876 F.2d 1526, 1528 (11th Cir. 1989)). "[T]he fraud on the market theory, as articulated by the Supreme Court, is used to support a rebuttable presumption of reliance, not a presumption of causation." Id. at 1448 (citing Basic v. Levinson, 485 U.S. 224, 241-242, 108 S.Ct. 978, 992, 99 L.Ed.2d 194 (1988)).

In Ziemba v. Cascade Int'l. Inc., 256 F.3d 1194, 1205 (11th Cir. 2001), the Eleventh Circuit held that in order for secondary actors, such as a law firm or accounting firm, to be liable under Rule 10b-5, "the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant [the secondary actor] at the time that the plaintiff's investment decision was made." In a case involving a secondary actor, the jury should be instructed that, in order to prove reliance, the plaintiff is required to prove that misrepresentations publicly attributable to the secondary actor were made to the plaintiff at the time the plaintiff's investment decision was made.

4.3
Securities Act - Rule 10b-5(c)
17 C.F.R. § 240.10b-5(c)
Fraudulent Practice Or Course Of Dealing
Stockbroker "Churning"
(Including Violation Of Blue Sky Law And
Breach Of Fiduciary Duty As Pendent State Claims)

The Plaintiff's first claim in this case is asserted under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that, among other things, allows the Securities Exchange Commission to promulgate, in the public interest or for the protection of investors, rules and regulations prohibiting certain conduct in the purchase or sale of securities. Among such regulations is Rule 10b-5(c) which makes it unlawful for anyone to engage in any practice or course of dealing which would operate as a fraud in connection with the purchase or sale of any security.

A "security" is commonly defined as a stock, bond, note, convertible debenture, warrant or other document representing a share in a company or a debt owed by a company.

In order to prevail on the claim under Rule 10b-5(c) the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant used an "instrumentality of interstate commerce" [a facility of a national securities exchange] in connection with the securities transaction involved in the case;

Second: That the Defendant's conduct in connection with such transactions violated Rule 10b-5(c) by engaging in an act, practice, or course of business dealing that operated as a fraud or deceit upon the Plaintiff;

Third: That the Defendant acted "knowingly":

Fourth: That the Plaintiff "justifiably relied" upon the Defendant's conduct; and

Fifth: That the Plaintiff suffered damages as a result of the Defendant's wrongful conduct.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

With regard to the first of these facts - - that an "instrumentality of interstate commerce" was used in some phase of the transaction - - the term "instrumentality of interstate commerce" means, for example, the use of the mails, the telephone, email, some other form of electronic communication, or some interstate delivery system like Federal Express or UPS [or a facility of a national securities exchange].

The second fact the Plaintiff must establish is that the Defendant engaged in conduct that violated Rule 10b-5(c). Included in the list of prohibited acts in Rule 10b-5(c) is any act, practice or course of business dealing that operates as a fraud or deceit upon any person in connection with the purchase or sale of any security.

In this instance the alleged violation of Rule 10b-5(c), as asserted by the Plaintiff, is the practice of "churning."

"Churning" is a term used in the securities industry and denotes excessive buying and selling contrary to the best interest of the client or customer. The practice of churning, if established by a preponderance of the evidence, is a deceptive practice within the meaning of Rule 10b-5(c). Churning occurs when a broker, exercising control over the volume and frequency of trades, abuses the customer's confidence for the broker's own personal gain by initiating transactions that are excessive in view of the character of the account and the customer's objectives as expressed to the broker. In order for you to find that churning occurred, the Plaintiff must show that the broker exercised control over the account, that is, that the broker made purchases and sales for the customer's account on the broker's own initiative without request or approval by the client, and that the purchase

and sale transactions were excessive in light of the customer's investment goals as known to the broker. Churning is frequently characterized by disproportionately high turnovers in the account, frequent in-and-out trading, and large brokerage commissions in relation to the amount invested. However, the mere fact that a large number of trades occurred is not, in and of itself, sufficient evidence to find that an account was churned.

The third fact the Plaintiff must prove under Rule 10b-5(c) is that the Defendant acted "knowingly." It is not enough to show that the Defendant acted accidentally or merely made a mistake in judgment or even that the Defendant was negligent. Rather, it must be shown that the Defendant acted with a mental intent to deceive, manipulate, or defraud or with willful and reckless disregard for the investor's interest.

The fourth essential part of the Plaintiff's claim under Rule 10b-5(c) is the requirement of proof that the Plaintiff "relied" upon the conduct of the Defendant and was "justified" in doing so.

In other words, if you find that the Plaintiff would have engaged in the disputed transactions anyway, and that the Defendant's conduct, standing alone, had no adverse affect upon the Plaintiff's position, then there was no reliance, and there can be no recovery. Further, the

Plaintiff must prove that reliance upon the Defendant was justified - - that the Plaintiff did not intentionally ignore suspicious circumstances and refuse to investigate them in disregard of a risk that was either known to the Plaintiff or so obvious that the Plaintiff should have been aware of it, and so great as to make it highly probable that harm would follow.

The fifth and last essential part of the Plaintiff's claim under Rule 10b-5(c) is the requirement that the Plaintiff prove injury or damage to the Plaintiff as a proximate result of the Defendant's conduct. For damage to be the proximate result of an act or course of dealing it need not be shown that the act or course of dealing was the sole or exclusive cause of the injury or damage, but it must be proved that such act or course of dealing played a substantial part in causing or bringing about the damage, so that, except for such conduct, the damage would not have occurred.

[The Plaintiff's second claim is based upon a statute enacted by the State of _____. Insofar as this case is concerned, the wording of that statute is substantially identical to Rule 10b-5(c), which was promulgated by the Securities and Exchange Commission - - the federal law previously explained to you.

Accordingly, in order to prevail on the claim under the state statute, the Plaintiff must prove each of those facts previously explained to you as being necessary to establish a claim under Rule 10b-5(c) except for the first item, which requires the use of an "instrumentality of interstate commerce."]

[Also, with regard to the requirement of proof that the Defendant acted "knowingly" (the third essential part of the claim under Rule 10b-5(c)), the governing rule under state law differs from the federal law. As stated previously, under Rule 10b-5(c), it must be established that the Defendant acted with a mental state embracing an intent to deceive, manipulate or defraud. Under the state statute, it must be shown that the Defendant acted "knowingly," that is, that the Defendant acted voluntarily and purposely, and not because of mistake or accident; and it must also be established that the Defendant's acts or conduct operated as a fraud or deceit upon the Plaintiff; but it is not necessary to prove that in so acting the Defendant specifically intended to defraud or deceive the Plaintiff.]

[The third separate claim alleged by the Plaintiff against the Defendant is that the Defendant violated a "fiduciary" obligation owed to the Plaintiff.

A fiduciary obligation exists whenever one person - - the client - - places special trust and confidence in another person - - the fiduciary - - and relies upon the fiduciary to exercise discretion or expertise in acting for the client; and the fiduciary knowingly accepts that trust and confidence and thereafter undertakes to act on behalf of the client by exercising the fiduciary's own discretion and expertise.

Of course, the mere fact that a business relationship comes into being between two persons does not mean that either owes a fiduciary obligation to the other. If one person engages or employs another and thereafter directs or supervises or approves the other's actions, the person so employed is not a fiduciary. Rather, as previously stated, it is only when one party reposes, and the other accepts, a special trust and confidence involving the exercise of professional expertise and discretion, that a fiduciary relationship comes into being.

When one person does undertake to act for another in a fiduciary relationship, the law forbids the fiduciary from acting in any manner adverse or contrary to the interests of the client, or from acting for one's own benefit in relation to the subject matter. The client is entitled to the best efforts of the fiduciary on the client's behalf, and the fiduciary must exercise skill, care and diligence when acting on behalf of the client.

A person acting in a fiduciary capacity is required to make truthful and complete disclosures to those to whom a fiduciary obligation is owed, and the fiduciary is forbidden to obtain an unreasonable advantage at the client's expense.

Thus, in order to recover on the claim that the Defendant breached a fiduciary obligation owed to the Plaintiff, the Plaintiff must establish each of the following facts by a preponderance of the evidence:

First: That a "fiduciary" relationship existed between the parties;

Second: That the Defendant violated that fiduciary obligation by "churning" the Plaintiff's accounts or by otherwise dealing in the Plaintiff's accounts for the Defendant's own interest thereby defrauding the Plaintiff; and

Third: That the Plaintiff suffered damages as a proximate result of that violation of the fiduciary obligation.

As stated previously with regard to the other claims, in order to show fraud, the Plaintiff must prove that the Plaintiff did not deliberately ignore and refuse to investigate a known risk that was so great as to make it highly probable that harm would follow.

Also, for damage to be the proximate result of an act or course of dealing, it must be shown that such act or course of dealing played a substantial part in causing or bringing about the damage, and that, except for such conduct, the damage would not have occurred.]

If you find for the Plaintiff on any of the Plaintiff's claims, you will then consider the issue of the amount of money damages to be awarded to the Plaintiff.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just, and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) [Describe Plaintiff's theory of recoverable compensatory or economic damages]

[(b) Punitive damages, if any (as explained in the Court's instructions)]

[The Plaintiff also claims that the acts of the Defendant were done willfully, intentionally or with callous and reckless indifference to the Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, willfulness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

4.3
Securities Act - Rule 10b-5(c)
17 C.F.R. § 240.10b-5(c)
Fraudulent Practice Or Course Of Dealing
Stockbroker "Churning" (Including Violation Of Blue Sky Law And Breach Of Fiduciary Duty As Pendent State Claims)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant used an "instrumentality of interstate commerce" in connection with the securities transactions involved in this case?

Answer Yes or No _____

2. That the Defendant's conduct in connection with such transactions violated Rule 10b-5(c)?

Answer Yes or No _____

3. That the Defendant acted "knowingly"?

Answer Yes or No _____

4. That the Plaintiff "justifiably relied" upon the Defendant's conduct?

Answer Yes or No _____

5. That the Plaintiff suffered damages as a result of the Defendant's wrongful conduct?

Answer Yes or No _____

6. That a "fiduciary" relationship existed between the parties?

Answer Yes or No _____

7. That the Defendant violated [his] [her] fiduciary obligation by "churning" the Plaintiff's accounts or by otherwise dealing in the Plaintiff's accounts for the Defendant's own interest thereby defrauding the Plaintiff?

Answer Yes or No _____

8. That the Plaintiff suffered damages as the proximate result of that violation of the fiduciary obligation?

Answer Yes or No _____

9. That the Plaintiff should be awarded $_____ in compensatory damages.

10. That the Plaintiff should be awarded $_____ as punitive damages.

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

See Arceneaux v. Merrill Lynch, 767 F.2d 1498 (11th Cir. 1985).

5.1
Civil RICO
(18 USC § 1964(c))
General Instruction

In this case the Plaintiff claims that the Defendant violated a federal law known as the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Plaintiff seeks an award of damages as compensation for that alleged violation.

It is unlawful under the so-called RICO statute for anyone associated with an "enterprise" to conduct, or to participate in conducting, the affairs of the enterprise through a "pattern of racketeering activity."

The term "enterprise" as defined in the law includes any partnership, corporation, association or other legal entity, and any union or other group of individuals associated in fact although not a legal entity, that is engaged in, or the activities of which affect, interstate commerce. In this case the Plaintiff claims that [describe the alleged "enterprise"] constituted an "enterprise" within the meaning of the RICO law.

The term "racketeering activity" includes any act in violation of [E.g. Title 18, United States Code relating to mail fraud (§ 1341) and wire fraud (§ 1343)].

The term "pattern of racketeering activity" requires proof of at least two acts of "racketeering activity," sometimes called predicate acts, which must have been committed as part of a common plan or scheme and thus connected with each other as part of a pattern rather than being a series of isolated or disconnected acts.

So, in order to prevail on the RICO claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant was associated with an "enterprise" as alleged and described by the Plaintiff and as defined in these instructions;

Second: That the Defendant "knowingly" committed at least two of the predicate acts hereafter described;

Third: That the predicate acts formed a pattern by having the same or similar purposes, results, participants, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics so that they were not isolated events;

Fourth: That the predicate acts amounted to, or threatened the likelihood of, continued criminal activity posing a threat of continuity projecting into the future;

Fifth: That through the commission of the two or more connected predicate acts, the Defendant conducted or participated in

the conduct of the affairs of the "enterprise;"

Sixth: That the "enterprise" was engaged in, or that its activities affected, interstate commerce; and

Seventh: That the Plaintiff was injured in [his/her/its] business or property as a proximate result of the Defendant's commission of the pattern of racketeering activity.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

The first fact the Plaintiff must prove, therefore, is that the Defendant was associated with an "enterprise," as previously defined.

The second fact the Plaintiff must prove is that the Defendant knowingly committed at least two so-called "predicate acts."

To act "knowingly" means to act voluntarily and intentionally, and not because of mistake or accident.

The "predicate acts" claimed by the Plaintiff are [describe the specific transactions alleged as predicate acts and further define, if necessary (i.e., if not already covered elsewhere in the instructions) the essential elements of the underlying offense].

The "predicate acts" alleged by the Plaintiff would constitute [a mail fraud and/or wire fraud offense in violation of Title 18, United States Code, §§ 1341 and 1343. Under those laws it is an offense for anyone to scheme to defraud someone else out of money or property by making false and fraudulent representations, and then to attempt to execute or carry out the scheme through use of the mails or interstate wire communications facilities. Each separate use of the mails or wires is a separate offense or separate predicate act].

If you find that the Defendant committed two or more of the predicate acts, you must then decide whether those acts constituted a "pattern of racketeering activity," as previously described, and whether that "pattern" of activity amounted to, or threatened the likelihood of, continued criminal activity posing a threat of continuity projecting into the future.

You must next decide whether the “pattern of racketeering activity” was engaged in by the Defendant while conducting, or participating in the conduct of, the affairs of the "enterprise."

If so, you must then decide whether the "enterprise" was engaged in, or whether its activities affected, "interstate commerce." The term "interstate commerce" refers to business transactions occurring

between places in different states; and, in this case, the Plaintiff claims that in conducting the affairs of the enterprise the Defendant [utilized interstate communications facilities by engaging in long distance telephone conversations; by traveling in interstate commerce from one state to another; and by causing the transmission of funds and/or other communications by mail and/or by wire in interstate commerce from one state to another]. If you find from a preponderance of the evidence that these transactions or events occurred, and that they occurred in, or as a direct result of, the conduct of the affairs of the alleged "enterprise," then the required effect upon interstate commerce has been established. If you do not so find, then the required effect upon interstate commerce has not been established.

If all of those issues are resolved in favor of the Plaintiff you must then decide whether the Plaintiff has suffered injury in [his/her/its] business or property as a "proximate result" of the Defendant's pattern of racketeering activity. To be the "proximate result" of such activity it must be proved that, except for such activity by the Defendant, the injury or damage claimed by the Plaintiff would not have occurred.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by

a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

[List separately each element of damages being claimed by the Plaintiff]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the

amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done willfully, intentionally or with callous and reckless indifference to the Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, willfulness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

5.1
Civil RICO
(18 USC § 1964(c))
General Instruction

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant was associated with an "enterprise" as alleged and described by the Plaintiff (and as defined in the Court's Instructions)?

Answer Yes or No _____

2. That the Defendant "knowingly" committed at least two of the "predicate acts" (as defined in the Court's Instructions)?

Answer Yes or No _____

3. That the predicate acts formed a pattern by having the same or similar purposes, results, participants, victims or methods of commission, or were otherwise interrelated by distinguishing characteristics so that they were not isolated events?

Answer Yes or No _____

4. That the predicate acts amounted to, or threatened the likelihood of, continued criminal activity posing a threat of continuity projecting into the future?

Answer Yes or No _____

5. That through the commission of the two or more connected predicate acts the Defendant conducted, or participated in the conduct of, the affairs of the enterprise?

Answer Yes or No _____

6. That the enterprise was engaged in, or its activities affected, interstate commerce?

Answer Yes or No _____

7. That the Plaintiff was injured in [his] [her] [its] business or property as a proximate result of the Defendant's commission of the pattern racketeering activity?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions, you need not answer any question following the question to which you gave No as the answer.]

8. That the Plaintiff should be awarded the following damages:

[Enumerate the recoverable elements of damages] $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1397 (11th Cir. 1994) (holding that predicate acts are related if they have similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and are not isolated events; and that a plaintiff who alleges a RICO violation may demonstrate continuity over a period of time by proving a series of related predicate acts that extend over a substantial period of time and threaten future criminal conduct).

Sikes v. Teleline, Inc., 281 F.3d 1350, 1360-61 (11th Cir. 2002) (summarizing the nine elements of a civil RICO claim predicated upon mail or wire fraud).

Beck v. Prupis, 529 U.S. 494, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) (act causing injury must be an act of racketeering, not just an act in furtherance of a conspiracy.

Quick v. Peoples Bank of Cullman County, 993 F.2d 793, 797 (11th Cir. 1993) (respondeat superior liability may be applied in the context of 18 USC § 1962 (b) only when an enterprise has derived some benefit from the RICO violation).

Arabian American Oil Co. v. Scarfone, 939 F.2d 1472, 1478 (11th Cir. 1991) (a plaintiff may bring a RICO action where a breach of contract claim also exists, and may receive treble damages even if the RICO claim and the breach of contract claim share identical compensatory damages).

Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 674 (11th Cir. 1991) (a plaintiff is not required to exhaust state remedies before bringing a RICO claim).

6.1
Jones Act - Unseaworthiness
General Instruction
(Comparative Negligence Defense)

The Plaintiff seeks to recover under a federal statute known as the Jones Act. The Jones Act provides a remedy to a seaman who, while employed as a member of the crew of a vessel in navigation, suffers personal injuries due to the negligence of his employer, or his employer's officers, agents or other employees.

More specifically, the Plaintiff alleges that the Defendant [describe the specific act(s) or omission(s) asserted as the defendant's negligence].

So, in order to prevail on the Jones Act claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That at the time of the alleged injury the Plaintiff was acting in the course of employment as a member of the crew of a vessel in navigation;

Second: That the Defendant was "negligent," as claimed; and

Third: That such negligence was a "legal cause" of damage sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[In this case the parties have stipulated and agreed that, at the time of the alleged injury, the Plaintiff was acting in the course of employment as a member of the crew of a vessel in navigation, and you should accept that fact as proven.]

[A seaman is injured "in the course of employment" when, at the time of the injury, the seaman was doing the work of the employer, that is, working in the service of the vessel as a member of the crew.]

[In order for the Plaintiff to prove membership in the crew of a vessel, the Plaintiff must a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature such that [his] [her] employment regularly exposed [him] [her] to the perils of the sea. The Plaintiff must also prove that the capacity in which [he] [she] was employed or that the duties [he] [she] performed contributed to the function of the vessel's regular operation or to the accomplishment of its mission.]

[The primary meaning of the term "vessel" is any watercraft or other contrivance used, or capable of being used, as a means of transportation on water. Although mere floatation may not be sufficient in and of itself to make a structure a vessel, if a structure is buoyant and capable of being floated from one location to another it may be found

to be a vessel even though it may have remained in one place for a long time and even though there are no plans to move it in the foreseeable future.]

[The term "vessel" may also include various special purpose craft (such as barges and dredges) that do not operate as vehicles for transportation, but serve as floating bases or vessels that may even be submerged so as to rest on the bottom and be used for stationary operations such as drilling or dredging. In considering whether a special purpose craft is a vessel, the determinative factors are the purposes for which the craft was constructed and the business in which it is engaged, that is, was the craft designed for and used in navigation and commerce? A craft not designed for navigation and commerce, however, may still be classified as a vessel if at the time of the accident it had actually been engaged in navigation or commerce.]

[In considering whether a special purpose craft is a vessel, the manner in which a party or parties may have referred to or denominated the craft in contracts or other documents is not necessarily determinative of its status as a vessel, but is simply a factor for you to consider along with all of the other evidence.]

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from the evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damage suffered by the Plaintiff, you may find that such injury or damage was legally caused by the Defendant's act or omission. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if it occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the Plaintiff's Jones Act claim for negligence, then your verdict should be for the Defendant. If, however, a preponderance of the evidence does support

the Plaintiff's claim, you will then consider the defense raised by the Defendant.

The Defendant contends that the Plaintiff was also negligent and that such negligence was a legal cause of the Plaintiff's own injury. This is a defensive claim so that the Defendant must prove, by a preponderance of the evidence:

First: That the Plaintiff was also "negligent;" and

Second: That such negligence was a "legal cause" of the Plaintiff's own damage.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

The law requires you to compare any negligence you find on the part of both parties. So, if you find in favor of the Defendant on this defense, that will not prevent recovery by the Plaintiff. It will only reduce the amount of the Plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the Plaintiff, that the Plaintiff's own negligence was, for example, 50% responsible for the Plaintiff's own damage, then you would fill in that percentage as your finding on the special verdict form I will explain in a moment. Such a finding would

not prevent the Plaintiff from recovering; the Court will merely reduce the Plaintiff's total damages by the percentage that you insert. Of course, by using the number 50% as an example, I do not mean to suggest to you any specific figure at all. If you find that the Plaintiff was negligent, you might find 1% or 99%.

The Plaintiff's second claim is for "unseaworthiness." Specifically, the Plaintiff alleges that the vessel was "unseaworthy" because [describe the specific conditions asserted as the basis for the claim].

So, in order to prevail on the unseaworthiness claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the vessel was unseaworthy, as claimed; and

Second: That the unseaworthy condition was a legal cause of damage to the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

A claim of "unseaworthiness" is a claim that the vessel owner has not fulfilled a legal duty owed to members of the crew to provide a vessel reasonably fit for its intended purpose. The duty to provide a

seaworthy ship extends not only to the vessel itself, but to all of its parts, equipment and gear; and also includes the responsibility of assigning an adequate crew.

The owner's duty under the law to provide a seaworthy ship is absolute. The owner may not delegate the duty to anyone. If the owner does not provide a seaworthy vessel, then no amount of due care or prudence will excuse that fault, whether or not the owner knew or could have known of the deficiency.

If, therefore, you find that the vessel was in any manner unsafe or unfit, and that such condition was a legal cause of damage to the Plaintiff, then you may find that the vessel was unseaworthy and the owner liable whether the owner was negligent or not.

The owner of the vessel is not required, however, to furnish an accident-free ship. A vessel is not called on to have the best of appliances and equipment, or the finest of crews, but only such gear as is reasonably proper and suitable for its intended use, and a crew that is reasonably competent and adequate.

An unseaworthy condition is a "legal cause" of damage only if it directly and in natural and continuous sequence produces, or contributes substantially to producing such damage, so it can

reasonably be said that, except for the unseaworthy condition, the loss, injury or damage would not have occurred. Unseaworthiness may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if it occurs at the same time as the unseaworthiness and if the unseaworthiness contributes substantially to producing such damage.

Similar to the response made to the Plaintiff's first claim, the Defendant denies that any unseaworthiness existed at the time of the incident, and alternatively states that if the vessel was unseaworthy, then the unseaworthiness did not cause any injury or damage to the Plaintiff. The Defendant further alleges that some contributory negligence on the part of the Plaintiff was also a cause of any injuries the Plaintiff may have sustained. Since I have already explained to you the meaning and effect of a finding of contributory negligence on the part of the Plaintiff, I will not do so again, except to remind you that the Defendant has the burden of establishing this defense by a preponderance of the evidence.

You should also remember that the Plaintiff has asserted two separate claims. The first is for negligence under the Jones Act; and the second is for unseaworthiness. The Plaintiff may be entitled to

recover damages provided the Plaintiff can establish either of those claims.

So, if the evidence proves negligence or unseaworthiness on the part of the Defendant that was a legal cause of damage to the Plaintiff, you will then consider the issue of the Plaintiff's damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact

standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial

(b) Net lost wages and benefits in the future [reduced to present value]

(c) Medical and hospital expenses, incurred in the past [and likely to be incurred in the future]

(d) Physical and emotional pain and mental anguish

[(e) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done willfully, intentionally or with callous and reckless indifference to the Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, willfulness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive

damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

6.1
Jones Act - Unseaworthiness
General Instruction
(Comparative Negligence Defense)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant was negligent in the manner claimed by the Plaintiff and that such negligence was a legal cause of damage to the Plaintiff?

Answer Yes or No _____

2. That the vessel was unseaworthy in the manner claimed by the Plaintiff and that such unseaworthiness was a legal cause of damage to the Plaintiff?

Answer Yes or No _____

[Note: If you answered No to both Question No. 1 and Question No. 2, you need not answer any of the remaining questions.]

3. That the Plaintiff was also negligent in the manner claimed by the Defendant and that such negligence was a legal cause of the Plaintiff's own damage?

Answer Yes or No _____

4. If you answered "Yes" to Question Three, what proportion or percentage of the Plaintiff's damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

Answer in Terms of Percentages

The Defendant _____%

The Plaintiff _____%

[Note: The total of the percentages given in your answer should equal 100%.]

5. If you answered "Yes" to Question One or Question Two, what sum of money do you find to be the total amount of the Plaintiff's damages (without adjustment by application of any percentages you may have given in answer to Question Four)?

(a) Net lost wages and benefits to the date of trial $_____

(b) Net lost wages and benefits in the future [reduced to present value] $_____

(c) Medical and hospital expenses, incurred in the past [and likely to be incurred in the future] $_____

(d) Physical and emotional pain and mental anguish $_____

[(e) Punitive damages, if any (as explained in the Court's instructions) $_____]

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

Chandris, Inc. v. Latsis, 515 U.S. 347, 368, 115 S.Ct. 2172, 2189-90, 132 L.Ed.2d 314 (1995) (providing requirements for seaman status under the Jones Act).

The Jones Act refers to the Federal Employers Liability Act ("FELA"), 45 USC § 51 et seq., in affording recovery rights to Jones Act plaintiffs. See Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331, 335 (5th Cir. 1997) (en banc). Under some prior Fifth Circuit precedent binding on the Eleventh Circuit, employees under FELA only had to exercise a "slight duty of care" toward their own safety, effectively placing a higher standard, comparatively speaking, upon the employer. See Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975); Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980).

Clarifying and overruling those prior Fifth Circuit cases, the Fifth Circuit concluded that both the employer and employee are held to the same standard of care, (i.e., an employee is obligated under the FELA to act with ordinary prudence). Gautreaux, 107 F.3d at 335 (5th Cir. 1997). The Fifth Circuit has noted that "[i]n Gautreaux, we held that 'nothing in the text or structure of the FELA-Jones Act legislation suggests that the standard of care to be attributed to either an employer or an employee is anything different than ordinary prudence under the circumstances." Crawford v. Falcon Drilling Co. Inc., 131 F.3d 1120, 1125 (5th Cir. 1997) (citing Gautreaux, 107 F.3d at 338).

However, the relaxed rule concerning the issue of causation under the Jones Act remains the same as it was before Gautreaux. Under that rule, reflected in this instruction, an employer's negligence is actionable if it "played any part, even the slightest, in producing the injury or death for which damages are sought." Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (citing Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957)).

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

Jones v. CSX Transp., 337 F.3d 1316 (11th Cir. 2003) (in Jones Act cases, as with FELA, a plaintiff does not need to make a showing of an objective manifestation of his or her emotional injury in order to recover for negligently inflicted emotional distress). Plaintiff can recover if the alleged fear is "genuine and serious". Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 157, 123 S.Ct. 1210, 1223, 155 L.Ed.2d 261 (2003).

Gifford v. American Canadian Caribbean Line, Inc., 276 F.3d 80 (1st Cir. 2002) (holding that unseaworthiness determination did not require that vessel be unseaworthy at precise time of injury but rather that the unseaworthiness was a direct and substantial cause of the plaintiff's injury).

6.2
Jones Act - Unseaworthiness
Maintenance And Cure

The Plaintiff's [third] claim is that, as a seaman, the Plaintiff is entitled to recover what the law calls "maintenance and cure." This claim is completely separate from both the Jones Act and the unseaworthiness claims of the Plaintiff, and must be decided entirely apart from your determination of those claims.

[The only common element of the three claims is the "seaman" status of the Plaintiff, and the test for seaman status is the same for all claims. Therefore, if the Plaintiff has proven employment as a "seaman" on the date of the accident for the purposes of the other claims, then you must find that the Plaintiff is a seaman for the purposes of "maintenance and cure." On the other hand, if you find that Plaintiff was not a seaman with regard to the other claims, then you may not find that the Plaintiff was a seaman entitled to "maintenance and cure."]

"Maintenance and cure" is the policy of providing to a seaman who is disabled by injury or illness while in the service of the ship medical care and treatment, and the means of maintaining one's self, during the period of convalescence.

A seaman is entitled to maintenance and cure even if the seaman is unable to establish that an injury was a result of any negligence on the part of the employer or an unseaworthy condition existing aboard the vessel. Generally speaking, in order to recover maintenance and cure, the Plaintiff need only show that an injury or illness occurred while the Plaintiff was in the service of the vessel on which the Plaintiff was employed as a seaman and that the injury or illness occurred without willful misbehavior by the Plaintiff. The injury or illness need not be work-related so long as it occurs while in the service of the ship. Neither maintenance nor cure may be reduced because of any negligence on the part of the seaman; and assumption of the risk is no defense to a claim for maintenance and cure.

"Maintenance" is defined as the cost of food and lodging, and transportation to and from a medical facility. However, a seaman is not entitled to maintenance for any period of time while admitted as an inpatient in any hospital because the cure provided by the employer through hospitalization includes the food and lodging of the seaman, and, therefore, the maintenance obligation of the employer is also discharged.

The "cure" to which a seaman may be entitled includes the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines and medical apparatus. However, the employer does not have a duty to provide cure payments for any period of time during which a seaman is hospitalized in a United States Marine Hospital, or in any other hospital at the employer's expense. With regard to the period of time covered by the claim, a seaman is entitled to receive maintenance and cure from the date of departure from the vessel until the seaman reaches the point of "maximum possible cure" under the circumstances, that is, the point at which no further improvement in the seaman's medical condition is to be reasonably expected. The obligation usually ends when qualified medical opinion is to the effect that maximum possible cure has been effected.

The owner is not an insurer that a cure will be effected. The date when a seaman resumes employment is one factor you may consider in deciding when the period, if any, during which a seaman may be entitled to maintenance and cure, ends. In a case in which the evidence warrants a finding that the seaman was forced by economic necessity to return to work prior to reaching maximum possible cure,

that fact may be taken into account in determining the date on which maintenance and cure should terminate.

It is important to note here that if you find that the Plaintiff is entitled to an award of damages under either the Jones Act or the unseaworthiness claims, and if you include either loss of wages or medical expenses in the damage award, then maintenance and cure cannot be awarded for the same period of time. In other words, there can be no double recovery for the Plaintiff. However, the Plaintiff may recover for any "willful or arbitrary" failure on the part of the employer to have paid maintenance and cure when it was due.

When the Defendant willfully and arbitrarily fails to pay maintenance or provide cure to a seaman up to the time that the seaman receives maximum cure, and such failure results in an aggravation of the seaman's injury, then the seaman may recover damages for prolongation or aggravation of the seaman's injury, pain and suffering, additional medical expenses incurred as a result of the failure to pay, and a reasonable attorney's fee and costs.

Therefore, in order to award additional damages to the Plaintiff for a willful failure of the shipowner to provide maintenance and cure, you must find:

First: That the Plaintiff was entitled to maintenance and cure;

Second: That it was not provided;

Third: That the Defendant willfully and arbitrarily failed to provide cure up to the time that the seaman reached maximum cure; and

Fourth: That such failure resulted in injury to the Plaintiff.

An employer has a duty to investigate a seaman's claim in good faith and with reasonable diligence. But, an employer is not obligated to pay maintenance and cure to a seaman just because the seaman claims an injury, and the employer has a right to contest the claim in good faith. Thus, an employer acts "willfully and arbitrarily" only when the employer acts without reason, or with callous disregard for the claim of the seaman. You may award damages for any failure of the employer to pay maintenance and cure to the Plaintiff only if, on the basis of all the facts and opportunities known to and available to the Defendant during the time in question, the refusal to pay maintenance and cure was arbitrary and capricious, or in callous disregard of the Plaintiff's claim.

[Finally, it is important to remember that the Plaintiff cannot recover attorney fees for the prosecution of either the Jones Act or the

unseaworthiness claims, but only for the prosecution of the maintenance and cure claim, if warranted.]

6.2
Jones Act - Unseaworthiness
Maintenance And Cure

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence?

1. That the Plaintiff was a "seaman" at the time of his [illness] [injury]?

Answer Yes or No _____

2. That the Defendant willfully and arbitrarily failed to provide maintenance and cure up to the time that the Plaintiff reached maximum cure:

Answer Yes or No _____

3. That the Plaintiff should be awarded the following damages:

[Enumerate the recoverable elements of damages] $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

7.1
Federal Employers Liability Act (FELA - 45 USC § 51)
General Instruction
(Comparative Negligence Defense)

In this case the Plaintiff's claims are asserted under the Federal Employers' Liability Act (FELA).

Under the Act every common carrier by railroad, while engaged in interstate commerce, is liable in damages to any of its employees who are injured as a result of the railroad's negligence. The Plaintiff claims, specifically, that the Defendant [describe the specific act(s) or omission(s) asserted as negligence on the part of the Defendant].

To prevail on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That at the time of the Plaintiff's injury, the Plaintiff was an employee of the Defendant performing duties in the course of that employment;

Second: That the Defendant was at such time a common carrier by railroad, engaged in interstate commerce;

Third: That the Defendant was "negligent" as claimed by the Plaintiff; and

Fourth: That such negligence was a "legal cause" of damage sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[In this case the parties have stipulated or agreed that the first two of these requirements have been satisfied. Accordingly, the issues for you to consider involve items three and four, that is, whether the Defendant, or any of its employees other than the Plaintiff, was "negligent" and, if so, whether such negligence was a "legal cause"of any damages sustained by the Plaintiff.]

Under the FELA it is the continuing duty of the Defendant to use reasonable care under the circumstances in furnishing the Plaintiff with a reasonably safe place in which to work. This does not mean that the Defendant is a guarantor of the Plaintiff's safety, and the mere fact that an accident happened, standing alone, does not require the conclusion that the accident was caused by anyone's negligence. The extent of the Defendant's duty is to exercise reasonable care under the circumstances to see that the place in which the work is to be performed is reasonably safe.

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use

under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from the evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damage suffered by the Plaintiff, you may find that such injury or damage was legally caused by the Defendant's negligence.

[In this case, the Plaintiff seeks to recover for emotional distress as an element of damages resulting from Defendant's conduct. In order to recover for the negligent infliction of emotional distress, a Plaintiff must establish:

First: That the Plaintiff sustained a physical impact as a result of the Defendant's negligent conduct, or that the Plaintiff was placed in an immediate risk of harm by the conduct; and

Second: That the Plaintiff exhibited some objective or verifiable manifestation of his or her emotional distress or injury.]

You are also instructed that negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the Plaintiff's claim under the FELA for negligence, then your verdict should be for the Defendant. If, however, a preponderance of the evidence does support the Plaintiff's claim, you will then consider the defense raised by the Defendant.

The Defendant contends that the Plaintiff was also negligent and that such negligence was a legal cause of the Plaintiff's own injury. Specifically, the Defendant claims [describe the specific act(s) or omission(s) asserted as negligence on the part of the Plaintiff]. This is a defensive claim and the burden of proving that claim, by a preponderance of the evidence, is upon the Defendant who must establish:

First: That the Plaintiff was also "negligent;" and

Second: That such negligence was a "legal cause" of the Plaintiff's own damage.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

The law requires you to compare any negligence you find on the part of both parties. So, if you find in favor of the Defendant on this defense, that will not prevent recovery by the Plaintiff. It will only reduce the amount of the Plaintiff's recovery. In other words, if you find that this accident was due partly to the fault of the Plaintiff, that the Plaintiff's own negligence was, for example, 50% responsible for the Plaintiff's own damage, then you would fill in that percentage as your finding on the special verdict form I will explain in a moment. Such a finding would not prevent the Plaintiff from recovering; the Court will merely reduce the Plaintiff's total damages by the percentage that you insert. Of course, by using the number 50% as an example, I do not mean to suggest to you any specific figure at all. If you find that the Plaintiff was negligent, you might find 1% or 99%.

If you find for the Plaintiff, you will then consider the issue of the Plaintiff's damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by

a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial

(b) Net lost wages and benefits in

the future [reduced to present value]

(c) Medical and hospital expenses incurred in the past [and likely to be incurred in the future]

(d) Physical and emotional pain and mental anguish

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

7.1
Federal Employer's Liability Act
(FELA - 45 USC § 51)
General Instruction (Comparative Negligence Defense)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant was negligent in the manner claimed by the Plaintiff and that such negligence was a legal cause of damage to the Plaintiff?

Answer Yes or No _____

[Note: If you answered No to Question No. 1 you need not answer any of the remaining questions.]

2. That the Plaintiff was also negligent in the manner claimed by the Defendant and that such negligence was a legal cause of the Plaintiff's own damage?

Answer Yes or No _____

3. If you answered "Yes" to Question Two, what proportion or percentage of the Plaintiff's damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

Answer in Terms of Percentages

The Defendant _____%

The Plaintiff _____%

[Note: The total of the percentages given in your answer should equal 100%.]

4. If you answered "Yes" to Question One, what sum of money do you find from a preponderance of the evidence to be the total amount of the Plaintiff's damages (without adjustment by application of any percentages you may have given in answer to Question Four)?

(a) Net lost wages and benefits to the date of trial $_____

(b) Net lost wages and benefits in the future [reduced to present value] $_____

(c) Medical and hospital expenses incurred in the past [and likely to be incurred in the future] $_____

(d) Mental and emotional humiliation or pain and anguish $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

See the Annotations and Comments following Federal Claims Instruction 6.1, supra, dealing with the Jones Act. (The Jones Act incorporates the FELA).

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

8.1
Patent Infringement
General Instruction
(With Defense Of Invalidity)

This is a patent infringement case. The Plaintiff claims that the Defendant infringed a United States Patent owned by the Plaintiff. [The Plaintiff also claims that the Defendant has induced and aided others in the infringement of the Plaintiff's patent.

Section 101 of Title 35 of the United States Code, a part of the patent law of the United States, provides that:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor (from the United States Patent Office).

Once a patent is issued, the owner of the patent has the right to exclude others from making, using, offering to sell or selling the patented invention throughout the United States, or importing into the United States any patented invention. [U. S. Patents based solely on applications filed prior to June 8, 1995 generally extend seventeen years from the date of issuance.] [U.S. Patents based on an application, including a continuing application, filed on or after June 8, 1995, generally have a term of twenty years measured from the filing date of the earliest application from which they can claim priority.] Thus, an "infringement" of a patent occurs whenever any person,

without the owner's permission, makes, uses, offers to sell, sells or imports the patented invention anywhere in the United States during the term of the patent.

The law requires that an application for a patent shall be in writing, and shall contain a specification that must state one or more "claims" particularly pointing out and distinctly describing the subject matter that the applicant regards as an invention. The claims define, in words, the exact limits or nature of the invention, and it is only the claims of the patent that can be infringed.

The "claims" of the patent that the Plaintiff alleges have been infringed by the Defendant are:

[Describe separately each claim the Plaintiff alleges to have been infringed]

As a matter of law, you are instructed that the meaning and scope of these claims are:

[Describe Court's construction of meaning and scope of claims]

The Plaintiff may prove its claim of infringement by demonstrating either: (1) that the Defendant's [process/product] literally infringes a claim contained in the patent, or (2) that the accused [process/product]

infringes one of the patent claims under the doctrine of equivalents, as I will explain in a moment.

In your deliberations, you should consider the issue of literal infringement first. A [process/product] literally infringes a claim of a patent when it contains the combination of each and every [step/element] of the invention as defined by the particular patent claim.

In making your determination, you must consider each claim separately, since proof of infringement of any one claim is sufficient to establish infringement of the patent.

In the case of an independent claim, that is, a claim that does not refer to any other claim of the patent, if you find that it has been proven by a preponderance of the evidence that the Defendant's [process/product] contains every [step/element] of a particular claim in the Plaintiff's patent, then the Defendant has literally infringed that claim. In contrast, a dependent claim directly refers to another claim by number, and must be interpreted as including all the elements of each claim or claims to which they directly or indirectly refer. In order to infringe on a dependent claim, all of the elements of the claims on which it depends must be found in the accused product or process. In sum, one who does not infringe on an independent claim cannot infringe

on a claim dependent on (and thus containing all the limitations of) that claim.

On the other hand, if you find that the Plaintiff has not proved by a preponderance of the evidence that the Defendant's [process/product] contains every [step/element] of a particular claim, the patent claim has not been literally infringed.

In those cases in which each and every [step/element] in the Defendant's [process/product] does not come within the literal words of the claims, infringement of the patent may still be found if you determine that the Defendant's [process/product] is substantially equivalent to the patent claim. This is called infringement under the "doctrine of equivalents." Under the doctrine, the Defendant's [process/product] infringes a patent claim if there is "equivalence" between the elements of the Defendant's [process/product] and the claimed elements of the patented invention - - that is, if the [steps/elements] of the Defendant's [process/product] perform substantially the same function in substantially the same way to produce substantially the same results as the [steps/elements] of the invention set forth in the claim. On the other hand, the Defendant's [process/product] does not infringe a patent claim under the doctrine of equivalents if it is so far changed in principle

that it performs the same function in a substantially different way as the [steps/elements] recited in the claim. In other words, for there to be an infringement under the doctrine of equivalents, you must determine that the Plaintiff has proven by a preponderance of the evidence the presence, in the Defendant's [process/product], of every [step/element] of the claim or its substantial equivalent. The doctrine of equivalents must be applied to individual [steps/elements] of the claim and not the invention as a whole. You should view the evidence from the perspective of a person of ordinary skill in the art. The test is objective, that is, whether a person of ordinary skill in the art would have considered the differences insubstantial on a [step by step] [element by element] basis.

In applying the doctrine of equivalents, the claims of the patent cannot be construed in a manner inconsistent with any limitations that were added during prosecution in the Patent Office to render the claims patentable. The doctrine of equivalents cannot be used to allow a claim as a whole to encompass what is the prior art. Equivalents must be proven on an element-by-element basis. The fact that an element of an accused device was known in the prior art is not a defense to infringement under the doctrine of equivalents.

You are also instructed that intent plays no role in the application of the doctrine of equivalents. Therefore, evidence of an alleged infringer's behavior or intent, such as intentional copying or intentional designing around a patent, or of independent experimentation, must not be considered in your determination of the applicability of the doctrine of equivalents.

In your deliberations on the issue of infringement, you are instructed not to interpret or construe the meaning or the scope of the claims except as I have instructed you. The burden of proof for the infringement claim is upon the Plaintiff.

If you find that the Plaintiff has failed to prove by a preponderance of the evidence that the Defendant infringed any of the claims listed above, either literally or under the doctrine of equivalents, you must find for the Defendant.

On the other hand, if you find that the Plaintiff has established by a preponderance of the evidence that any claim in the patent has been infringed, you must then consider the Defendant's allegation that the patent is invalid. There are several things or conditions that, if you find them to exist, will operate under the law to render a patent invalid even

though it was otherwise regularly issued by the Patent Office. I will explain in a moment what some of those things are.

You should first understand, however, that because a patent duly issued by the Patent Office is presumed to be valid (and each claim of a patent is presumed to be valid independently of the validity of the other claims), the Defendant has the burden of persuasion, that is, the burden of establishing by clear and convincing evidence that the Plaintiff's patent or any claim in the patent is not valid. In other words, the Defendant must come forward with something more than a preponderance of the evidence in order to overcome the presumption that the patent is valid. The presumption of validity is statutory, and it applies to each claim. When the record before the examiners in the Patent and Trademark Office in Washington, called the "file wrapper," discloses that the examiner considered certain information or documents during the prosecution of the application for the patent, there is a presumption that the examiner found patentable differences between that information or those documents he considered and the invention claimed in the patent application.

There are several circumstances that will make a patent invalid. Under Section 102 of Title 35 of the United States Code, a person is not

entitled to a patent if [(a) the claimed invention was publicly known or used by others in the United States, or patented or described in a printed publication in the United States or in a foreign country, before the invention thereof by the applicant;] or [(b) the claimed invention was patented or described in a printed publication in the United States or a foreign country or was in public use or on sale in the United States, more than one year prior to the date of the application for patent in the United States;] or [(c) the applicant has abandoned the claimed invention;] or [(d) the applicant or the applicant's representative filed a foreign patent application on the claimed invention more than 12 months before the United States application was filed and the foreign patent was issued before the United States application was filed; or [(e) the claimed invention was described in either an application for a patent, or a patent granted on an application for patent by another filed in the United States before the invention by the applicant;] or [(f) the applicant did not invent the subject matter sought to be patented; or [(g) before the applicant's invention, the claimed invention was made in the United States by another who had not abandoned, suppressed or concealed it.]

In addition, under Section 103 of Title 35 of the United States Code, even though the claimed invention is not identically disclosed or described as set forth in Section 102, a patent may not be obtained if the differences between the subject matter sought to be patented and the "prior art" are such that the subject matter as a whole would have been obvious, at the time the claimed invention was made, to a person having ordinary skill in that field.

Prior art includes all of the knowledge, acts, descriptions, and patents which I have just described to you, such as public knowledge and use by others in this country, other patents, and also descriptions in printed publications in the United States or in a foreign country. However, the patentability of an invention does not depend on how the invention was made.

The [process/product] recited by a claim is invalid if it is "anticipated" by the prior art. By statute, for a claim to have been "anticipated," first, all of the claim elements must be found in a single prior art reference, and second, the elements in the reference must be arranged as in the claim. Similarly, if you find that the differences between the [process/product] described in any claim in the Plaintiff's patent and what is taught by the prior art would have been obvious to

a person skilled in the art at the time the claimed invention was made, then the product is said to be “obvious” from the prior art, and the claim of the patent is invalid under Section 103.

The Plaintiff has introduced secondary evidence to refute the obviousness of the patent by showing that [the claimed invention filled a long felt need] [others failed in their attempts to develop it] [it has enjoyed commercial success] [others have entered into consent decrees and have obtained licenses to manufacture the patented device] [the Defendant allegedly copied the Plaintiff’s [process/product]. Such evidence may be considered in determining whether the claimed invention would have been obvious, but it is entitled to weight in making that determination only if it is related to features of the [process/product] claimed in the patent rather than to other considerations such as advertising, promotion, or salesmanship [or, in the case of the prior licenses, the cost of litigation and the like]].

If you find that the Defendant has infringed any of the claims of the Plaintiff’s patent, and if you find that those claims are valid in keeping with these instructions and the facts as you find them from the evidence in this case, you will next consider the issue of damages to be awarded to the Plaintiff.

If you find there has been an infringement, Section 284 of Title 35 of the United States Code provides that the owner of the patent is entitled to an award of damages adequate to put the Plaintiff in the financial position it would have been in had the infringement not occurred, but in no event may the award of damages be less than a reasonable royalty for the use made of the invention by the infringer.

You must calculate damages from the moment of infringement, if all of the products manufactured and sold by the Plaintiff or by persons acting under the Plaintiff were covered by the patent and were properly marked, that is, the products contained the number of the patent from the time when the Plaintiff obtained the patent. If not, you should calculate the damages from the time the Defendant was first notified of the infringement. Filing of an action for infringement is such notice. If the products were not marked with their patent number, then you should not award any damages for the period of time before the Defendant had notice of the infringement.

On the other hand, when the Defendant has actual knowledge of the Plaintiff's patent and, in spite of such knowledge, willfully and wantonly makes, uses or sells the patented product without the permission of the Plaintiff and with a disregard for the rights of the

Plaintiff, then, in that event, you may find that the Defendant is guilty of willful infringement.

8.1
Patent Infringement
General Instruction
(With Defense of Invalidity)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant's product literally infringes a claim contained in the patent?

Answer Yes or No _____

2. That the Defendant's product infringes, under the "doctrine of equivalents," a claim contained in the patent?

Answer Yes or No _____

[Note: If you answered No to both of the preceding questions you need not answer the remaining questions.]

3. That the Plaintiff's patent is invalid because [state the basis of the Defendant's claim of invalidity]?

Answer Yes or No _____

4. If you answered "No" to Question No. 3, that the Plaintiff should be awarded $_____ in damages.

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

This instruction in the 1990 edition stated that the specifications and drawings submitted as a part of the application could be used to explain the meaning of the words used in the claims. The Supreme Court has since held that the meaning and scope of claims are questions of law for the court. See Markman v. Westview Instruments, Inc., 517 U.S. 370, 390, 116 S.Ct. 1384, 1396, 134 L.Ed.2d 577 (1996).

Athletic Alternatives, Inc. v. Prince Mfg., Inc., 73 F.3d 1573, 1581 (Fed. Cir. 1996) (the test under the doctrine of equivalents is an objective one "from the perspective of one of ordinary skill in the relevant art.").

Atlanta Motoring Accessories, Inc. v. Saratoga Technologies, Inc., 33 F.3d 1362, 1366-67 (Fed. Cir. 1994) (when two devices perform the same function in substantially different ways, the doctrine of equivalents is not applied, and the patent is not infringed); Southern States Equip. Co. v. USCO Power Equip. Co., 209 F.2d 111 (5th Cir. 1953) (same).

The Supreme Court has held that evidence of intent, such as copying, designing around a patent, or independent experimentation, "plays no role in the application of the doctrine of equivalents." Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17, 36, 117 S.Ct. 1040, 1052, 137 L.Ed.2d 146 (1997).

The time period for which a patentee can collect damages for patent infringement varies from case to case, and usually is not for the period from the issuance of the patent until trial. Regardless of how long ago the patent issued and how long the infringement has continued, the patentee cannot collect any damages for infringement more than six years prior to the filing of the complaint. See 35 USC § 286. In addition, U. S. Patent applications are now published in most cases within

18 months of filing. See 35 USC § 122(b). In some circumstances the patentee can collect reasonable royalty damages for the period before issuance of the patent and after publication. See 35 USC § 154(d).

In 1994, 35 USC § 271(a) was amended to include, as infringing activities, "offers to sell" and "importing." In addition, statutory exceptions exist to the traditional territorial concept of infringement occurring in the U. S., including, for a product patent, making certain components of the patented invention in the U. S. and exporting them so that they will be combined outside the U. S. into the claimed invention, and for a method patent, using the patented method outside the U. S. to make a product which is shipped back into the U. S. See 35 USC § 271(f)-(g).

The time period for which a U. S. Patent is valid is complex and requires a careful case-by-case analysis. there are exceptions to the rules described in the instruction above that govern the length of the patent's validity. First, where an application was filed prior to June 8, 1995, the term of the patent is actually seventeen years from the date of issuance or twenty years from the original filing date, whichever is longer. Second, transitional provisions in place at the time of the amendment of the rule could permit a patent to have a 17 year term from issuance, even if based on an application filed after June 8, 1995.

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 70 S.Ct. 854, 94 L.Ed. 1097 (1950) set forth the test for the doctrine of equivalents that appeared in the last version of these instructions, which included overall equivalence as a factor to be considered. However, in Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co., 520 U.S. 17, 29, 117 S.Ct. 1040, 1049, 137 L.Ed.2d 146 (1997), the Supreme Court clarified the test for equivalence by holding that it must be considered on an element-by-element basis, and not based on the invention as a whole.

The measurement of damages in patent cases is quite case-specific. Three common forms of damages in patent cases are for reasonable royalty (mentioned briefly in the instruction), price erosion, and lost profits. First, a reasonable royalty is the amount that the owner of a patent would accept, assuming a willingness to license its use, from a person who wants to obtain a license to use the claimed invention, neither of whom is acting under financial distress or other compulsion to enter into the agreement. To calculate such damages, the jury must determine, from a preponderance of the evidence, what would have been a reasonable royalty to be paid for a license to use the claimed invention during the period of the infringement. See 35 USC § 284; Georgia-Pacific Corp. v. United States Plywood Corp., 318 F.Supp. 1116, 1120 (S.D.N.Y. 1970), modified and aff'd sub nom, Georgia-Pacific Corp. v. U. S. Plywood-Champion Papers, Inc., 446 F.2d 295 (2nd Cir.).

The law does not require mathematical precision in proof of lost profits, but only proof to a reasonable, but not absolute, certainty. To recover lost profits for some of the infringing sales, the Plaintiff must show (1) that the Plaintiff would have made the sale but for the infringement, i.e., that causation existed; and (2) proper

evidence of the computation of the loss of profits. In essence, the jury must determine what the customers who purchased the infringing product would have done if the infringing product did not exist. The Plaintiff must only show a reasonable probability that it would have made the sales but for the infringement; it need not negate all possibility that a purchaser might have bought a different product or foregone the purchase totally. See generally King Instrument Corp. v. Otari Corp., 767 F.2d 853, 856-57 (Fed. Cir. 1985); Paper Converting Machine Co. v. Magna-Graphics Corp., 745 F.2d 11, 22 (Fed. Cir. 1984); Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc., 633 F.Supp. 1047, 1053 (D. Del. 1986).

The jury may infer that the Plaintiff has proven its lost profits if it finds that the Plaintiff has proven the following factors by a preponderance of the evidence:

(1) that there was a demand for the patented product;
(2) that there were no acceptable non-infringing substitutes;
(3) that the Plaintiff had the manufacturing and marketing capacity to make the infringing sales actually made by the Defendant; and
(4) the amount that the Plaintiff would have made had the Defendant not infringed.

See Panduit Corp. v. Stahlin Bros. Fibre Works, 575 F.2d 1152, 1156 (6th Cir. 1978); State Indus., Inc. v. Mor-Flo Indus., Inc., 883 F.2d 1573, 1577-78 (Fed. Cir. 1989).

Finally, a Plaintiff may be entitled to recover additional damages if it can show to a reasonable probability that, if there had been no infringement, the Plaintiff would have been able to charge higher prices for its patented products. In that case, the jury can also award as additional damages the amount represented by the difference between the amount of profits that the patent owner would have made by selling its product at the higher price and the amount of profits the patent owner actually charged for its patented product. This type of damage is known as "price erosion damage," and is in addition to any lost profits damages from lost sales. See Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056 (Fed. Cir. 1983); Minnesota Min. & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc., 976 F.2d 1559 (Fed. Cir. 1992), Micro Motion, Inc. v. Exac Corp., 761 F.Supp. 1420, 1430-34 (N.D.Cal. 1991).

See also Federal Circuit Bar Association Model Patent Jury Instructions (2002), http://fedcirbar.org.

9.1
Eminent Domain
General Instruction
(Including Partial Taking Instructions)

This action is brought by the United States in the exercise of the Federal Government's power of eminent domain. It is sometimes called a condemnation proceeding.

The Government has the right and the power under the Constitution to take private property for public purposes. That power is essential to the independence and operation of the Government. Otherwise, any landowner could delay or even prevent public improvements, or could effectively force payment of a price exceeding the fair market value of the property taken.

The Government's exercise of the power of eminent domain is always subject, however, to the requirement of the Fifth Amendment to the Constitution that payment of "just compensation" shall be made to the owner for all estates or interests in property so taken. The term "just compensation" means the "fair market value" of the property on the date of taking.

Because the landowner has declined to accept the Government's opinion concerning the fair market value of the property, it is the landowner's burden to prove, by a preponderance of the evidence, that

the fair market value of the property was more than the Government has offered.

Accordingly it will be your responsibility to determine, based upon a preponderance of all of the evidence submitted by both sides, what the fair market value of the property was on the date of taking.

"Fair market value" means the price in cash, or its equivalent, that the property would have brought at the time of taking, considering its highest and most profitable use, if then offered for sale in the open market with a reasonable time allowed to find a purchaser.

In other words, fair market value means the amount a willing buyer would have paid a willing seller in an arms-length transaction with both parties being fully informed concerning all of the advantages and disadvantages of the property, and with neither acting under any compulsion to buy or sell.

In arriving at your decision concerning fair market value, you should take into account all factors that could fairly be suggested by the seller to increase the price paid, and all counter-arguments that the buyer could fairly make to reduce the price.

On some occasions public knowledge of the fact that the Government plans to take certain property may either increase or

decrease the fair market value of the property as of the time of the taking.

So, in deciding upon the fair market value at the time of the taking you should not consider the fact that the Government had plans to take the land. Instead you should fix the fair market value on the date of the taking without regard to any threat of a taking.

[When, as in this case, the Government takes only a part of the owner's property [or a partial interest in his property] the method by which to determine the just compensation to be paid to the property owner is to compare the fair market value of the property before and after the taking; that is, to subtract the fair market value of what remains, after the taking, from the fair market value of the whole, immediately before the taking, the difference being the fair market value of the part that was taken.]

[In making that calculation, however, you must consider "severance damages," if any, as well as "enhancement" in value, if any. Thus, when the property condemned constitutes only a part of an owner's interest, the owner is entitled to just compensation, not only for the fair market value of the interest actually taken, but also an amount equal to any reduction of the fair market value of the owner's interest in

the land which was not taken, due to the severance or separation of the interest which was taken. Such additional compensation is commonly known as "severance damage."]

[On the other hand, the Government contends that the portion of the Defendant's land that was not taken in this proceeding benefitted through enhancement or increase in value because of the public improvement involved. Two types of benefits may result from a public improvement, namely, general benefits and special benefits. General benefits are those that result not only to the property of the Defendant landowner, but also to the property in the community generally. Special benefits are those that accrue specially to a particular parcel or parcels of land as distinguished from other property in general.]

[You may not consider any increase in value because of general benefits, but you should consider any increase due to special benefits, that is the increase in value, if any, caused by the improvement, to that portion of the Defendant's land that was not taken by the Government in this proceeding.]

[Accordingly, in determining the fair market value of what remains after the taking (to be deducted from the fair market value of the whole property before the taking, the difference being the measure of the

Defendant's just compensation), you should keep in mind that the valuation after the taking should include and reflect severance damages, if any, or special benefits, if any, according to your determination from the evidence as to whether such damage or such benefits occurred and, if so, in what amounts.]

The law requires, and the judgment to be entered by the Court upon your verdict will provide, payment of interest by the Government to compensate the landowner for any delay in payment caused by the Government, after the date of taking. So, you are not to consider any delay in payment in arriving at your verdict, and you are not to include in your verdict any interest or other compensation for the delay.

VERDICT

We, the Jury, find from a preponderance of the evidence that the fair market value of the subject property on the date of taking was $_____.

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

There is authority for the proposition that the burden of proof is upon the landowner, usually citing to United States ex rel. Tennessee Valley Auth. v. Powelson, 319 U.S. 266, 273-74, 63 S.Ct. 1047, 1051-52, 87 L.Ed. 1390 (1943).

10.1
Tax Refund Suits
Reasonable Compensation to
Stockholder - Employee

The dispute in this case is whether the Plaintiff may deduct on its federal income tax returns for the years involved certain amounts that it says it paid as compensation.

The Plaintiff is entitled to certain deductions, of course, among which are ordinary and necessary business expenses including salaries or other compensation paid for personal services actually rendered by its employees, including an employee who is also a stockholder. On the other hand, a corporation is not entitled to a deduction for dividends paid to its shareholders. Dividends paid by a corporation to its shareholders are a distribution of profits, not deductible expenses.

The Commissioner of Internal Revenue has the duty, therefore, to disallow that portion of any deduction for a salary or compensation that the Commissioner believes is either (1) not compensation at all or (2) unreasonable in amount. One purpose of this requirement is to prevent a corporation from improperly reducing its taxes by distributing its profits to its shareholders and calling it something else, such as salaries or compensation.

So, in this case, the Defendant must establish by a preponderance of the evidence that the subject payments should be treated as a distribution of earnings, and not as compensation for services rendered, because the amount of the payments were unreasonable when compared with the value of the personal services actually rendered.

Ordinarily, a reasonable compensation is the amount that is paid for like services, by like enterprises or businesses under like circumstances, to a qualified person, whether that person is a shareholder of the corporation or not. The fact that the payments have been labeled as salary, compensation, or bonus does not matter one way or the other.

In making your decision as to what amount is reasonable compensation in this case you may consider all of the following factors:

1. The size, nature and complexity of the business carried on by the Plaintiff.

2. The quality and quantity of the services actually rendered by the employee, including the difficulty or simplicity of the work and the responsibility assumed by the employee.

3. The professional and business qualifications, experience, and background of the employee, including any special training or formal education the employee had.

4. Whether or not all of the employee's time was devoted to the business, or whether time was devoted to other businesses and time-consuming interests and activities.

5. The salaries paid to others employed by the Plaintiff and whether and how much stock they owned, if any.

6. What a comparable business concern pays for comparable services.

7. The relationship, if any, between the amounts paid and the employee's share holdings in the Plaintiff.

8. The dividend history of the Plaintiff.

9. Whether the amount paid was set or adjusted after the profits for the year were known.

10. The extent of control that the employee or a member of the employee's family had over the corporation in setting the amount of the payment.

11. Whether the person or persons setting the amount of the payment did so with a view of avoiding payment of corporate taxes on such amount.

No one of those factors is controlling, of course, and your decision should be made after consideration of all the circumstances as shown by all of the evidence in this case.

VERDICT

[A general verdict form will usually suffice]

ANNOTATIONS AND COMMENTS

The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, effective July 22, 1998, amended 26 USC § 7491 to provide that in any court proceeding, and subject to certain stated conditions, when "a taxpayer introduces credible evidence with respect to any factual issue . . . the Secretary shall have the burden of proof with respect to such issue." 26 USC § 7491(a)(1). This instruction has been formulated on the assumption that the preliminary burden shifting decision as to whether "credible evidence" has been produced by the Plaintiff is a decision that will be made by the Court, not the jury. Otherwise, the Court will have entered judgment against the Plaintiff as a matter of law pursuant to Federal Rule of Civil Procedure 50. In terms of trial procedure, the Plaintiff should probably be required to go forward first in making opening statement and presenting evidence. Then, if the Plaintiff's case survives a Rule 50 motion, the Defendant will take on the burden of persuasion and should proceed with the evidence. The Defendant, arguably, should also gain the right to open and close the jury arguments, and the jury should then be instructed, simply, that the Defendant has the burden of proof.

10.2
Tax Refund Suits
Debt vs. Equity

The question you must decide in this case is whether the advances made to the Plaintiff corporation by its stockholders created a bona fide indebtedness, that is, were true loans, or whether they were made in fact as investments in the capital of the corporation.

The difference between a loan and an investment is important because under the provisions of the Internal Revenue Code, a corporation may deduct from its gross income, for income tax purposes, any amounts paid by it as interest on money that it has borrowed, but it may not deduct other payments such as a distribution of dividends made by it to its shareholders. The fact that the amount paid is taxable in either event, to the people who received the payment, does not matter.

In this case the Commissioner of Internal Revenue took the position that the advances made by the stockholders to the Plaintiff were investments in the capital of the corporation, and, therefore, that the payments made by the Plaintiff to its stockholders represented dividend distributions rather than interest payments. As a result, the

deductions claimed by the Plaintiff for the payment of this amount as interest were disallowed.

The Defendant has the burden of proving, by a preponderance of the evidence, that the Commissioner's determination was correct.

Of course, a person may be an investor and a creditor in the same corporation at the same time, but, as I shall explain later, status as one or the other is not necessarily determined by the label that is attached to the transaction or series of transactions.

An investment in capital is an advance made to a corporation by a stockholder or stockholders as an investment for the purpose of making a profit dependent upon and measured by the future success of the business. In other words, the stockholder making the advance intends to make an investment and take the risks of the venture. Repayment is not agreed to by the corporation and the investor anticipates a return out of future profits of the enterprise. A return is by no means certain, however, since an investment in capital is similar to any other investment that is dependent upon future profits and earnings.

A loan is an advance of money pursuant to an agreement, either express or implied, that the money will be repaid at some future date. The agreement to repay must be absolute, that is, payable in any event.

Of course, the lender takes the risk that the corporation may not be able to repay, but the borrower's legal obligation to repay continues to exist without regard to financial ability or corporate profits and earnings.

In general, the essential difference between a stockholder who makes an investment in capital, and a creditor who merely loans money to the corporation, is that the stockholder's intention is to embark upon the corporate venture as one of the owners, taking the risks of loss involved so as to enjoy the chances of profit; whereas the creditor, on the other hand, does not intend to be an owner or to take such risks so far as they may be avoided, and intends merely to lend money to others who intend to take the risk.

There is no single factor or test to be applied in making the decision of whether advances by stockholders to a corporation should be considered as loans or investments in capital. You must consider all of the facts of the case; and you must consider the true substance of the transaction, not its form. Names and labels are not determinative -- the fact that the advances are called loans or take the form of enforceable legal obligations under state law is not controlling. The substance, and not the form, is the important thing. A transaction must be examined, for income tax purposes, in terms of what was intended

to be accomplished and what was actually accomplished, not from the names or titles or forms used by the parties.

Thus, while no single factor should be regarded as decisive, there are a number of things you may consider.

One factor you may consider is the presence or absence of a maturity date. The presence of a fixed maturity date indicates a fixed obligation to repay, and is a characteristic of a debt obligation. On the other hand, the absence of a fixed maturity date might indicate that repayment was in some way tied to the fortunes of the business, and would be indicative of an equity advance.

A related consideration is whether there was an expectation of payment at maturity. If there was such an expectation, that would be an indication of the existence of a debt. On the other hand, if there is no good expectation of payment at maturity, or if there is an unreasonably postponed due date on the note representing the advance, then that would be an indication that the advance was intended to be an investment.

Another factor for you to consider is whether the advances made by the stockholders were used for the purpose of buying capital assets [such as machinery] that are essential to the long-range conduct of the

business, or whether the advances were merely for current operating expenses. If the advances were for current operating expenses, this might indicate that they were intended to be a loan. If the advances made by the shareholders were made to purchase assets essential to the long-range conduct of the business, this might indicate an investment in capital rather than a loan.

If the corporation established a sinking fund (that is, a fund in which money is accumulated to permit a loan to be paid off when it becomes due), did not have the notes of the stockholder subordinated to other indebtedness, and never prevailed upon its stockholders to postpone or forego payments as they became due of amounts that they termed principal, or interest, this would indicate that there was a good expectation of payment at maturity - - that the transaction was a true loan. On the other hand, if the corporation did not establish a sinking fund, did have its stockholders' notes subordinated to other creditors, and did have its stockholders postpone the payments required by the notes, this would indicate that there was no good expectation of payment at maturity - - that the transaction was an investment.

Another factor that you may consider is the source of the payments. If repayment is possible only out of corporate earnings, the

transaction has the appearance of a contribution of equity capital. If, however, repayment is not dependent upon earnings, the transaction reflects a loan to the corporation.

Another factor that you may consider is the right to enforce repayment. If there is a definite obligation to repay the advance, then this is an indication of the existence of a debt.

Another factor that you may consider is an increase in participation in management. If the contributors were granted an increased voting power or participation in the affairs of the corporation by virtue of the advance, this would indicate that the advance was intended to be an investment. If, on the other hand, the contributors were not granted any increased voting power or participation in the corporation's affairs by virtue of the advance, this would indicate the existence of a debt.

Another factor that you may consider is how other creditors were treated by the corporation. If they were paid on a date certain, upon maturity of the corporation's obligation to them, but advances to the corporation by its stockholders were not so paid, this indicates that the advances by the stockholders were capital investments, and not true indebtedness.

Another factor that you may consider is whether there was "thin" or inadequate capitalization. Thin capitalization is evidence of a capital contribution where (1) the debt to equity ratio was initially high, (2) the parties realized the likelihood that it would go higher, and (3) substantial portions of these funds were used for the purpose of capital assets and for meeting expenses needed to commence operations.

As specifically concerns the debt to equity ratio, you should keep in mind that if the amount of the debt is much higher, or several times higher, than the amount of capital stock, this would tend to indicate that the advances in question were capital investments. If the amount of debt is more nearly equal to, or is less than, the amount of capital stock, this would tend to indicate that the advances represented true indebtedness.

Another factor that you should keep in mind is that if the corporation makes its interest payments but does not pay cash dividends, although it has earnings available for this purpose, this is a factor that may indicate that the advances are capital investment rather than debt. On the other hand, payment of dividends under such circumstances may indicate that the advances are true loans. Also, if the corporation makes so called "interest" payments that are paid only

when profits are available, this would indicate a capital investment; if interest payments are made regularly, whether profits are available or not, a true loan is indicated.

Another factor that you may consider is the identity of interests between creditor and stockholder. If advances are made by stockholders in proportion to their respective stock ownership, an equity capital contribution is indicated. A sharply disproportionate ratio between a stockholder's percentage interest in stock and debt is, however, strongly indicative that the debt is bona fide.

Another factor that you may consider is the ability of the corporation to obtain loans from outside lending institutions. If a corporation is able to borrow funds from outside sources at the time an advance is made, the transaction has the appearance of a bona fide indebtedness. If no reasonable creditor would have loaned funds to the corporation at the time of the advance, an inference arises that a reasonable shareholder would likewise not so act, and the transaction has the appearance of an investment in capital.

As stated before, no single factor or consideration is controlling; your decision should be made on the basis of all the evidence in the case.

VERDICT

[A general verdict form will usually suffice]

ANNOTATIONS AND COMMENTS

See the Annotations and Comments following Federal Claims Instruction 10.1, supra.

In Mixon v. United States, 464 F.2d 394 (5th Cir. 1972) and In re Lane, 742 F.2d 1311 (11th Cir. 1984), the Court of Appeals discusses the various factors bearing upon the debt/equity issue as explained in this instruction. The Court also stated that "[t]his evaluation presents primarily a question of law . . . " Mixon, 464 F.2d at 402; Lane, 742 F.2d at 1315. In both cases, however, the issue had apparently been presented to the district court on a stipulated record without a demand for jury trial, and the quoted remark of the Court of Appeals was made in the context of identifying the standard of review on appeal. It is the belief of the Committee, therefore, that the debt/equity issue could still present a question for the jury in a proper case where a demand for jury trial is made and the operative facts are not stipulated by the parties or resolved by the court on summary judgment.

10.3
Tax Refund Suits
Employee vs. Independent Contractor

The sole issue for you to decide in this case is whether, during the time in question, the _____ were employees or independent contractors.

Most of you are familiar with the law concerning the withholding of federal income taxes from wages paid to an employee by an employer. The law requires that every employer making payments of wages to an employee shall deduct and withhold from the amount of the gross wages paid a certain amount of tax that is then paid by the employer to the Federal Government for the employee's account as payment, in whole or in part, of the employee's income tax obligation.

In the event an employer fails to withhold the necessary taxes from the employee's wages, the employer is personally required to pay the amount that should have been withheld.

The Plaintiff contends that it is not liable for the amount it has paid in this case, and is entitled to a refund on the ground that the _____ _____ were not its employees, but were, instead, independent contractors. In other words, if they were not the Plaintiff's employees, the Plaintiff is entitled to recover the money it paid. On the other hand,

if they were employees of the Plaintiff, then it is not entitled to the money it seeks to recover in this case. The Plaintiff has the burden of proof on this issue and must establish by a preponderance of the evidence that the _____ were employees of the Plaintiff, not independent contractors. The titles or labels used by the parties are not controlling.

Some factors that would indicate that a worker is an employee include: (1) the worker receives on the job instructions from the employer; (2) the worker is trained by the employer; (3) the worker's services are integrated into the employer's business; (4) the worker's services are rendered personally; (5) the worker's relationship with the employer is a continuing relationship; (6) the worker has set hours of work (7) the worker's full-time employment is mandatory; (8) the worker works on the employer's premises; (9) the worker has a set order of tasks; (10) the worker provides oral or written reports to the employer; (11) the worker is paid by the hour, week or month; and (12) the worker may be discharged for reasons other than nonperformance.

Factors that would indicate independent contractor status include: (1) the worker's right to hire, supervise and pay assistants; (2) the worker pays his own business and/or travel expenses; (3) the worker

furnishes his own tools; (4) the worker has significant investment in his business operations; (5) the worker realizes a profit or loss from his work; (6) the worker has the right to work for more than one firm at a time; (7) the worker has the right to make his services available to the general public; and (8) the worker has the right to terminate his relationship with Plaintiff without incurring liability.

Although no one factor is decisive on its own, collectively all of these factors define the extent of the employer's control or lack of control over the time and manner in which a worker performs. The question of an employer's control or lack of control over a worker is fundamental in establishing that worker's status as employee or independent contractor.

[If you determine that the _____ were employees and not independent contractors, you must then decide whether the Plaintiff had a reasonable basis for not treating the _____ as employees. The law provides that under certain circumstances an employer may still treat workers as independent contractors even though those workers meet the definition of an employee. In this case, the Plaintiff contends that it falls within one of those exceptions. To prevail on this issue, the Plaintiff must prove by a preponderance of the evidence: (1) that all

federal tax returns filed by the Plaintiff consistently treated _____ as independent contractors; and (2) that the Plaintiff reasonably relied on [judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer.] [a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment, for employment tax purposes, of the individuals holding positions substantially similar to the position held by the _____] [long-standing, recognized practice of a significant segment of the industry in which the _____ were engaged] in deciding to treat the _____ as independent contractors].

10.3
Tax Refund Suits
Employee vs. Independent Contractor

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the _____ were independent contractors and not employees of the Plaintiff:

Answer Yes or No _____

[Note: If you answered Yes to Question No. 1 you need not answer the remaining question.]

2. That the Plaintiff had a reasonable basis for not treating the _____ as employees because all of the Plaintiff's tax returns consistently treated the _____ as independent contractors and the Plaintiff reasonably relied upon [judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer] [a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment, for employment tax purposes, of the individuals holding positions substantially similar to the position held by the _____] [long standing, recognized practice of a significant segment of the industry in which the _____]?

Answer Yes or No _____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

26 USC § 7491(a)(1), as amended by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L.105-206 (see Annotations and Comments following

Federal Claims Instruction 10.1, supra) only applies in Subtitle A (income tax) and Subtitle B (estate and gift tax) cases. Thus, the taxpayer retains the burden of proof in Subtitle C (employment tax) cases.

See Hosp. Res. Personnel, Inc. v. United States, 68 F.3d 421 (11th Cir. 1995) (discussing factors to consider in distinguishing employers from independent contractors).

See also 26 USC § 3401 regarding the "safe haven" provisions referred to in the last paragraph of the instruction.

10.4
Tax Refund Suits
Business Loss vs. Hobby Loss

The controversy in this case concerns the deductibility of expenses involved in the operation of _____, which was owned by the Plaintiff. The Plaintiff contends that _____ was being operated as a business for profit and that [he] [she] was therefore entitled to deduct on the Plaintiff's income tax returns for the years in issue the losses sustained in the operation of that business. The Government contends that _____ was not really a true business venture but was operated as a hobby for the personal pleasure, enjoyment and prestige of the Plaintiff and the Plaintiff's family; that the Plaintiff did not have a true profit motive in operating the _____; and that, as a consequence, the Plaintiff is not entitled to deduct from the Plaintiff's other income the losses that resulted from operating _____.

The Government has the burden of proof on this issue and must persuade you, by a preponderance of the evidence, of the correctness of its position.

The Internal Revenue Code allows a taxpayer to deduct all of the ordinary and necessary expenses paid or incurred during a taxable year

in carrying on a trade or business. Moreover, if a loss is sustained during a particular year, that loss may be deducted from income derived from other sources, such as the Plaintiff has done here. The key words in this case are the words "trade or business." If expenses or losses occur in a trade or business, they are deductible. On the other hand, expenses or losses are not deductible if a person is engaged in an activity simply for pleasure as a hobby or for recreation or social prestige. It is only when the activity is entered into with the bona fide expectation of making a profit that it may be considered as a trade or business.

In order to constitute a business, the activity usually must be carried on regularly and continuously, over a period of time. Generally, the person engaged in such activity must be regularly engaged in selling goods or services, and regularly devoting time and attention to such activity. However, it need not be the taxpayer's only or even a principal occupation. It may be a sideline, so long as it occupies the time, attention and labor of the person for the purpose of profit, not as a mere recreation or hobby. In this regard you may consider the Plaintiff's regular occupation and the amount of income derived from that occupation. You may also compare the character of the Plaintiff's

regular occupation with the size and character of the activity in question in this case and the time expended on each.

The fact that the Plaintiff's activities were conducted in the face of serious losses, standing alone, does not necessarily mean that those activities were for the Plaintiff's personal pleasure, provided the Plaintiff had a profit motive.

Similarly, if the taxpayer sincerely and in good faith hopes and expects to make a profit, that is sufficient despite the fact that others may believe that there is no reasonable expectation of such profit.

In determining whether the Plaintiff intended to engage in the activity for profit, no one factor is controlling. The considerations I have mentioned are designed solely to guide you and assist you in evaluating and weighing the evidence presented.

[You must determine separately for each of the years involved whether the activity here in question was a bona fide trade or business for profit. It may be a business one year and not the next, or vice versa. However, the fact that the activity was or was not a business in a year prior or subsequent to the years in question is a relevant fact.]

VERDICT

[A general [verdict form will usually suffice]

ANNOTATIONS AND COMMENTS

See the Annotations and Comments following Federal Claims Instruction 10.1, supra.

10.5
Tax Refund Suits
Real Estate Held Primarily For Sale

In this case the Plaintiff claims to be entitled to treat the gains or profits realized from the sale of the properties in question as capital gain, subject to the lower capital gain tax rate. The Government contends that the gain should be taxed at the higher tax rates applicable to ordinary income.

You need not concern yourselves, however, with the amount of gain realized by the Plaintiff on the sale of these properties, or with the dollar amount of the taxes to be paid as a result of these gains. What you must decide is whether or not the Plaintiff is entitled to treat any gain from the sale of the properties in question as capital gain.

Basically, the purpose of the capital gains provisions of the Internal Revenue Code is to attract the investment of capital in the economy thereby stimulating commercial activity and creating new jobs. This is accomplished by granting preferential tax treatment in situations where the gain or profit involved in a sale of property is the result of an increase in the value of property while it was being held for investment over a period of time. Since these capital gains provisions are

exceptions to the normal tax requirements of the Code, they do not apply to the profits arising from the everyday operation of a business.

In order for the Plaintiff to qualify for capital gain tax treatment, the law requires (1) that the Plaintiff held each of the parcels of property for more than one year prior to sale; and (2) that the Plaintiff held the properties in question as an investment and not primarily as inventory or in the nature of stock in trade for sale to customers in the ordinary course of a trade or business.

The Government has the burden of proof on this issue and must persuade you, by a preponderance of the evidence, of the correctness of its position.

In this case the parties agree that the properties in question were held by the Plaintiff for more than one year prior to sale.

The only question that you must decide is whether or not, at the time of sale, the Plaintiff was holding the properties in question as an investment or primarily as in the nature of stock in trade for sale to customers in the ordinary course of a trade or business. The word "primarily" as I have just used it means "of first importance" or "principally."

In making that decision, you must carefully consider the circumstances surrounding the Plaintiff's ownership and sale of these properties. While the purpose for which the property was originally acquired is entitled to some weight, the ultimate question is the purpose for which the property was held by the Plaintiff at the time of sale. Property that was originally acquired for investment purposes as a capital asset may, while being held, change in character to property held for sale to customers in the ordinary course of a trade or business. If the Plaintiff held the property for investment in the hope that it would appreciate in value without any further activity on the Plaintiff's part, this would indicate that the property was a capital asset. However, if the Plaintiff held the property in the hope that it could be developed and then resold it in the ordinary course of a trade or business, this would be evidence that it was held primarily for sale. Various factors that you may consider in arriving at your decision are:

1. The extent to which the Plaintiff (or others acting for the Plaintiff) engaged in developing or improving the properties. If there was no development or improvement, this would indicate a passive capital investment; but if the Plaintiff did develop or improve the

properties, this would indicate that the properties were being held for sale to customers in the ordinary course of a trade or business.

2. The number, continuity, and frequency of the sales. The presence of extensive and continuous sales activity over a period of time would be an indication that the properties in question were held for sale to customers in the ordinary course of a trade or business. Limited sales on an infrequent basis is evidence that the properties were not held for sale to customers in the ordinary course of a trade or business.

3. The solicitation of customers. If the Plaintiff (or others acting for the Plaintiff) actively solicited customers, or routinely advertised properties for sale, this would be evidence of holding the properties for sale to customers in the ordinary course of a trade or business. Conversely, the absence of active solicitation of customers or ongoing advertising may be evidence that the properties were not held for sale to customers in the ordinary course of a trade or business.

4. Income the Plaintiff derived from the sale of the properties in relation to the Plaintiff's income from other sources. If a substantial part of the Plaintiff's total income during the years involved came from sales of properties, this is an indication that the sales activity constituted the conduct of a trade or business. If the income derived from the sale

of the properties was not substantial in relation to the Plaintiff's income from other sources, this is an indication that the sale of the properties did not constitute a trade or business.

5. The holding period of the property. The shorter the elapsed time between the Plaintiff's acquisition and later disposition of the properties, the more reasonable it is to conclude that the properties were held for sale to customers in the ordinary course of a trade or business. Conversely, the longer the holding period, the more it appears that the properties were held for investment purposes.

This is not an exclusive list of the factors that may be relevant to your decision in this case. I have merely attempted to give you some guidelines to follow. There may well be other factors that you may consider that I have not mentioned, and you should bear in mind that no one factor is determinative of the issue before you.

VERDICT

[A general verdict form will usually suffice]

ANNOTATIONS AND COMMENTS

See the Annotations and Comments following Federal Claims Instruction 10.1, supra.

In the present case, the [name corporation], [withheld] [failed to withhold] from the wages and salaries paid to its employees during the periods involved, federal income taxes and social security taxes totaling $_____.

The corporation failed to pay to the Government the amount [withheld] [that should have been withheld] as it was required to do under the law; and it then became insolvent and had no funds from which the Government could collect the withholding taxes.

To assure that withholding taxes are eventually paid to the Government when the employer fails to pay, Congress has enacted a law stating that any person associated with a corporation who had the personal duty and responsibility in the operation of the business to see to it that the taxes were paid to the Government, and who willfully failed to do so, is personally liable in the form of a penalty for the amount of withholding taxes not paid over.

The penalty provided by law is generally referred to as the 100% penalty since the amount of the penalty is equal to the amount of the taxes that were not paid. Thus, the penalty is merely a means of

collecting the withholding taxes not paid over, and enables the Government to be made whole.

The employer in this case was a corporation and, as stated previously, it can only act through its officers, directors, and employees. Every corporation that is an employer must have some person who has the duty or responsibility of withholding and paying over those taxes that the law requires the corporation to withhold and remit to the Government. There may be more than one responsible person, but there is always at least one. Thus, there may be more than one person liable for the 100% penalty.

The Government contends in this instance that the Plaintiff was one of the persons responsible to collect, truthfully account for and pay over the taxes that were supposed to be withheld. The Government also contends that the failure of the Plaintiff to pay over those taxes was willful. The Government has the burden of proving, by a preponderance of the evidence, that the Plaintiff was a "responsible person." If the Government meets that burden by showing that the Plaintiff was responsible, then the burden of proof is shifted to the Plaintiff to prove that [he] [she] did not "willfully" fail to collect and pay over the withholding taxes.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

The first issue for you to decide, therefore, is whether the Plaintiff was a "responsible person." The term responsible person includes any person who is connected with the corporation-employer in a way that such person has the power to see that the taxes are paid, or the power to make final decisions concerning the corporation, or who determines which creditors are to be paid and when they are to be paid. The term responsible person may include corporate officers, employees, members of the board of directors or stockholders. The meaning of the term is very broad and is not limited to the person who actually prepares the payroll checks or the tax returns. The responsible person need not even be authorized to draw checks for the corporation so long as that person has the power to decide who will get such checks. In other words, the responsible person is any person who can effectively control the finances, or determine which bills should or should not be paid.

If you find that the Plaintiff was not a responsible person, then you will not consider any other issue. On the other hand, if you conclude that the Plaintiff was a responsible person, you must then decide

whether the Plaintiff acted "willfully" in failing to pay the withholding taxes to the Government.

For purposes of this case the term "willfully" means only that the act of failing to pay over the taxes was voluntarily, consciously, and intentionally done. If the responsible person voluntarily, consciously, and intentionally used the trust funds that were withheld, or caused them to be used, for purposes other than payment of taxes, that person is deemed to have acted willfully. It is not necessary that the Plaintiff had an intent to defraud or to deprive the United States of the taxes, nor is it necessary that the Plaintiff had a bad motive or design; it is enough if the Plaintiff made a deliberate choice to pay other creditors instead of paying the Government. This means that if you find that the Plaintiff decided to use corporate funds to pay suppliers, employees' net take home salaries, rent, or any creditor other than the Government, and did so at a time when withholding taxes were due and owing to the Government, then you must find that the Plaintiff acted willfully in failing to see that the withholding taxes were paid. It is no excuse that the responsible person, in good faith, hoped to pay the taxes at a later time, or even that such person relied upon the advice and information furnished by regularly employed accountants and/or attorneys.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was a "responsible person" (as defined in the Court's instructions)?

Answer Yes or No _____

[Note: If you answered No to Question No. 1 you need not answer the remaining question.]

2. That the Plaintiff's failure to pay over the withholding taxes was not "willful" (as defined in the Court's instructions)?

Answer Yes or No _____

SO SAY WE ALL

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

The former Fifth Circuit and the Eleventh Circuit have defined "willfully" as meaning, in general, "a voluntary, conscious, and intentional act, such as payment of other creditors in preference to the United States, although bad motive or evil intent need

not be shown." Mazo v. United States, 591 F.2d 1151, 1154 (5th Cir. 1979). The willfulness requirement is met if the responsible person shows a "reckless disregard of a known or obvious risk that trust funds may not be remitted to the government such as by failing to investigate or to correct mismanagement after being notified that withholding taxes have not been duly remitted." Id.; see also George v. United States, 819 F.2d 1008 (11th Cir. 1987); Malloy v. United States. 17 F.3d 329 (11th Cir. 1994). Under no circumstances does the delegation of the obligation to pay the taxes absolve a responsible person of liability. George, 819 F.2d at 1012.

Thibodeau v. United States, 828 F.2d 1499, 1505-06 (11th Cir. 1987) ("The responsible officer's actions before the due date for payment of the withheld taxes satisfies the "willfulness" requirement under § 6672 when the responsible officer . . . knows that the withheld funds are being used: for other corporate purposes, regardless of his expectation that sufficient funds will be on hand on the due date for payment over to the government.").

The shifting burden of proof concept is derived from Mazo, George and Thibodeau, supra.

11.1
Automobile Dealers Day-In-Court Act
(15 USC § 1222)

In this case the Plaintiff claims that the Defendant violated a federal statute known as the Automobile Dealers Day-In-Court Act - - an Act of Congress that required the Defendant to act in "good faith" in [terminating] [not renewing] the Plaintiff's franchise agreement.

"Good faith" is the duty of each party to a franchise agreement (and all officers, employees, or agents of each party) to act in a fair and equitable manner toward each other so as to guarantee each party freedom from coercion, intimidation, or threats of coercion or intimidation from the other.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant failed to act in "good faith" in the matter of the [termination] [nonrenewal] of the franchise;

Second: That the lack of good faith by the Defendant involved wrongful acts of coercion or intimidation, or threats thereof, toward the Plaintiff; and

Third: That the Plaintiff suffered damages as a result of those wrongful acts and conduct of the Defendant.

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

The fact that a dealer has a written franchise agreement with a manufacturer does not [mean that the agreement cannot be terminated] [automatically give the dealer the right to have the written agreement renewed when it expires]. The law requires only that the manufacturer act in "good faith" with regard to the matter of [termination] [renewal]. The manufacturer is always free to advance its own business interests by making recommendations and arguments in an effort to goad a dealer into more efficient operations or a higher level of sales. The manufacturer is also free to enforce the reasonable provisions of the contract and to [terminate] [refuse a renewal of] the agreement if the dealer has materially breached its terms. A “material” breach of a contract means a failure to perform some important term or provision of the agreement as distinguished from some unimportant breach.

A manufacturer's behavior becomes unlawful only when it does not exercise good faith and its actions toward the dealer amount to coercion and intimidation.

In order to prove coercion or intimidation, the Plaintiff must prove conduct on the part of the Defendant that results in the dealer's acting, or refraining from acting, against the dealer's will. The Plaintiff must show that the manufacturer attempted to force or coerce the Plaintiff in some way into doing something it had a lawful right not to do, or to refrain from doing something it had a lawful right to do. Acts or statements that do nothing more than enforce the contract and attempt to hold the Plaintiff to its terms do not amount to coercion or intimidation. The coercion or intimidation must include a wrongful demand that will result in penalties or sanctions if not complied with.

In addition, the coercion or intimidation must be actual; that is, the mere fact that a dealer feels that it has been coerced or intimidated is not sufficient. It is for you to decide on the basis of all the circumstances disclosed by the evidence whether the Defendant's conduct reached the level of actual coercion, intimidation or threats thereof.

If you find in favor of the Plaintiff you will then consider the issue of the Plaintiff's damages. In that regard you should award the Plaintiff an amount of money that will fairly and adequately compensate it for the damage the evidence shows it has sustained and is reasonably certain

to experience in the future as a result of the [termination] [failure to renew the franchise].

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

[State or enumerate the elements
of recoverable damages]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done willfully, intentionally or with callous and reckless indifference to the Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, willfulness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive

damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

11
Automobile Dealers Day-In-Court Act
(15 USC § 1222)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant failed to act in "good faith" in the matter of the [termination] [nonrenewal] of the franchise?

Answer Yes or No _____

[Note: If you answered No to Question No. 1 you need not answer the remaining questions.]

2. That the lack of good faith by the Defendant involved wrongful acts of coercion or intimidation, or threats thereof, toward the Plaintiff?

Answer Yes or No _____

[Note: If you answered No to Question No. 2 you need not answer the remaining questions.]

3. That the Plaintiff suffered damages as a result of those wrongful acts and that conduct of the Defendant?

Answer Yes or No _____

4. That the Plaintiff should be awarded the following damages:

[State or enumerate the recoverable elements of damages] $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

"Bad faith" has been defined narrowly and does not mean simply a lack of fairness, but entails a showing of coercion. Absent coercion, there can be no recovery under the Act, even if the manufacturer otherwise acts in "bad faith" as that term is normally used. See Cabriolet Porsche Audi, Inc. v. Am. Honda Motor Co., 773 F.2d 1193, 1210 (11th Cir. 1985); see also Carroll Kenworth Truck Sales, Inc. v. Kenworth Truck Co., 781 F.2d 1520, 1525 (11th Cir. 1986); Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1038-39 (5th Cir. 1981); H. C. Blackwell Co., Inc. v. Kenworth Truck Co., 620 F.2d 104, 106 (5th Cir. 1980).

12.1
Odometer Tampering - Motor Vehicle Information And Cost Savings Act (49 USC § 32701, et. seq.)

In this case the Plaintiff claims that the Defendant violated a federal law against tampering with odometers in motor vehicles.

An odometer is the instrument placed in the vehicle by the manufacturer for measuring and recording the total, actual distance or mileage a motor vehicle has traveled.

The Plaintiff claims that the Defendant, with the intent to defraud, altered the odometer in the vehicle prior to its sale by changing the odometer to show a lower number of miles than the vehicle had actually been driven.

In order to prevail on this claim, the Plaintiff must prove both of the following facts by a preponderance of the evidence:

First: That the Defendant or its agent altered the odometer in the vehicle by changing the number of miles it had recorded; and

Second: That the Defendant or its agent so acted with the intent to defraud someone.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

It is not necessary for the Plaintiff to prove that the Plaintiff personally was actually defrauded or that the Plaintiff was the specific person intended to be defrauded; but, in order to recover, it is necessary for the Plaintiff to prove that the Defendant intended to defraud someone.

To act with the intent to defraud means to act with the specific intent to deceive or cheat someone, ordinarily for the purpose of bringing some financial gain to one's self.

If a preponderance of the evidence does not support the Plaintiff's claim, then your verdict should be for the Defendant.

However, if a preponderance of the evidence does support the Plaintiff's claim, the Plaintiff would be entitled to recover either three times the amount of actual damages shown by the evidence to have been sustained, or $1,500, whichever is the greater.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also,

compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

In this case the Plaintiff's actual damages would be measured by the difference between the amount paid for the vehicle by the Plaintiff and the true retail value of the vehicle on the date of sale if the vehicle's actual mileage had been disclosed on the odometer at that time.

After arriving at the Plaintiff's actual damages, you would then multiply by three and enter the resulting amount on your verdict form. If, however, that calculation results in a figure less than $1,500.00, you would then enter the sum of $1,500.00 as the Plaintiff's statutory damages.

12.1
Odometer Tampering - Motor Vehicle Information And Cost Savings Act
(49 USC § 32701 et. seq.)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant or its agent altered the odometer on the vehicle by changing the number of miles it had recorded?

Answer Yes or No _____

[Note: If you answered No to Question No. 1 you need not answer the remaining questions.]

2. That the Defendant or its agent so acted with the intent to defraud someone?

Answer Yes or No _____

[Note: If you answered No to Question No. 2 you need not answer the remaining questions.]

3. That the Plaintiff should be awarded damages as follows:

(a) Actual damages multiplied by three $_____

OR

(B) Statutory damages (Insert $1,500.00 if the answer to subpart (a) is less than that amount) $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

49 USC § 32703 - - Preventing tampering.

A person may not - -

* * * * *

(2) disconnect, reset, alter, or have disconnected, reset, or altered, an odometer of a motor vehicle intending to change the mileage registered by the odometer. . . .

49 USC § 32710 - - Civil actions by private persons.

(a) Violation and amount of damages. - - A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater.

(b) Civil actions. - - A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction. The action must be brought not later than 2 years after the claim accrues. The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.

13.1
Interstate Land Sales Full Disclosure Act
(15 USC § 1709(b))

In this case the Plaintiff claims that the Defendant violated a federal law known as the Interstate Land Sales Full Disclosure Act, and the Plaintiff seeks an award of damages as compensation for that alleged violation.

Under that law a real estate developer is prohibited from using the mails, or any other means of communication in interstate commerce, for the sale or lease of lots in a "subdivision" (as that term is defined in the law), unless the developer has previously filed with the Secretary of Housing and Urban Development a document known as a "statement of record," and has also furnished the purchaser, before the signing of any contract for sale or lease, another document known as a "property report."

Among other information that must be given, a property report is required to specify [describe the type of information germane to the Plaintiff's claims and information required by the regulations to be included in a property report under § 1707].

In this case the Plaintiff claims that the Defendant violated the law because the property report [contained an untrue statement of a

material fact] [omitted to state a material fact required to be stated in the report]. Specifically, the Plaintiff contends that [describe the alleged false statement or material omission].

There are three facts that the Plaintiff must prove by a preponderance of the evidence in order to establish this claim:

First: That the "property report" [contained an untrue statement of fact] [omitted to state a fact required to be stated in the report], as alleged;

Second: That the [untrue statement] [omitted fact] was material; and

Third: That the Plaintiff suffered damages as hereafter defined.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

If the Plaintiff proves that the property report contained [an untrue statement of material fact] [omitted to state a material fact required to be stated in the report], the Plaintiff is not required to prove that the Defendant intended to make it or that the Defendant even knew of it. The Plaintiff is only required to prove that the Defendant made [the untrue statement] [omission].

A [statement] [omission] is "material" if a reasonable investor would have considered the [erroneous statement] [omitted fact] as important in making a decision.

If you find that the Plaintiff has established this claim, you will then consider the amount of the Plaintiff's damages. The law provides that the Plaintiff may recover the difference between what the Plaintiff paid for the property (plus the reasonable cost of improvements, if any) and the fair market value of the property [at the time the Plaintiff purchased the property] [at the time this suit was brought]; [less the amount the Plaintiff received from any resale of the property by the Plaintiff]. [The Plaintiff may also recover independent appraiser fees and the expense of travel to and from the property].

13.1
Interstate Land Sales Full Disclosure Act
(15 USC § 1709(b))

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the "property report" [contained an untrue statement of fact] [omitted to state a fact required to be stated in the report]?

Answer Yes or No _____

[Note: If you answered No to Question No. 1 you need not answer the remaining questions.]

2. That the [untrue statement] [omitted fact] was material?

Answer Yes or No _____

[Note: If you answered No to Question No. 2 you need not answer the remaining questions.]

3. That the Plaintiff suffered damages as a result of those wrongful acts of the Defendant?

Answer Yes or No _____

4. That the Plaintiff should be awarded the following damages:

[Enumerate the elements of recoverable damages sought by the Plaintiff] $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

15 USC § 1703 - - Requirements respecting sale or lease of lots

> It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails - -

(1) with respect to the sale or lease of any lot not exempt under section 1702 of this title - -

* * * * *

(C) to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein pursuant to sections 1704 through 1707 of this title or any regulations thereunder. . . .

15 USC § 1709 - - Civil liabilities

(a) Violations; relief recoverable. A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title. In a suit authorized by this subsection, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable. In determining such relief the court may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased.

(b) Enforcement of rights by purchaser or lessee. A purchaser or lessee may bring an action at law or in equity against the seller or lessor (or successor thereof) to enforce any right under subsection (b), (c), (d), or (e) of section 1703 of this title.

(c) Amounts recoverable. The amount recoverable in a suit authorized by this section may include, in addition to matters specified in subsections (a) and (b) of this section, interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot.

Neither the United States Supreme Court nor the Eleventh Circuit has ruled on whether the ILSFDA is a specific intent statute. Courts deciding the issue have concluded that the ILSFDA is not a specific intent statute. See United States v. Dacus, 634 F.2d 441, 446 (9th Cir. 1980); Hester v. Hidden Valley Lakes, Inc., 495 F.Supp. 48, 53-54 (N.D. Miss. 1980); Husted v. Amrep Corp., 429 F.Supp. 298, 310 (S.D.N.Y. 1977).

INDEX TO STATE CLAIMS INSTRUCTIONS

[Caveat: The State Claims Instructions are offered only as a guide and may require editing or revision to correctly state the law of any particular jurisdiction. Extreme care should be exercised in every case to insure that the instruction as worded correctly states the law of the pertinent state. Judges and lawyers in Alabama are referred to the Alabama Pattern Jury Instructions Civil (Westlaw Data Base AL-ADJICIV).]

INDEX TO STATE CLAIMS INSTRUCTIONS
(Continued)

1.1
Negligence
Comparative Negligence Defense

In this case the Plaintiff claims that the Defendant was negligent and that such negligence was a legal cause of damage sustained by the Plaintiff. Specifically, the Plaintiff alleges that the Defendant [describe the specific act(s) or omission(s) asserted as negligence on the part of the Defendant].

In order to prevail on this claim the Plaintiff must prove both of the following facts by a preponderance of the evidence:

First: That the Defendant was "negligent;" and

Second: That such negligence was a "legal cause" of damage sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

Negligence is a "legal cause" of damage if it directly and in natural and continuous sequence produces, or contributes substantially to producing such damage, so it can reasonably be said that, except for the negligence, the loss, injury or damage would not have occurred. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such damage.

If a preponderance of the evidence does not support the Plaintiff's claim, then your verdict should be for the Defendant. If, however, a preponderance of the evidence does support the Plaintiff's claim, you will then consider the defense raised by the Defendant.

The Defendant contends that the Plaintiff was also negligent and that such negligence was a legal cause of the Plaintiff's own injury. This is a defensive claim and the burden of proving that claim, by a preponderance of the evidence, is upon the Defendant who must establish:

First: That the Plaintiff was also "negligent;" and

Second: That such negligence was a "legal cause" of the Plaintiff's own damage.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

Florida Law

Finding in favor of the Defendant on this defense will not prevent recovery by the Plaintiff, it will only reduce the amount of the Plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the Plaintiff - - that the Plaintiff's own negligence was, for example, 50% responsible for the Plaintiff's own damage - - then you would fill in that percentage as your finding on the special verdict form that I will explain in a moment. Such a finding would not prevent the Plaintiff from recovering; the Court will merely reduce the Plaintiff's total damages by the percentage that you insert. Of course, by using the number 50% as an example, I do not mean to suggest to you any specific figure at all. If you find that the Plaintiff was negligent, you might find 1% or 99%.

Georgia Law

Finding in favor of the Defendant on this defense will not necessarily prevent recovery by the Plaintiff, it may only reduce the

amount of the Plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the Plaintiff - - that the Plaintiff's own negligence was, for example, 25% responsible for the Plaintiff's own damage - - then you would fill in that percentage as your finding on the special verdict form I will explain in a moment. Such a finding would not prevent the Plaintiff from recovering; the Court will merely reduce the Plaintiff's total damages by the percentage that you insert.

On the other hand, if you find that the Plaintiff's negligence equaled or exceeded the Defendant's negligence, then the Plaintiff cannot recover at all. In other words, if you find that the Plaintiff was responsible for 50% or more of the damages, then you have found that the Plaintiff's negligence equaled or exceeded the Defendant's negligence, in which case the Plaintiff is barred from recovery.

Return To General Charge

If the evidence proves negligence on the part of the Defendant that was a legal cause of damage to the Plaintiff, you should award the Plaintiff an amount of money that will fairly and adequately compensate the Plaintiff for such damage.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by

a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as pain and suffering has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Medical and hospital expenses, past and future

(b) Mental or physical pain and anguish, past and future

(c) Net lost wages and benefits to the date of trial

(d) Net lost wages and benefits in the future [reduced to present value]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

1.1
Negligence
Comparative Negligence Defense

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant was negligent in the manner claimed by the Plaintiff and that such negligence was a legal cause of damage to the Plaintiff?

Answer Yes or No _____

[Note: If you answered No to Question No. 1 you need not answer the remaining questions.]

2. That the Plaintiff also was negligent in the manner claimed by the Defendant and that such negligence was a legal cause of the Plaintiff's own damage?

Answer Yes or No _____

3. If you answered "Yes" to Question Two, what proportion or percentage of the Plaintiff's damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

Answer in Terms of Percentages

The Defendant _____%

The Plaintiff _____%

(Note: The total of the percentages given in your answer should equal 100%.)

4. If you answered "Yes" to Question One, what sum of money do you find from a preponderance of the evidence to be the total amount of the Plaintiff's damages (without adjustment by application of any percentages you may have given in answer to Question Three)?

(a) Medical and hospital expenses, past and future $_____

(b) Mental or physical pain and anguish, past and future $_____

(c) Net lost wages and benefits to the date of trial $_____

(d) Net lost wages and benefits in the future [reduced to present value] $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

Florida has adopted a "pure" comparative negligence rule. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

Georgia follows a modified contributory/comparative negligence rule under which a negligent plaintiff may recover unless the Plaintiff's negligence is equal to or greater than the Defendant's negligence, i.e., 50% or more. If it is, the greater contributory negligence bars recovery. If it is not, the Plaintiff may recover damages but the amount will be reduced by the percentage of the negligence attributable to the Plaintiff. See Smith v. Am. Oil Co., 49 S.E.2d 90 (1948) (overruled on other grounds); Williams v. United States, 379 F.2d 719 (5th Cir. 1967).

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

1.2
Negligence
With Counterclaim By Defendant

In this case the Plaintiff claims that the Defendant was negligent and that such negligence was a legal cause of damage sustained by the Plaintiff. Specifically, the Plaintiff alleges that the Defendant [describe the specific act(s) or omission(s) asserted as negligence on the part of the Defendant].

Conversely, the Defendant counterclaims that the Plaintiff was negligent and that such negligence was a legal cause of damage sustained by the Defendant. Specifically, the Defendant alleges that the Plaintiff [describe the specific act(s) or omission(s) asserted as negligence on the part of the Plaintiff].

In order to prevail on their respective claims, each party must prove both of the following facts by a preponderance of the evidence:

First: That the other party was "negligent;" and

Second: That such negligence was a "legal cause" of damage sustained by the party asserting the claim.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

Negligence is a "legal cause" of damage if it directly and in natural and continuous sequence produces, or contributes substantially to producing such damage, so it can reasonably be said that, except for the negligence, the loss, injury or damage would not have occurred. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such damage.

If you find for both parties on their respective claims against each other, that is, that both were negligent and that the negligence of each contributed as a legal cause of the damage sustained by the other Florida Law. . . . then you should award to each party, respectively, the total amount of damages sustained by each, and should also state on

the special verdict form the percentages by which the negligence of each contributed to the damages. The Court will then enter an appropriate judgment based upon your findings.

Georgia Law. . . . then you should state on the special verdict form the percentages by which the negligence of each contributed to the damages. If you should find that both parties were equally responsible - - that the negligence of each contributed to 50% of the damages, then neither can recover from the other. If, however, you find that one of the parties was more responsible than the other - - that the negligence of one contributed to, say, 75% of the damages, then you should determine the total amount of the damages sustained by each party (without deduction of any kind based on the percentages of responsibility you have found), and the Court will then enter an appropriate judgment based on your findings.

In considering the issue of either party's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize either party. Also, compensatory

damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as pain and suffering has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate either party for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Medical and hospital expenses, past and future

(b) Mental or physical pain and anguish, past and future

(c) Net lost wages and benefits to the date of trial

(d) Net lost wages and benefits in the future [reduced to present value]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

1.2
Negligence
With Counterclaim By Defendant

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant was negligent in the manner claimed by the Plaintiff and that such negligence was a legal cause of damage to the Plaintiff?

Answer Yes or No _____

2. That the Plaintiff was negligent in the manner claimed by the Defendant and that such negligence was a legal cause of the Plaintiff's own damage as well as damage to the Defendant?

Answer Yes or No _____

3. If you answered "Yes" to Question One and/or Question Two, what proportion or percentage of the parties' damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

Answer in Terms of Percentages

The Defendant _____%

The Plaintiff _____%

(Note: The total of the percentages given in your answer should equal 100%.)

4. If you answered "Yes" to Question One, what sum of money do you find from a preponderance of the evidence to be the total amount of the Plaintiff's damages (without adjustment by application of any percentages you may have given in answer to Question Three)?

(a) Medical and hospital expenses, past and future $_____

(b) Mental or physical pain and anguish, past and future $_____

(c) Net lost wages and benefits to the date of trial $_____

(d) Net lost wages and benefits in the future [reduced to present value] $_____

5. If you answered "Yes" to Question Two, what sum of money do you find from a preponderance of the evidence to be the total amount of the Defendant's damages (without adjustment by application of any percentages you may have given in answer to Question Three)?

(a) Medical and hospital expenses, past and future $_____

(b) Mental or physical pain and anguish, past and future $_____

(c) Net lost wages and benefits to the date of trial $_____

(d) Net lost wages and benefits in the future [reduced to present value] $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

See the Annotations and Comments following State Claims Instruction No. 1.1, supra.

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

1.3
Negligence
Medical Malpractice
Claim Against Hospital And Physician
Statute Of Limitations Defense

In this case the Plaintiff claims that the Defendants were negligent and that such negligence was a legal cause of damage sustained by the Plaintiff. Specifically, the Plaintiff alleges that the Defendants [describe the specific act(s) or omission(s) asserted as negligence on the part of the Defendants].

In order to prevail on this claim the Plaintiff must prove both of the following facts by a preponderance of the evidence:

First: That the Defendants were "negligent;" and

Second: That such negligence was a "legal cause" of damage sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

In general, "negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably

careful person would do under like circumstances. In a medical malpractice case such as this, however, what a "reasonably careful person" would or would not do is to be measured by the standard of what a reasonably careful, similar health care provider would or would not do under the same circumstances.

Thus, the measure of the duty of care owed by a hospital to its patients is to exercise that degree of care, skill and diligence used by reasonably prudent hospitals generally [in the community or a similar community].

In the case of a physician, it is the duty of a medical practitioner to apply to the diagnosis and treatment of a patient the ordinary skills, means and methods that are recognized as necessary, and that are customarily followed in the diagnosis and treatment of similar cases, according to the prevailing professional standard of care of reasonably prudent physicians who are qualified by training and experience to practice in the same field or speciality [in the community or a similar community].

Physicians are not held liable, however, for honest errors of judgment. They are allowed a wide range in the exercise of their judgment and discretion. To hold a physician liable it must be shown

that the course that the physician pursued was against the course recognized as correct by the profession[; but where a physician's duty to a patient and a subsequent breach of that duty are so obvious as to be apparent to persons of common experience, then the Plaintiff is not required to establish such duty and its breach through the use of expert testimony].

Negligence is a "legal cause" of damage if it directly and in natural and continuous sequence produces, or contributes substantially to producing such damage, so it can reasonably be said that, except for the negligence, the loss, injury or damage would not have occurred. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause, if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such damage.

[If the evidence proves negligence on the part of the Defendants that was a legal cause of damage to the Plaintiff, you will then consider an issue in this case arising from a defense asserted by the Defendants and based upon what is called the statute of limitations. This is simply a provision of the law requiring that suit be commenced in Court on

certain types of claims within a prescribed period of time, otherwise suit is barred or precluded. On this issue the Defendants have the burden of proof by a preponderance of the evidence.

In a case like this one, the time limit placed upon the Plaintiff began to run when the Plaintiff first knew, or by the exercise of reasonable care should have known, that [here describe the operative fact triggering the statute of limitations].

In this instance the applicable limitations period is _____ years, and the Defendants claim that suit is barred because the Plaintiff knew, or by the exercise of reasonable care should have known more than _____ years before the commencement of this suit on _____, that [describe again the operative fact triggering the statute of limitations].

With regard to the Plaintiff's knowledge, you are instructed that the means of knowledge is ordinarily equivalent in law to knowledge. So, if it appears from a preponderance of the evidence in the case that the Plaintiff had information that would normally have led a reasonably careful person of the same age, mental capacity, intelligence, training and experience to make inquiry through which such a person would surely learn certain facts, then the Plaintiff may be found to have had

actual knowledge of those facts just as though the Plaintiff had made such inquiry and had actually learned those facts.

If you find against the Defendant on this defense, you will then consider the issue of the Plaintiff's damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as pain and suffering has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Medical and hospital expenses, past and future

(b) Mental or physical pain and anguish, past and future

(c) Net lost wages and benefits to the date of trial

(d) Net lost wages and benefits in the future [reduced to present value]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been

reasonably realized if the Plaintiff had taken advantage of such opportunity.]

1.3
Negligence
Medical Malpractice
Claim Against Hospital And Physician
Statute Of Limitations Defense

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant was negligent in the manner claimed by the Plaintiff?

Answer Yes or No _____

[Note: If you answered No to Question No. 1 you need not answer the remaining questions.]

2. That such negligence was a legal cause of damage sustained by the Plaintiff?

Answer Yes or No _____

3. That the Plaintiff knew, or by the exercise of reasonable care should have known, more than _____ years before the

commencement of this suit on _[date]_ that [describe the operative fact triggering the statute of limitations]?

Answer Yes or No _____

4. That the Plaintiff should be awarded the following damages:

(a) Medical and hospital expenses, past and future $_____

(b) Mental or physical pain and anguish, past and future $_____

(c) Net lost wages and benefits to the date of trial $_____

(d) Net lost wages and benefits in the future [reduced to present value] $_____

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

Florida law, see Fla. Stat. 766.102 (2002) and 766.110 (2003).

Georgia law, see Ga. Code Ann. §§ 9-3-70 et seq., § 51-1-27 (2002).

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

2.1
Products Liability (Against Manufacturer) With Defenses Of Mis-Use And Assumption Of Risk

In this case the Plaintiff claims damages for personal injuries alleged to have been caused by a defective condition in the [describe the allegedly defective product].

In order to recover on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant manufactured and sold the product being used by the Plaintiff at the time of the accident involved in this case;

Second: That, at the time of such manufacture and sale, the product was in a defective condition making it unreasonably dangerous to the user;

Third: That the product was expected to and did in fact reach the Plaintiff, and was thereafter operated up to the time of the accident without substantial change in its condition as of the time the Defendant sold it; and

Fourth: That the defective condition in the product was a "legal cause" of the injury complained of by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

Thus, in cases involving allegedly defective, unreasonably dangerous products, the Defendant may be liable even though you may find that the Defendant was not negligent and exercised all reasonable care in the design, manufacture and sale of the product in question.

On the other hand, any failure of a manufacturer of a product to adopt the most modern, or even a better safeguard, does not make the manufacturer legally liable to a person injured by that product. The manufacturer does not guarantee that no one will get hurt in using its product, and a product is not defective or unreasonably dangerous merely because it is possible to be injured while using it. There is no duty upon the manufacturer to produce a product that is "accident-proof." What the manufacturer is required to do is to make a product that is free from defective and unreasonably dangerous conditions.

A product is in a defective condition, unreasonably dangerous to the user, when it has a propensity or tendency for causing physical harm beyond that which would be contemplated by the ordinary user, having ordinary knowledge of the product's characteristics commonly known to the foreseeable class of persons who would normally use the product.

[Also, a product is defective if it is unreasonably dangerous when used as intended, and is marketed without a warning, unless the danger is open and obvious or is otherwise known to the Plaintiff. In order to establish a manufacturer's liability for failure to warn, Plaintiff must prove:

First: That the manufacturer knew or had reason to know the product was or was likely to be unreasonably dangerous in the use for which it was made;

Second: That the danger was not open and obvious;

Third: That the manufacturer failed to exercise reasonable care to warn consumers of its dangerous condition or the facts that made it dangerous; and

[Fourth: That the failure to warn was a "legal cause" of the injury complained of by the Plaintiff.]

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

With regard to the issue of "legal cause," a defective condition is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes substantially to producing such injury, so that it can reasonably be said that, except for the defective

condition, the injury complained of would not have occurred. A defective condition may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the defective condition and if the defective condition contributes substantially to producing such damage.

If you find that a preponderance of the evidence does support the claim of the Plaintiff, you must then consider the defenses raised by the Defendant as to which the Defendant has the burden of proof by a preponderance of the evidence.

[The Defendant contends that the Plaintiff assumed the risk of injury from the dangers that the Plaintiff contends caused the Plaintiff's injury. In order to establish this defense the Defendant must prove:

First: That the dangerous situation or condition was open and obvious, or that the Plaintiff knew of the dangerous situation; and

Second: That the Plaintiff voluntarily assumed the risk of the danger and was injured thereby.]

[The Defendant also contends that the Plaintiff's injury occurred as the result of a "misuse" of the product. A manufacturer is entitled to expect a normal use of the manufactured product. If the Plaintiff's injury

occurred because of the Plaintiff's use of the product in a way or manner for which the product was not made or adapted, and such use was not reasonably foreseeable to the Defendant, then the Plaintiff cannot recover.

In order to establish this defense the Defendant must prove:

First: That the Plaintiff was using the product at the time of the accident in a way or manner for which the product was not made or adapted; and

Second: That such use was not reasonably foreseeable to the Defendant.

If you find that the Defendant has established [this defense] [either of these defenses] by a preponderance of the evidence, then your verdict will be for the Defendant.

If you find for the Plaintiff, however, you should award an amount of money that the preponderance of the evidence shows will fairly and adequately compensate the Plaintiff for the Plaintiff's injury or damage.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not

be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as pain and suffering has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Medical and hospital expenses, past and future

(b) Mental or physical pain and anguish, past and future

(c) Net lost wages and benefits to the date of trial

(d) Net lost wages and benefits in the future [reduced to present value]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

2.1
Products Liability (Against Manufacturer)
With Defenses Of Mis-Use And
Assumption Of Risk

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant manufactured and sold the product being used by the Plaintiff at the time of the accident involved in this case:

Answer Yes or No _____

2. That at the time of such manufacture and sale, the product was in a defective condition making it unreasonably dangerous to the user?

Answer Yes or No _____

3. That the product was expected to and did reach the Plaintiff, and was thereafter operated up to the time of the accident, without substantial change in its condition as of the time the Defendant sold it?

Answer Yes or No _____

4. That the defective condition in the product was a "legal cause" of the injury complained of by the Plaintiff?

Answer Yes or No _____

5. That the manufacturer knew or had reason to know the product was, or was likely to be, unreasonably dangerous in the use for which it was made?

Answer Yes or No _____

6. That the danger was not open and obvious?

Answer Yes or No _____

7. That the manufacturer failed to exercise reasonable care to warn consumers of its dangerous condition or the facts that made it dangerous?

Answer Yes or No _____

8. That the failure to warn was a “legal cause” of the injury complained of by the Plaintiff?

Answer Yes or No _____

9. That the dangerous situation or condition was open and obvious, or that the Plaintiff otherwise knew of the dangerous condition or situation?

Answer Yes or No _____

10. That the Plaintiff voluntarily assumed the risk of the danger and was injured thereby?

Answer Yes or No _____

11. That the Plaintiff was using the product at the time of the accident in a way or manner for which the product was not made or adapted?

Answer Yes or No _____

12. That such use was not reasonably foreseeable to the Defendant?

Answer Yes or No _____

13. That the Plaintiff should be awarded the following damages:

(a) Medical and hospital expenses, past and future $_____

(b) Mental or physical pain and anguish, past and future $_____

(c) Net lost wages and benefits to the date of trial $_____

(d) Net lost wages and benefits in the future [reduced to present value] $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

2.2
Products Liability (Against Manufacturer)
Comparative Negligence Defense

In this case the Plaintiff claims damages for personal injuries alleged to have been caused by a defective condition in the [describe the allegedly defective product].

In order to recover on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant manufactured and sold the product being used by the Plaintiff at the time of the accident involved in this case;

Second: That, at the time of such manufacture and sale, the product was in a defective condition making it unreasonably dangerous to the user;

Third: That the product was expected to and did in fact reach the Plaintiff, and was thereafter operated up to the time of the accident without substantial change in its condition as of the time the Defendant sold it; and

Fourth: That the defective condition in the product was a "legal cause" of the injury complained of by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

Thus, in cases involving allegedly defective, unreasonably dangerous products, the Defendant may be liable even though you may find that the Defendant was not negligent and exercised all reasonable care in the design, manufacture and sale of the product in question.

On the other hand, any failure of a manufacturer of a product to adopt the most modern, or even a better safeguard, does not make the manufacturer legally liable to a person injured by that product. The manufacturer does not guarantee that no one will get hurt in using its product, and a product is not defective or unreasonably dangerous merely because it is possible to be injured while using it. There is no duty upon the manufacturer to produce a product that is "accident-proof." What the manufacturer is required to do is to make a product that is free from defective and unreasonably dangerous conditions.

A product is in a defective condition, unreasonably dangerous to the user, when it has a propensity or tendency for causing physical harm beyond that which would be contemplated by the ordinary user, having ordinary knowledge of the product's characteristics commonly known to the foreseeable class of persons who would normally use the product.

[Also, a product is defective if it is unreasonably dangerous when used as intended and is marketed without a warning, unless the danger is open and obvious or is otherwise known to the Plaintiff. In order to establish a manufacturer's liability for failure to warn, Plaintiff must prove:

First: That the manufacturer knew or had reason to know the product was or was likely to be unreasonably dangerous in the use for which it was made;

Second: That the danger was not open and obvious;

Third: That the manufacturer failed to exercise reasonable care to warn consumers of its dangerous condition or the facts that made it dangerous; and

Fourth: That the failure to warn was a "legal cause" of the injury complained of by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

With regard to the issue of "legal cause," a defective condition is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes substantially to producing such injury, so that it can reasonably be said that, except for the defective

condition, the injury complained of would not have occurred. A defective condition may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the defective condition and if the defective condition contributes substantially to producing such damage.

If you find that a preponderance of the evidence does support the claim of the Plaintiff, you must then consider the defense raised by the Defendant.

The Defendant contends that the Plaintiff was negligent and that such negligence was a contributing legal cause of the Plaintiff's own injury. Specifically, the Defendant alleges that the Plaintiff [describe the specific act(s) or omission(s) asserted as negligence on the part of the Plaintiff]. This is a defensive claim and the burden of proving that claim, by a preponderance of the evidence, is upon the Defendant who must establish:

First: That the Plaintiff was "negligent" as claimed by the Defendant; and

Second: That Plaintiff's negligence was a "legal cause" of the Plaintiff's own damages.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

The definition and explanation given a moment ago concerning the term "legal cause" also applies with regard to that requirement of the Defendant's contributory negligence defense.

Finding in favor of the Defendant on the defense of contributory negligence will not prevent recovery by the Plaintiff, it will only reduce the amount of the Plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the Plaintiff, that the Plaintiff's own negligence was, for example, 25% responsible for the Plaintiff's own damage, then you would fill in that percentage as your finding on the special verdict form. Such a finding would not prevent the Plaintiff from recovering; the Court will merely reduce the Plaintiff's total

damages by the percentage that you insert. Of course, by using the number 25% as an example, I do not mean to suggest to you any specific figure at all. If you find that the Plaintiff was negligent, you might find 1% or 99%.

If the evidence establishes a defect in the Defendant's product that was a legal cause of damage to the Plaintiff, you should award the Plaintiff an amount of money that will fairly and adequately compensate the Plaintiff for such damage.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as pain and suffering has been or need

be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Medical and hospital expenses, past and future

(b) Mental or physical pain and anguish, past and future

(c) Net lost wages and benefits to the date of trial

(d) Net lost wages and benefits in the future [reduced to present value]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or

employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

2.2
Products Liability (Against Manufacturer
Comparative Negligence Defense

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant manufactured and sold the product being used by the Plaintiff at the time of the accident involved in this case:

Answer Yes or No _____

2. That at the time of such manufacture and sale, the product was in a defective condition making it unreasonably dangerous to the user?

Answer Yes or No _____

3. That the product was expected to and did reach the Plaintiff, and was thereafter operated up to the time of the accident, without substantial change in its condition as of the time the Defendant sold it?

Answer Yes or No _____

4. That the defective condition in the product was a "legal cause" of the injury complained of by the Plaintiff?

Answer Yes or No _____

5. That the manufacturer knew or had reason to know the product was, or was likely to be, unreasonably dangerous in the use for which it was made?

Answer Yes or No _____

6. That the danger was not open and obvious?

Answer Yes or No _____

7. That the manufacturer failed to exercise reasonable care to warn consumers of its dangerous condition or the facts that made it dangerous?

Answer Yes or No _____

8. That the failure to warn was a "legal cause" of the injury complained of by the Plaintiff?

Answer Yes or No _____

9. That the Plaintiff was "negligent" as claimed by the Defendant?

Answer Yes or No _____

10. That Plaintiff's negligence was a "legal cause" of the Plaintiff's own damages?

Answer Yes or No _____

11. That the Plaintiff's own negligence was _____% responsible for the Plaintiff's own damages?

Answer by inserting a percentage.

12. That the Plaintiff should be awarded the following damages.

(a) Medical and hospital expenses, past and future $_____

(b) Mental or physical pain and anguish, past and future $_____

(c) Net lost wages and benefits to the date of trial $_____

(d) Net lost wages and benefits in the future [reduced to present value] $_____

[Note: Do not reduce any award of damages to the Plaintiff by the percentage given, if any, in answer to Question No. 11. The Court will make the necessary calculations in entering judgment.]

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

In D'Amario v. Ford Motor Co., 806 So.2d 424 (Fla. 2001), the Florida Supreme Court held that in a "crash worthiness" case involving an alleged defective auto design that caused injury after the initial collision (e.g. a defective airbag), that principles of comparative fault as to apportionment of fault to the underlying crash do not apply because the auto manufacturer cannot be held liable for injuries caused by the initial accident. Thus, the auto manufacturer is only liable for the increased injury by the defective design after the crash and the fault of the manufacturer cannot be apportioned or compared with that of the driver of the vehicle who caused the initial crash. However, Comparative Negligence generally applies in products liability cases. Standard Havens Prods. v. Benitez, 648 So.2d 1192 (Fla. 1994).

3.1
Intentional Fraud
(With Defense Of Waiver)

In this case the Plaintiff claims that the Defendant committed a fraud - - that the Defendant made certain allegedly false and fraudulent misrepresentations [and/or omissions] to the Plaintiff.

The term "fraud" is generally defined in the law as an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity; made for the purpose of inducing the other person to act; and upon which the other person does in fact rely with resulting injury or damage. [Fraud may also include an omission or intentional failure to state material facts, knowledge of which would be necessary to make other statements by the Defendant not misleading to the Plaintiff.]

In this instance the alleged misrepresentations [and/or omissions] that the Plaintiff claims the Defendant fraudulently made are as follows:

> [Here enumerate the specific misrepresentations and/or omissions claimed to have been fraudulently made.]

Each of these alleged misrepresentations [and/or omissions] should be considered and judged separately in accordance with the instructions that follow. It is not necessary that the Plaintiff prove all of them in order to recover.

To prevail on this claim of fraud, therefore, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant made one or more of those alleged misrepresentations [or omissions];

Second: That the misrepresentation [or omission] related to a material existing fact;

Third: That the Defendant knew at the time he made the misrepresentation that it was false or acted with reckless disregard for its truth or falsity [or that the omission made other statements materially misleading];

Fourth: That the Defendant intended to induce the Plaintiff to rely and act upon the misrepresentation [or omission]; and

Fifth: That the Plaintiff ["reasonably"] ["justifiably"] relied upon the misrepresentation [or omission] and suffered injury or damage as a result.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

To make a "misrepresentation" simply means to state as a fact something that is false or untrue. [To make a material "omission" is to omit or withhold the statement of a fact, knowledge of which is necessary to make other statements not misleading.]

To constitute fraud, then, a misrepresentation must not only be false [or an omission must make other statements misleading], but must also be "material" in the sense that it relates to a matter of some importance or significance rather than a minor or trivial detail.

It must also relate to an "existing fact." Ordinarily, a promise to do something in the future does not relate to an existing fact and cannot be the basis of a claim for fraud unless the person who made the promise did so without any present intent to perform it or with a positive intent not to perform it. Similarly, a mere expression of opinion does not relate to an existing fact and cannot be the basis for a claim of fraud unless the person stating the opinion has exclusive or superior knowledge of existing facts that are inconsistent with such opinion.

To constitute fraud the Plaintiff must also prove that the Defendant made the misrepresentation [or omission] knowingly and intentionally, not as a result of mistake or accident. It must be proved that the Defendant either knew of the falsity of the misrepresentation [or the false effect of the omission], or that the Defendant made the misrepresentation [or omission] in reckless disregard for its truth or falsity.

Finally, to constitute fraud the Plaintiff must prove that the Defendant intended for the Plaintiff to rely upon the misrepresentation [and/or omission]; that the Plaintiff did in fact rely upon the misrepresentation [and/or omission]; and that the Plaintiff suffered injury or damage as a proximate result of the fraud.

Florida Law.

[When it is shown that the Defendant made a material misrepresentation [and/or omission] with the intention that the Plaintiff rely upon it, then, under the law, the Plaintiff may rely upon the truth of the representation even though its falsity could have been discovered had the Plaintiff made an investigation, unless the Plaintiff knows the representation to be false or its falsity is obvious to him.]

Georgia Law.

[When it is shown that the Defendant made a material misrepresentation [and/or omission] with the intention that the Plaintiff rely upon it, the Plaintiff must prove that reliance upon the misrepresentation [and/or omission] was justified. If, in the exercise of reasonable care and due diligence for the protection of one's own interests, the Plaintiff could have learned the truth of the matter by making a reasonable inquiry or investigation under the circumstances

presented, but failed to do so, then it cannot be said that the Plaintiff "justifiably" relied upon such misrepresentations [and/or omissions].]

Return to General Charge

Damages are the proximate or legal result of the fraud if you find from a preponderance of the evidence that, except for the fraudulent act, the damages would not have occurred. The fraudulent act may be a proximate or legal cause of damages even though the act operates in combination with the act of another so long as the fraud contributes substantially to producing the damages.

[Now, if you find that the Plaintiff has failed to prove the claim of fraud under these instructions, then, of course, your verdict will be for the Defendant. On the other hand, if you find for the Plaintiff, you must then consider the Defendant's defense to this claim; namely, the defense of waiver as to which the Defendant has the burden of proof by a preponderance of the evidence.

It is a general rule of law that any claim for fraud is waived if one is induced by misrepresentations or fraud to enter into a contract and, with knowledge of the fraud, does an act to ratify or affirm the contract that shows an intention to abide by the contract as made, with the fraud in it. In so affirming or ratifying the contract, the party has waived [his]

[her] right to recover damages as a result of the original misrepresentations. The question of whether a party has waived a claim for fraud is one of the intent of the defrauded party. Such intent, however, may be inferred from the party's conduct and the surrounding circumstances.

Similarly, once a defrauded person has discovered or reasonably should have discovered the nature of the deception, that person waives and thereby gives up any right to recover damages upon receiving from the defrauding party some substantial concession or upon entering into a new and more favorable contract in respect to the transaction.]

If you find for the Plaintiff on the claim of fraud, [and against the Defendant on the defense to that claim,] you will then consider the amount of money damages to be awarded to the Plaintiff. In that respect you should award the Plaintiff an amount of money shown by a preponderance of the evidence to be fair and adequate compensation for such loss or damage as resulted from the fraud.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are

not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

> [State or enumerate the elements of recoverable compensatory damages or, if none can be proved, available nominal damages]

[Any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage, in a manner consistent with what an ordinarily prudent person would do in similar circumstances.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that [he] [she] could

have reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

3.1
Intentional Fraud
(With Defense Of Waiver)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant made one or more of those alleged misrepresentations [or omissions]?

Answer Yes or No _____

2. That the misrepresentation [or omission] related to a material existing fact?

Answer Yes or No _____

3. That the Defendant knowingly, or with reckless disregard for the facts, made the misrepresentation [or omitted facts that made other statements materially misleading]?

Answer Yes or No _____

4. That the Defendant intended to induce the Plaintiff to rely and act upon the misrepresentation [or omission]?

Answer Yes or No _____

5. That the Plaintiff [”reasonably”] [”justifiably”] relied upon the misrepresentation [or omission] and suffered injury or damage as a result?

Answer Yes or No _____

[Note: If you answered No to any of the preceding Questions skip all remaining Questions and have your Foreperson sign below.]

6. That the Plaintiff waived [his] [her] claim of fraud against the Defendant - - by affirming the contract in such a way as to demonstrate an intention to abide by the existing contract, or by entering into a new contract with the Defendant in respect to the transaction - - at a time when the Plaintiff had discovered, or reasonably should have discovered, the nature of the alleged deception?

Answer Yes or No _____

[Note: If you answered Yes to the preceding Question you need not answer the remaining question.]

7. That the Plaintiff should be awarded the following damages:

[State or enumerate the elements of recoverable damages]

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

As shown by the choices given in the body of this instruction, the law of the three states of the Eleventh Circuit appears to differ with respect to a fraud victim's duty to investigate or exercise due diligence before relying upon a representation that later proves false. With respect to Alabama law, see Foremost Ins. Co. v. Parham, 693 So.2d 409 (Ala. 1997). With respect to Florida law, see Gold v. Perry, 456 So.2d 1197 (Fla. 4th DCA 1984). With respect to Georgia law, see Simmons v. Pilkenton, 497 S.E.2d 613 (1998).

Despite the Florida Supreme Court's unequivocal statement that "to prove fraud, a plaintiff must establish that the defendant made a deliberate and knowing misrepresentation . . . ." First Interstate Dev. Corp. v. Ablanedo, 511 So.2d 536, 539 (Fla. 1987); see also Parker v. State of Fla. Bd. of Regents, 724 So.2d 163, 168-69 (Fla. 1st DCA. 1998), some conflicting Florida caselaw persists in holding that a showing that defendant "should have known of the representation" satisfies the scienter requirement. See, e.g., Babbitt Elec., Inc. v. Dynascan Corp., 38 F.3d 1161, 1177 (11th Cir. 1994); Mejia v. Jurich, 781 So.2d 1175, 1177 (Fla. 3d DCA. 2001). However, in Rand v. Nat'l Fin. Ins., Co., 304 F.3d 1049 (11th Cir. 2002), the Eleventh Circuit Court of Appeals made it clear that those decisions misstate Florida law; the phrase "or should have known" should not be used in describing the requirement of scienter.

One commentary has concluded that this "confusion may be due to the historical lack of a clear distinction between fraudulent and negligent misrepresentation in Florida case law." The Florida Bar, Business Litigation in Florida § 15.57 (2001); see, e.g., Ong v. Brown, Rudnick, Freed, Gesmer, P.A., 1994 WL 143075 at *2 (M.D. Fla. 4/12/94) (unpublished) (fraudulent misrepresentation). Georgia, in contrast, makes a clear distinction. Compare Smiley v. S & J Inv., Inc., 580 S.E.2d 283, (2003) (negligent misrepresentation), and Allocco v. City of Coral Gables, 221 F.Supp.2d 1317, 1355 (S.D. Fla. 2002) (negligent misrepresentation), with Fisher v. Comer Plantation, Inc., 772 So.2d 455, 463 (Ala. 2000) (fraudulent misrepresentation), DCA Architects, Inc. v. Am. Bldg. Consultants, Inc., 417 S.E.2d 386, 389 (1992) (fraudulent misrepresentation), and Ideal Pool Corp. v. Baker, 377 S.E.2d 511, 513-14 (1988) (same).

Similar confusion must be avoided in distinguishing between the torts of fraud and fraud in the inducement. See Jackson v. BellSouth Telecomm., Inc., 181 F.Supp.2d 1345, 1361 n.14 (S.D. Fla. 2001) (the elements of fraud in the inducement include "that the representer knew or should have known of the statement's falsity"); S. Broad. Group, LLC v. Gem Broad., Inc., 145 F.Supp.2d 1316, 1329 (M.D. Fla. 2001); Samuels v. King Motor Co. of Fort Lauderdale, 782 So.2d 489, 497 (Fla. 4th DCA 2001). Compare Roland v. Cooper, 768 So.2d 400, 403-04 (Ala. Civ. App. 2000) (fraud in the inducement); JarAlllah v. Schoen, 531 S.E.2d 778, 779-80 (2000) (fraud and fraud in the inducement claims).

It is also important to distinguish actual from constructive fraud, the latter of which does not require the elements of knowledge or intent. Georgia: See O.C.G.A. § 23-2-51; Huddleston v. R. J. Reynolds Tobacco Co., 66 F.Supp.2d 1370, 1376 (N.D. Ga. 1999); Garbutt v. S. Clays, Inc., 894 F.Supp. 456, 461 (M.D. Ga. 1995); Eason Pub'ns, Inc. v. NationsBank of Georgia, 458 S.E.2d 899 (1995); Vickers v. Roadway Exp., Inc., 435 S.E.2d 253, 253 (1993); Jackson v. Paces Ferry Dodge, Inc., 359 S.E.2d 412, 414 (1987); Alabama: See General Motors Corp. v. Bell, 714 So.2d 268 (Ala. 1996); Hornaday v. First Nat. Bank of Birmingham, 65 So.2d 678 (Ala. 1952); First Bank of Childersburg v. Florey, 676 So.2d 324 (Ala. Civ. App. 1996); Florida: See Niles v. Mallardi, 828 So.2d 1076, 1078 (Fla. 4th DCA 2002); First Union Nat. Bank v. Turney, 824 So.2d 172, 191 (Fla. 1st DCA 2001); Beers v. Beers, 724 So.2d 109, 116-17 (Fla. 5th DCA 1998).

While Florida law is clear that the preponderance of the evidence standard is applicable to fraud claims, Passaat, Ltd. v. Bettis, 654 So.2d 980, 981 (Fla. 4th DCA 1995), the law is less clear in Georgia and Alabama. Alabama holds that "fraud, which is never presumed, must be clearly and satisfactorily proven," Talb, Inc. v. Dot Dot Corp., 559 So.2d 1054, 1057 (Ala. 1990) (quoting Southern Ry. Co. v. Arnold, 50 So. 293, 295 (1909)), and Westlaw editors have taken this to be a clear and convincing standard in their headnotes to Southern Ry. Co. v. Arnold. Alabama caselaw, however, has not squarely confirmed this, although clear and convincing evidence is required to support punitive damages. See Ala. Code § 6-11-20. Georgia law is similarly unclear. Courts note that "because fraud is inherently subtle, slight circumstances of fraud may be sufficient to establish a proper case," Petzelt v. Tewes, 581 S.E.2d 345, (2003); Seckinger v. Holtzendorf, 409 S.E.2d 76, 79 (1991) ("the law only requires slight circumstances to establish fraud and conspiracy"), yet others seem to apply a clear and convincing standard. See Magnus Homes, LLC v. DeRosa, 545 S.E.2d 166, 166 (2001); Kodadek v. Lieberman, 545 S.E.2d 25, 29 (2001). In some of these cases, however, Georgia courts are also reviewing an award of punitive damages, which does require a showing of clear and convincing evidence. See O.C.G.A. § 51-12-5-1.

On defense of waiver, see generally 37 Am.Jur.2d Fraud and Deceit § 321-23 (2002).

3.2.1
Civil Theft
(Florida)

The Plaintiff's claim is for civil theft. A person commits theft if [he] [she] knowingly obtains or uses, or tries to obtain or use, the property of another with intent to deprive that other person of his right to it. The Defendant is liable for civil theft, then, if the Plaintiff proves by clear and convincing evidence:

First: That Defendant obtained or used [or attempted to obtain or use] the property of Plaintiff;

Second: That Defendant did so with criminal intent; that is, with the intent to deprive Plaintiff, either temporarily or permanently, of a right to the property or a benefit from it; and

Third: That Defendant's actions injured Plaintiff in some fashion.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

You will notice that the civil theft claim must be proved by clear and convincing evidence - - not just a preponderance of the evidence. Clear and convincing evidence is something more than a

preponderance of the evidence; it is evidence that leaves you with a firm conviction that the claim is true.

if you find for the Plaintiff on the claim of civil theft, [and against the Defendant] you will then consider the issue of the amount of money damages to be awarded to the Plaintiff. You may award the Plaintiff only those damages shown to be proximately caused by Defendant's wrongful action.

Damages are the proximate or legal result of a wrongful act of another if you find from [clear and convincing evidence] [a preponderance of the evidence] that, except for the wrongful act, the damages would not have occurred. A wrongful act may be a proximate or legal cause of damages even though the wrongful act operates in combination with the act of another so long as the wrongful act contributes substantially to producing the damages.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by [clear and convincing] [a preponderance of the] evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also,

compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by [clear and convincing] [a preponderance of the] evidence, and no others:

> [State or enumerate the elements of recoverable compensatory damages or, if none can be proved, nominal damages]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, or reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive

damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

3.2.1
Civil Theft
(Florida)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find by clear and convincing [a preponderance of the] evidence:

1. That the Defendant made to the Plaintiff a knowing and willful misrepresentation, or knowing and willful omission, of material facts? That Defendant obtained or used [or attempted to obtain or use] the property of Plaintiff?

Answer Yes or No _____

2. That the Defendant made such misrepresentation or omission with the unlawful intent to commit a theft of the Plaintiff's property by deceit and by depriving the Plaintiff of the property, either temporarily or permanently, or by appropriating the property to the Defendant's use or the use of someone else not entitled thereto? That Defendant did so with criminal intent; that is, with the intent to deprive

Plaintiff, either temporarily or permanently, of a right to the property, or a benefit from it?

Answer Yes or No _____

3. That Defendant's actions injured Plaintiff in some fashion?

Answer Yes or No _____

[Note: If you answered No to any of the preceding Questions skip Question 4.]

4. That the Plaintiff should be awarded damages as follows:

[State or enumerate the elements of recoverable damages]

SO SAY WE ALL.

_____
Foreperson

DATED_____

ANNOTATIONS AND COMMENTS

Fla. Stat. § 772.11 provides a civil cause of action for any form of theft, embezzlement, conversion or larceny, including obtaining property by fraud, willful misrepresentation of a future act or false promise. See Palmer v. Gotta Have it Golf Collectibles, Inc., 106 F.Supp.2d 1289, 1303 (S.D. Fla. 2000); Huff Groves Trust v. Caulkins Indiantown Citrus Co., 829 So.2d 923, 923 (Fla. 4th DCA 2002). The statute requires proof by "clear and convincing evidence," see Standard Jury Instructions - - Civil Cases, 720 So.2d 1077, 1079 (Fla. 1998); Starr Tyme, Inc. v. Cohen, 659 So.2d 1064, 1069 (Fla. 1995) (requiring civil theft plaintiff to prove actual damages by clear and convincing evidence); Haddad v. Cura, 674 So.2d 168 (Fla. 3rd DCA 1996), provides for treble damages and attorney's fees, but precludes

punitive damages. See Ames v. Provident Life and Acc. Ins. Co., 942 F.Supp. 551, 561 (S.D. Fla. 1994).

In Georgia, O.C.G.A. § 51-10-6(a) also provides a civil cause of action for criminal theft, including theft by deception. This Charge should be modified when necessary to reflect the language of Georgia's criminal theft statute. O.C.G.A. § 16-8-3(a). Unlike the Florida statutory scheme, there is no provision in Georgia for treble damages, but punitive damages may be recoverable. See O.C.G.A. § 51-10-6(a). Also, the preponderance of the evidence standard presumably applies in Georgia, although the issue is not addressed by the statute or any caselaw.

Civil theft is distinguishable from civil theft by deception. See Ellerbee v. State, 569 S.E.2d 902, 904 (2002) ("The offense of theft by deception requires: (1) obtaining property by any deceitful means or artful practice; (2) with the intention of depriving the owner of the property. O.C.G.A. § 16-8-3(a)"). On the latter, see Charge 3.2.2 Civil Theft by Deception infra.

Note that civil theft resembles the common law tort of conversion. See Ex parte Anderson, 867 So.2d 1125, (2003); Blakely v. Victory Equip. Sales, Inc., 576 S.E. 2d 288, 292 (2002); United Am. Bank of Cent. Florida, Inc. v. Seligman, 599 So.2d 1014, 1017 (Fla. 5th DCA 1992).

3.2.2
Civil Theft By Deception
(Georgia)

The Plaintiff's claim is for civil theft by deception. A person commits the offense of theft by deception when he obtains the property of another by some deceitful means or artful practice with the intent to deprive its owner of the property. The Defendant is liable for civil theft by deception, then, if the Plaintiff proves by a preponderance of the evidence:

First: That Defendant obtained the property of the Plaintiff;

Second: That Defendant did so by deceitful means or artful practice, with the intent to deprive Plaintiff, either temporarily or permanently, of a right to the property; and

Third: That Defendant's actions injured Plaintiff in some fashion.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

If you find for the Plaintiff on the claim of civil theft by deception, [and against the Defendant] you will then consider the issue of the amount of money damages to be awarded to the Plaintiff. You may

award the Plaintiff only those damages shown to be proximately caused by Defendant's wrongful action.

Damages are the proximate or legal result of a wrongful act of another if you find from a preponderance of the evidence that, except for the wrongful act, the damages would not have occurred. A wrongful act may be a proximate or legal cause of damages even though the wrongful act operates in combination with the act of another so long as the wrongful act contributes substantially to producing the damages.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

[State or enumerate the elements of recoverable compensatory

damages or, if none can be proved,
nominal damages.]

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, or reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

3.2.2
Civil Theft By Deception
(Georgia)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That Defendant obtained the property of the Plaintiff?

Answer Yes or No _____

2. That Defendant did so by deceitful means or artful practice, with the intent to deprive Plaintiff, either temporarily or permanently, of a right to the property?

Answer Yes or No _____

3. That Defendant's actions injured Plaintiff in some fashion?

Answer Yes or No _____

[Note: If you answered No to any of the preceding Questions, skip Question 4.]

4. That the Plaintiff should be awarded damages as follows:

[State or enumerate the elements of recoverable damages.]

SO SAY WE ALL.

_____
Foreperson

DATED _____

ANNOTATIONS AND COMMENTS

This pattern instruction is a modification of the 2000 instruction for civil theft. It is modeled on Georgia law, O.C.G.A. § 51-10-6 (civil theft cause of action for violation

of several criminal theft statutes), in conjunction with O.C.G.A. § 16-8-3 (theft by deception). See Ellerbee v. State, 569 S.E.2d 902, 904 (2002) ("The offense of theft by deception requires: (1) obtaining the property by any deceitful means or artful practice; (2) with the intention of depriving the owner of the property. O.C.G.A. § 16-8-3(a)").

For the application of Florida law to specific civil theft violations, Pattern Instruction 3.2.1 (Civil Theft) should be used and modified as necessary because of Florida's heightened "clear and convincing" standard. See Fla. Stat. § 772.11 (providing civil cause of action for any form of theft, embezzlement, conversion or larceny, including obtaining property by fraud, willful misrepresentation of a future act or false promise).

3.3
Breach Of Fiduciary Duty

The Plaintiff's claim is that the Defendant violated what is called a "fiduciary" duty or obligation that the Defendant allegedly owed to the Plaintiff.

A "fiduciary" obligation exists whenever one person - - the client - - places special trust and confidence in another person - - the fiduciary - - relying upon the fiduciary to exercise discretion or expertise in acting for the client; and the fiduciary knowingly accepts that trust and confidence and thereafter undertakes to act on behalf of the client by exercising the fiduciary's own discretion and expertise.

Of course, the mere fact that a business relationship arises between two persons does not mean that either owes a fiduciary obligation to the other. If one person engages or employs another and thereafter directs or supervises or approves the other's actions, the person so employed is not a fiduciary. Rather, as previously stated, it is only when one party places, and the other accepts, a special trust and confidence - - usually involving the exercise of professional expertise and discretion - - that a fiduciary relationship comes into being.

When one person does undertake to act for another in a fiduciary relationship, the law forbids the fiduciary from acting in any manner adverse or contrary to the interests of the client, or from acting for the fiduciary's own benefit in relation to the subject matter of their relationship. The fiduciary thus has a responsibility to disclose any conflicts between the fiduciary's interests and the principal's interests which might make the fiduciary act in the fiduciary's own best interest at the expense or the detriment of his principal. The client is entitled to the best efforts of the fiduciary on the client's behalf, and the fiduciary must exercise skill, care and diligence when acting on behalf of the client.

Within the scope of action acknowledged or agreed to by the fiduciary, then, the fiduciary is required to make truthful and complete disclosures to those to whom a fiduciary obligation is owed, and the fiduciary is forbidden to obtain an unreasonable advantage at the client's expense.

In order to recover on this claim the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That a "fiduciary" relationship existed between the parties (as that term has been defined in these instructions);

Second: That the Defendant violated that fiduciary obligation by [describe the acts constituting the alleged breach of the fiduciary obligation]; and

Third: That the Plaintiff suffered damages as a proximate result of that violation of the fiduciary obligation.

For damage to be the proximate result of an act or course of dealing, it must be shown that such act or course of dealing played a substantial part in causing or bringing about the damage, and that, except for such conduct, the damage would not have occurred.

If you find for the Plaintiff on any of the Plaintiff's claims, you will then consider the issue of the amount of money damages to be awarded to the Plaintiff.

In considering the issue of the Plaintiff's damages, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) [Describe Plaintiff's theory of recoverable compensatory or economic damages, as well as punitive and nominal damages.]

3.3
Breach Of Fiduciary Duty

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That a "fiduciary" relationship existed between the parties (as that term has been defined in these instructions)?

Answer Yes or No _____

2. That the Defendant violated that fiduciary obligation by [describe the acts constituting the alleged breach of the fiduciary obligation]?

Answer Yes or No _____

3. That the Plaintiff suffered damages as a proximate result of that violation of the fiduciary obligation?

Answer Yes or No _____

[Note: If you answered No to any of the preceding Questions, skip Question 4.]

4. That the Plaintiff should be awarded the following damages:

[State or enumerate the elements of recoverable damages]

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

This instruction is generic, intended for all kinds of fiduciary relationships. However, the instruction must be modified in those cases where state law explicitly recognizes or denies a fiduciary relationship by virtue of the positions of the parties involved. See, e.g., Bloodworth v. Bloodworth, 579 S.E.2d 858, 861 (Ga. App. 2003) (duty exists between executor of estate and those with interest in estate); Aukerman v. Witmer, 568 S.E.2d 123, 129 (2002) (relationship exists between corporate officers and directors and shareholders); Garrett v. Fleet Finance, Inc. of Georgia, 556 S.E.2d 140, 145 (Ga. App. 2001) (attorney-client relationship is fiduciary relationship); KPMG Peat Marwick v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 765 So.2d 36, 38 (Fla. 2000) (same for accountant-client relationship); Moss v. Appel, 718 So.2d 199, 201 (Fla. 4th DCA 1998) (insurance broker is in fiduciary relationship with insured); but see Baker v. Campbell, 565 S.E.2d 855, 859 (Ga.

App. 2002) (no relationship between bank and borrowers); Clark v. Byrd, 564 S.E.2d 742, 744-45 (2002) (no relationship between insurer and insured); Gaulden v. Mitchell, 849 So.2d. 192, 194-95 (2002) (no relationship between seller and buyer of home); Gunter v. Huddle, 724 So.2d 544, 546 (Ala. Civ. App. 1998) (no relationship between patient and physician).

Florida law: Distinguishes explicitly between express and implied fiduciary relationships. See Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp., 850 So.2d 536, 540 (Fla. 5th DCA. 2003); Maxwell v. First United Bank, 782 So.2d 931, 933-34 (Fla. 4th DCA. 2001) ("Express fiduciary relationships are created by contract, such as principal/agent, or can be created by legal proceedings in the case of a guardian/ward. A fiduciary relationship which is implied in law is based on the circumstances surrounding the transaction and the relationship of the parties, and may be found when confidence is reposed by one party and a trust accepted by the other") (cites and quotes omitted); First Nat'l Bank & Trust Co. of Treasurer Coast v. Pack, 789 So.2d 411, 415 (Fla. 4th DCA 2001); Capital Bank v. MVB, Inc., 644 So.2d 515 (Fla. 3d DCA 1994); Capital Bank v. MVB, Inc., 644 So.2d 515 (Fla. 3rd DCA 1994).

Georgia: See Hicks v. Talbott Recovery System, Inc., 196 F.3d 1226, 1238-39 (11th Cir. 1999) ("some confidential relationships are created by law, some by contract, and others may be created by the facts of a particular case") (quoting Trulove v. Woodmen of the World Life Ins. Soc'y, 419 S.E.2d 324, 327 (1992); id. ("All the law requires is the showing of a relationship in fact which justifies the reposing of confidence in one party by another") (quoting Remediation Servs., Inc. v. Georgia-Pacific Corp., 433 S.E.2d 631, 635 (1993)).

Alabama: See Fisher v. Comer Plantation, Inc., 772 So.2d 455, 465-66 (Ala. 2000) (drawing on the distinction between express and implied agency to conclude that a jury could infer a fiduciary duty upon first finding that the party was a fiduciary/agent on a theory of implied agency).

Punitive Damages: Punitive damages are also available on breach of fiduciary duty claims. See Caswell v. Jordan, 362 S.E.2d 769, 774 (1987); Mortellite v. Am. Tower, L.P., 819 So.2d 928, 934 (Fla. 2nd DCA 2002); Third Generation Inc. v. Wilson, 668 So.2d 518, 521 n. 3 (Ala. 1995). See Pattern Instruction 3.1 (Fraud) for punitive damages charge.

4.1
Fire Insurance Claim
General Instruction
(With Defenses Based Upon False Application, Arson, And False Claim Form)

In this case the Plaintiff seeks to recover from the Defendant under a fire insurance policy issued by the Defendant insuring the Plaintiff's [home] [business premises] and contents.

There is no dispute that the fire occurred and that the Plaintiff's property was [damaged] [destroyed] as a result of that fire.

The principal issues for you to decide, therefore, arise out of the defenses asserted by the Defendant. The Defendant claims [(1) that the Plaintiff made a fraudulent or a material misstatement (or concealment) of fact in the original application for the policy;] [(2) that the Plaintiff intentionally burned or procured the burning of the insured property;] [(3) that the Plaintiff intentionally and fraudulently misrepresented a material fact relating to the claim after the loss had occurred].

With respect to the first defense, that the Plaintiff made a fraudulent or a material misstatement [or concealment] in the application for the insurance policy, the Defendant contends [describe the misrepresentation or concealment alleged by the Defendant.] Thus, the insurance policy provides that the policy shall be void if the insured

either makes a fraudulent statement in the application or misrepresents or conceals a material matter. This is a valid provision, and it is not necessary for the insurance company to have either actually been deceived by the falsehood or relied upon the misrepresentation to its detriment in order for the policy to be deemed void. I will define the terms "fraudulent" and "material" for you a little later in these instructions. To sustain this defense the Defendant must prove by a preponderance of the evidence either:

First: That the Plaintiff made a fraudulent statement [or concealment] in the application (without regard to the materiality of the subject matter);

or

Second: That the Plaintiff made a misrepresentation or [concealment] in the application (without regard to fraudulent intent) concerning a subject matter that was material to the risk or material to the hazard assumed by the insurer.

Accordingly, the first series of questions you will be asked on your verdict form are:

1. Do you find from a preponderance of the evidence that the Plaintiff, in the application for the subject insurance, made a fraudulent statement [or concealment] (without regard to the materiality of the subject matter)?

Answer Yes or No.

2. Do you find from a preponderance of the evidence that the Plaintiff, in the application for the subject insurance, made a misrepresentation [or concealment] (without regard to fraudulent intent) concerning a subject matter that was material to the risk?

Answer Yes or No.

With respect to the second defense, that the Plaintiff intentionally caused or procured the Plaintiff's own loss, the Defendant must prove by a preponderance of the evidence both of the following facts:

First: That the fire was incendiary in origin; that is, that the fire did not occur through accident or negligence, but was deliberately and intentionally set by someone for the purpose of causing destruction of the property; and

Second: That the Plaintiff is the person who intentionally and willfully set the fire, or solicited, procured, aided or counseled some other person to do so for the Plaintiff.

[The question of whether the fire was actually incendiary in origin is a question for you to determine on the basis of the evidence you have heard in the case. As to the second element, the Defendant need not show that someone actually saw the Plaintiff set the fire that destroyed the building. Instead, the Defendant may rely entirely on circumstantial

evidence. As you may recall from my earlier instruction, "circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, an ultimate conclusion.

If the Defendant relies upon circumstantial evidence to prove that the Plaintiff intentionally and willfully caused or procured the fire that destroyed the building, the Defendant must establish that the Plaintiff had a sufficient motive and a reasonable opportunity to set the fire or to cause the fire to be set. In determining whether such motive and opportunity existed in this case, you may consider such factors as the financial status of the insured, the nature and extent of the Plaintiff's debts and liabilities, the potential for profit or loss, and whether there is sufficient information connecting the Plaintiff with the fire.]

Accordingly, the next series of questions you will be asked on your verdict form are:

3. Do you find from a preponderance of the evidence that the fire in question was incendiary in origin; that is, that the fire did not occur through accident or negligence, but was deliberately and intentionally set by some person with the intent to cause destruction of the insured property?

Answer Yes or No.

(If your answer is "No," skip the next question.)

4. If you answered Yes to the preceding Question, do you find from a preponderance of the evidence that the Plaintiff intentionally and willfully set fire to the insured property or that the Plaintiff solicited, procured, aided or counseled some other person to do so?

Answer Yes or No.

With respect to the third defense, that the Plaintiff fraudulently, willfully and intentionally misrepresented or concealed material facts after the loss had occurred, the insurance policy involved in this case provides that the policy shall be void if the insured willfully misrepresents or conceals any material fact in the claim form or otherwise during the investigation of the loss.

This is a valid provision, and by its terms, if, after the loss, any false answer is intentionally and willfully made by the insured concerning a fact material to the inquiry, such answer would be fraudulent and the policy would be rendered void. It is not necessary, however, that the insurance company actually be deceived by the falsehood or rely upon such misrepresentation to its detriment. In this case the false statement that the Defendant alleges the Plaintiff made was [describe the false statement alleged by the Defendant.]

To establish this defense, therefore, it must be proved by a preponderance of the evidence that the insured in making such a

statement knew that the statement was false, and that the statement was material to the claim involved, that is to say, that the statement affected the liability of the company to pay. Thus, if such statement, even though erroneous, was made with the honest belief that it was true, then the insured would not be guilty of fraud, which is a necessary part of the Defendant's defense.

Accordingly, the next question you will be asked on your verdict form is:

> 5. Do you find from a preponderance of the evidence that the Plaintiff fraudulently, willfully and intentionally misrepresented or concealed material facts or circumstances on the claim form or during the inquiry made by the Defendant after the fire loss had occurred?
>
> Answer Yes or No.

The word "intentionally," wherever that word has been used in these instructions, means to say or do something deliberately, consciously and voluntarily.

The word "willfully," wherever that word has been used in these instructions, means to say or do something purposely and in bad faith, with the specific intent to accomplish a wrongful result.

The words "fraud" or "fraudulent," wherever those words have been used in these instructions, mean the making of any untrue

statement of fact that is then known to be untrue by the person making the statement, or making a statement with reckless indifference as to its truth or falsity, and making such statement with the intent to deceive. A "fraudulent" statement or representation may also be made by statements of misleading half truths, or a deliberate concealment of material facts, when done with the intent to deceive.

Incorrect answers on an insurance application are not fraudulent statements and do not invalidate the policy when the particular applicant in good faith makes an erroneous expression of opinion or judgment, or the applicant misunderstands an inquiry that is couched in language or refers to subjects in special fields beyond his or her understanding. If an application provides that answers be made “to the best of the insured’s knowledge and belief,” a misrepresentation by the insured does not invalidate the policy if you find that the insured actually responded to the best of [his] [her] knowledge and belief. However, even a good faith misrepresentation of fact may be sufficient to invalidate an insurance policy if the misrepresentation was material.

The word "material" wherever that word has been used in these instructions, means that the subject matter of the statement [or concealment] related to a fact or circumstance that would be important

to the decision to be made as distinguished from an insignificant, trivial or unimportant detail; that is, to be material, an assertion [or concealment] must relate to a fact or circumstance that would affect the liability of the insurer (if made during an investigation of the loss), or would affect the insurance company's decision to issue the policy, or the amount of coverage to be afforded or the premium to be charged, by changing the nature, extent, or character of the risk (if made in the application for the policy).

[If you find for the Plaintiff and against the Defendant on its defenses, you will then consider the issue of the Plaintiff's damages.]

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Damages to the Building

(b) Damages to the Contents

Accordingly, the next question you will be asked on your verdict form is:

6. What sum of money do you find from a preponderance of the evidence to be the amount of the Plaintiff's damages resulting from the fire?

Answer in Dollars and Cents.

Damages to the Building $_____

Damages to the Contents $_____

Total Damages $_____

4.1
Fire Insurance Claim
General Instruction
(With Defenses Based Upon False Application, Arson, And False Claim Form)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff, in the application for the subject insurance, made a fraudulent statement [or concealment] (without regard to the materiality of the subject matter)?

Answer Yes or No _____

2. That the Plaintiff, in the application for the subject insurance, made a misrepresentation [or concealment] (without regard to fraudulent intent) concerning a subject matter that was material to the risk?

Answer Yes or No _____

3. That the fire in question was incendiary in origin; that is, that the fire did not occur through accident or negligence, but was deliberately and intentionally set by some person with the intent to cause destruction of the insured property?

Answer Yes or No _____

4. If you answered Yes to the preceding Question, that the Plaintiff intentionally and willfully set fire to the insured property or that the Plaintiff solicited, procured, aided or counseled some other person to do so?

Answer Yes or No _____

5. That the Plaintiff fraudulently, willfully and intentionally misrepresented or concealed material facts or circumstances on the claim form or during the inquiry made by the Defendant after the fire loss had occurred?

Answer Yes or No _____

6. What sum of money do you find from a preponderance of the evidence to be the amount of the Plaintiff's damages resulting from the fire?

Answer in Dollars and Cents.

Damages to the Building $_____

Damages to the Contents $_____

Total Damages $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

The statutes of each of the three states in the Eleventh Circuit provide that an insurance policy is voidable if the application is fraudulent or contains misrepresentations that are material to the risk, or if the insurer in good faith would

not have provided coverage under the stated terms if the true facts had been known. See Ala. Code § 27-14-7; Fla. Stat. § 627.409; Ga. Code § 33-24-7.

Under the law of all three states in the Eleventh Circuit, a defendant may prove arson as an affirmative defense to payment of a fire insurance claim through circumstantial evidence by showing that the fire was incendiary in origin and the plaintiff had a motive and the opportunity to intentionally set the fire. Williams v. Allstate Ins. Co., 591 So.2d 38, 40 (Ala. 1991); Bush v. Ala. Farm Bureau Mut. Cas. Ins. Co., Inc., 576 So.2d 175, 179 (Ala. 1991); Michigan Millers Mut. Ins. Corp. v. Benfield, 140 F.3d 915, 921-22 (11th Cir. 1998) (applying Florida law); Insurance Co. of N. Am. v. Valente, 933 F.2d 921 (11th Cir. 1991) (applying Florida law); D. R. Mead & Co. v. Cheshire of Fla., Inc., 489 So.2d 830, 831 (Fla. 3d DCA 1986); Fortson v. Cotton States Mut. Ins. Co., 308 S.E.2d 382, 385 (Ga. App. 1983).

5.1
Breach Of Construction Contract
Claim By Contractor - Counterclaim By Owner

In this case, as you know, there are several claims made by the parties against each other, and there are a number of separate issues arising out of those claims. These issues will be submitted to you for your decision in the form of specific questions, known as Special Interrogatories, which will constitute the form of your verdict.

The first claim for your consideration is the claim of the Plaintiff against the Defendant to recover sums claimed by the Plaintiff to be due and unpaid under the contract between the parties for the construction of the buildings and related improvements.

In the case of a construction contract, the building contractor is entitled to payment of the contract price upon proof of "substantial performance" of the work required by the contract. It is not necessary that the building contractor fully and completely perform every item specified in the plans and specifications, which are a part of the contract. The term "substantial performance" means that degree of performance of a contract that, while not equal to full and complete performance, is so nearly equivalent that it would be unreasonable to deny the contractor the payment agreed upon in the contract, subject,

of course, to the owner's right to a reduction of the contract price measured by whatever damages the owner has suffered by reason of the contractor's failure to render full and complete performance.

Accordingly, the first two questions you will be asked (as a part of the Special Interrogatories to be submitted to you) are:

1. Do you find from a preponderance of the evidence that the Plaintiff substantially performed its obligations under the contract (and change orders) for the construction of the work?

   Answer Yes or No.

2. If you answered Yes to Question One, what amount of money do you find to be due and unpaid by the Defendant to the Plaintiff under the contract (without reduction in amount for any damages Defendant may have sustained due to lack of full and complete performance)?

   Answer in Dollars and Cents.

Thus, even though you may find that the Plaintiff substantially performed the contract, you may also find that the Defendant nevertheless sustained damages because of a lack of full and complete performance on the part of the Plaintiff with respect to the construction work. So, in that regard, the third question you will be asked is as follows:

3. If you answered Yes to Question One, do you find from a preponderance of the evidence that the Defendant nevertheless sustained damages by reason of a failure on the part of the Plaintiff to fully and completely perform the construction work?

Answer Yes or No.

[If you find that the Plaintiff substantially performed the construction work, but also find that the Defendant sustained damages because of a failure of full and complete performance by the Plaintiff, you will then consider the issue of whether the Plaintiff, as it contends, was in fact "prevented" by the Defendant from fully and completely performing the work.

On that issue you are instructed that, when two parties enter into a contract, each becomes obligated under the law to permit the other to perform the contract without interference; that is, each party must reasonably avoid any action that would effectively hinder, obstruct or prevent the other party from undertaking or completing whatever the other party agreed to do.

So, in this case, if you find from a preponderance of the evidence that the Plaintiff (including the Plaintiff's subcontractors) was ready, willing and able to perform its contractual obligations but the Defendant did something that effectively hindered, obstructed and prevented the

Plaintiff from so doing, then the Defendant cannot recover damages for that failure because the Defendant, personally, became charged under the law with responsibility for it. On this issue you will be asked, as question number four, the following:

> 4. If you answered Yes to Question Three, do you find from a preponderance of the evidence that the Defendant prevented the Plaintiff from fully and completely performing the construction work?
>
> Answer Yes or No.]

In summary, up to this point, if you find that the Plaintiff substantially performed the construction work; and you also find that the Defendant nevertheless sustained damages from a lack of full and complete performance of that work[; and if you further find that the Plaintiff was not "prevented" by any action on the part of the Defendant from accomplishing full and complete performance of the work], you will then consider the next issue, namely, the amount of the damages sustained by the Defendant. Question number five, which you will be asked concerning that issue, is as follows:

> 5. If you answered Yes to Question Three[, and No to Question Four], what amount of money do you find from a preponderance of the evidence to be due to the Defendant on account of such damages, measured by the

reasonable cost in money necessary to supply or correct the deficiencies in the Plaintiff's failure to fully and completely perform the contract work?

Answer in Dollars and Cents.

The questions discussed up to this point, of course, all deal with the issues arising out of the Plaintiff's claim against the Defendant for alleged breach of contract resulting from the Defendant's refusal to pay the balance claimed to be due under the construction agreement. However, the Defendant asserts a counterclaim against the Plaintiff contending that, in fact, the Plaintiff breached the contract by failing to substantially perform its obligations for the construction of the work. So, if you find against the Plaintiff on its claim (answering "No" to question number one), you will then consider question number six, as follows:

6. If you answered No to Question One, do you find from a preponderance of the evidence that the Plaintiff failed to substantially perform its obligations under the contract (and change orders) for the construction of the work?

Answer Yes or No.

If you answer "Yes" to question number six - - finding in favor of the Defendant on the counterclaim - - you must then consider whether the defects or omissions in the Plaintiff's performance of the work are

reasonably capable of being corrected without necessity of substantially tearing down and completely rebuilding the improvements. If so, the measure of the Defendant's damages under the law would be the amount you find from a preponderance of the evidence to be the reasonable cost of effecting those repairs or completing those omissions. On the other hand, if you find that the defects or omissions in the work are of such a magnitude that it would be necessary, in order to correct them, to substantially tear down or remove the existing improvements and rebuild them, then the cost of so doing would obviously exceed the value that would be added to the property, and carrying out such repairs or reconstruction would not be feasible from an economic standpoint. Thus, under those circumstances, the measure of the Defendant's damages under the law would not be the cost of such reconstruction; rather, it would be the difference between the market value of the property as actually improved by the Plaintiff, and the market value the property would have had at the time in question if it had been improved in compliance with the plans and specifications incorporated in the contract. These issues will be presented to you for resolution through the answers you supply to questions seven through ten, as follows:

7. If you answered Yes to Question Six, do you find from a preponderance of the evidence that the defects and/or omissions in the work are reasonably susceptible of correction and completion without necessity of substantially tearing down and rebuilding the improvements?

Answer Yes or No.

8. If you answered Yes to Question Six and Question Seven, what amount of money do you find from a preponderance of the evidence to be due to the Defendant as compensatory damages for the Plaintiff's failure to substantially perform its contract for the construction of the work, the measure of such damages being the reasonable cost in money necessary to correct or complete the defects and/or omissions in the construction?

Answer in Dollars and Cents.

9. If you answered Yes to Question Six and No to Question Seven, do you find from a preponderance of the evidence that the defects and/or omissions in the work are of such a character that in order to reasonably correct or complete them it would be necessary to substantially tear down and rebuild the work?

Answer Yes or No.

10. If you answered Yes to Question Six and Question Nine, what amount of money do you find from a preponderance of the evidence to be due to the Defendant as compensatory damages for the Plaintiff's failure to substantially perform its contract for the construction of the work, the measure of such damages being the difference between the fair

market value of the defective work and the fair market value the work would have had if properly completed in accordance with the contract?

Answer in Dollars and Cents.

5.1
Breach Of Construction Contract
Claim By Contractor - Counterclaim By Owner

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff substantially performed its obligations under the contract (and change orders) for the construction of the work?

Answer Yes or No _____

2. If you answered "Yes" to Question One, what amount of money do you find to be due and unpaid by the Defendant to the Plaintiff under the contract (without reduction in amount for any damages Defendant may have sustained due to lack of full and complete performance)?

Answer in Dollars and Cents $_____

3. If you answered "Yes" to Question One, that the Defendant nevertheless sustained damages by reason of a failure on the part of the Plaintiff to fully and completely perform the construction work?

Answer Yes or No _____

4. If you answered "Yes" to Question Three, that the Defendant prevented the Plaintiff from fully and completely performing the construction work?

Answer Yes or No _____

5. If you answered "Yes" to Question Three[, and "No" to Question Four], what amount of money do you find from a preponderance of the evidence to be due to the Defendant on account of such damages, measured by the reasonable cost in money necessary to supply or correct the deficiencies in the Plaintiff's failure to fully and completely perform the contract work?

Answer in Dollars and Cents $_____

6. If you answered "No" to Question One, do you find from a preponderance of the evidence that the Plaintiff failed to substantially perform its obligations under the contract (and change orders) for the construction of the work?

Answer Yes or No _____

7. If you answered "Yes" to Question Six, do you find from a preponderance of the evidence that the defects and/or omissions in the work are reasonably susceptible of correction and completion without necessity of substantially tearing down and rebuilding the improvements?

Answer Yes or No _____

8. If you answered "Yes" to Question Six and Question Seven, what amount of money do you find from a preponderance of the evidence to be due to the Defendant as compensatory damages for the Plaintiff's failure to substantially perform its contract for the construction of the work, the measure of such damages being the reasonable cost in money necessary to correct or complete the defects and/or omissions in the construction?

Answer in Dollars and Cents $_____

9. If you answered "Yes" to Question Six and "No" to Question Seven, do you find from a preponderance of the evidence that the defects and/or omissions in the work are of such a character that in order to reasonably correct or complete them it would be necessary to substantially tear down and rebuild the work?

Answer Yes or No _____

10. If you answered "Yes" to Question Six and Question Nine, what amount of money do you find from a preponderance of the evidence to be due to the Defendant as compensatory damages for the Plaintiff's failure to substantially perform its contract for the construction of the work, the measure of such damages being the difference between the fair market value of the defective work and the fair market value the work would have had if properly completed in accordance with the contract?

Answer in Dollars and Cents $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____

6.1
Tortious Interference With Business Relationship
Raiding Key Employees

In this case the Plaintiff claims that the Defendant committed acts constituting tortious or unlawful interference with the employment relationships existing between the Plaintiff and its key employees.

In order to recover on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the Defendant enticed or induced Plaintiff's employees to leave the Plaintiff's employ;

Second: That the Defendant did so with the wrongful intent to injure or destroy the Plaintiff's business; and

Third: That the Plaintiff suffered injury or damage in its business as a proximate result of the Defendant's wrongful acts.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

In our free enterprise system, it is not unlawful or improper, standing alone, for someone to hire away someone else's employees so long as the person doing so wants to use the employees' services in advancing that person's own business rather than with the intent of

injuring or destroying the other employer's business. This is true regardless of how much the loss of the employees may inconvenience the former employer. The mere fact that someone's activity has injured another in business does not mean that the latter may recover because, in a free enterprise system, a businessperson has no legal complaint concerning a loss resulting from lawful competition, including competition for the services of skilled employees. If the means of competition are lawful, the advantage gained should remain where success has put it.

The theory of the tort or wrong of interference is that the law draws a line between lawful competition and vindictive destruction of someone else's business. So, a systematic effort to induce employees to leave their present employment and take work with another is unlawful when the purpose of such enticement is to cripple or destroy their employer rather than to obtain their skills and services in the legitimate furtherance of one's own business enterprise.

[It also becomes unlawful when the inducement is made through the use of untruthful means, or for the purpose of having the employees commit wrongs, such as disclosing the former employer's trade secrets.]

If you find that the Plaintiff has failed to prove its claim of tortious interference as defined in these instructions, then, of course, your verdict will be for the Defendant. On the other hand, if you find for the Plaintiff on this claim, you will then consider the issue of the amount of pecuniary or monetary damages to be awarded. In that respect you should award the Plaintiff an amount of money shown by a preponderance of the evidence in the case to be fair and adequate compensation for such loss or damage, if any, as proximately resulted from the tortious interference. For damage to be the proximate result of such interference, it must be shown that, except for the tortious interference, such damage would not have occurred.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

[State or enumerate the elements
of recoverable damages]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that reasonably could have been realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done willfully, intentionally or with callous and reckless indifference to the

Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, willfulness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages.]

6.1
Tortious Interference With Business Relationship
Raiding Key Employees

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant enticed or induced Plaintiff's employees to leave the Plaintiff's employ?

Answer Yes or No _____

2. That the Defendant did so with the wrongful intent to injure or destroy the Plaintiff's business?

Answer Yes or No _____

3. That the Plaintiff suffered injury or damage in its business as a proximate result of the Defendant's wrongful acts?

Answer Yes or No _____

[Note: If you answered No to any of the preceding questions you need not answer any of the questions following or coming after the Question to which you gave No as the answer.]

4. That the Plaintiff should be awarded the following damages:

[State or enumerate the elements of recoverable damages]

SO SAY WE ALL.

_____
Foreperson

DATED:_____

ANNOTATIONS AND COMMENTS

Under Florida law, the elements of tortious interference with a business relationship are "(1) the existence of a business relationship that affords the plaintiff existing or prospective legal rights; (2) the defendant's knowledge of the business relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the plaintiff." Int'l Sales & Serv., Inc. v. Austral Insulated Prods., Inc., 262 F.3d 1152, 1154 (11th Cir. 2001).

Under Georgia law, a defendant cannot be liable for tortious interference with contractual or business relationships for soliciting a plaintiff's employees to leave their employer and establish a business to compete with the plaintiff unless the defendant is a "stranger" to the relationship between the plaintiff and his or her employees. Iraola & CIA, S.A. v. Kimberly-Clark Corp., 325 F.3d 1274, 1283-84 (11th Cir. 2003) (citing Atlanta Mkt. Ctr. Mgmt. Co. v. McLane, 503 S.E.2d 278 (Ga. 1998)).

Under Alabama law, the torts of interference with business relations and interference with contractual relations have been combined. Gross v. Lowder Realty Better Homes & Gardens, 494 So.2d 590, 597 (Ala. 1986). Under the combined standard, the intentional interference with business or contractual relations requires the following to be actionable: "(1) The existence of a contract or business relation; (2) Defendant's knowledge of the contract or business relation; (3) Intentional interference by the defendant with the contract or business relation; (4) Absence of justification for the defendant's interference; and (5) Damage to the plaintiff as a result of defendant's interference." Id. (footnote omitted); see also Alabama Pattern Jury Instructions Civil: 2d Ed. §§ 10.35 & 10.36, at 209-12.

INDEX TO SUPPLEMENTAL DAMAGES INSTRUCTIONS

INDEX TO SUPPLEMENTAL DAMAGES INSTRUCTIONS
(Continued)

1.1
Duty To Mitigate
In General

You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff [within the limitations of any disability sustained] failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.

1.2
Duty To Mitigate
Pursuing Medical Care

The Plaintiff also has a duty to minimize damages by following the expert recommendations of the physicians. In other words, a person who has suffered injury by reason of a Defendant's negligence is bound to use reasonable and proper effort to make the damages as small as practicable, and to act in good faith to adopt reasonable methods and follow reasonable programs of medical care or treatment to restore or correct the injured condition.

Failure of the Plaintiff to make a reasonable effort to minimize damages does not prevent all recovery, but does prevent recovery of such damages as might have been avoided.

1.3
Duty To Mitigate
When Issue Raised Concerning
Advisability Of Medical Treatment

The Plaintiff also has a duty to minimize damages by submitting to advised surgery or other medical treatment if you find that a reasonably prudent person, under the same circumstances as those of the Plaintiff, would have submitted to the surgery and medical treatment to cure the injuries as speedily as practicable. In deciding whether a reasonably prudent person would submit to a suggested course of medical treatment you should consider among other things (1) the risk of pain or further injury involved in the particular medical treatment; (2) the expense or inconvenience of the treatment, and (3) the probability that the advised course of medical treatment would be successful in alleviating the condition. With regard to the probability of success of the medical treatment, you may consider the conflict of opinion among physicians on the question of its advisability and effectiveness. If you should find that the Plaintiff was unreasonable in refusing to submit to a suggested course of medical treatment, then you should deny recovery for any damages that would have been avoided by submitting to such medical treatment.

2.1
Punitive Damages
In General

The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's [federally protected] rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's [federally protected] rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

When assessing punitive damages, you must be mindful that punitive damages are meant to punish the Defendant for the specific conduct that harmed the Plaintiff in the case and for only that conduct. For example, you cannot assess punitive damages for the Defendant being a distasteful individual or business. Punitive damages are meant to punish the Defendant for this conduct only and not for conduct that occurred at another time. Your only task is to punish the Defendant for the actions [it] [he] [she] took in this particular case.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].

ANNOTATIONS AND COMMENTS

A major limitation on recovery of punitive damages is the Supreme Court's recent announcement that "few awards exceeding a single-digit ration between punitive and compensatory damages . . . will satisfy due process." State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). Also in that case, the Court further explained the guideposts set out in BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) for courts reviewing punitive damages awards. Those three guideposts are: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. See id. at 575.

3.1
Mortality Tables - Actuarial Evidence
Life Expectancy In General

If a preponderance of the evidence shows that the Plaintiff has been permanently injured, you may consider the Plaintiff's life expectancy. The mortality tables received in evidence may be considered in determining how long the claimant may be expected to live. Bear in mind, however, that life expectancy as shown by mortality tables is merely an estimate of the average remaining life of all persons in the United States of a given age and sex having average health and ordinary exposure to danger of persons in that group. So, such tables are not binding on you but may be considered together with the other evidence in the case bearing on the Plaintiff's own health, age, occupation and physical condition, before and after the injury, in determining the probable length of the Plaintiff's life.

3.2
Mortality Tables - Actuarial Evidence
Work Life Expectancy

When considering life expectancy in determining future damages, you should bear in mind, of course, the distinction between entire life expectancy and work life expectancy, and those elements of damage related to future income [or future support] should be measured only by the Plaintiff's remaining work life expectancy.

3.3
Mortality Tables - Actuarial Evidence
Life Expectancy Of Decedent

In determining how long someone would have lived, if the person had lived out a normal life, you may consider the person's normal life expectancy at the time of death. The mortality tables received in evidence may be considered in determining how long a person may have been expected to live. Such tables are not binding on you but may be considered together with other evidence in the case bearing on the decedent's health, age and physical condition, before the injury and death, in determining the probable length of the decedent's life.

3.4
Mortality Tables - Actuarial Evidence
Life Expectancy Of Survivor

In determining the duration of any future loss by the survivor because of the death of the decedent, you should consider the joint life expectancy of the survivor and the decedent. The mortality tables received in evidence may be considered together with the other evidence in the case in determining how long each may have been expected to live.

4.1
Effect Of Income Taxes
Recovery Of Take-Home Pay

Under the law, any award made to the Plaintiff in this case for past or future lost earnings is not subject to federal or state income tax. Therefore, in computing the amount of any damages that you may find the Plaintiff is entitled to recover for lost earnings, the Plaintiff is entitled to recover only the net, after-tax income. In other words, the Plaintiff is entitled to recover only "take-home pay" that you find the Plaintiff has lost in the past, or will lose in the future.

ANNOTATIONS AND COMMENTS

Although 26 USC § 104(a)(2) has been interpreted as excluding from taxable income lost wages awarded in a personal injury action, it remains uncertain following the passage of the Civil Rights Act of 1991 whether past or future earnings recovered in an employment discrimination cause of action would be excludable from taxable income. See United States v. Burke, 504 U.S. 229, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) (Title VII prior to the 1991 Amendment); Comm. of Internal Revenue v. Schleier, 515 U.S. 323, 115 S.Ct. 2159, 132 L.Ed.2d 294 (1995) (ADEA).

5.1
Reduction To Present Value
Inflation And Calculation Of
Below-Market Discount Rate

If you should find that the Plaintiff has proved a loss of future earnings, any amount you award for that loss must be reduced to present value. This must be done in order to take into account the fact that the award will be paid now, and the Plaintiff will have the use of that money now and in the near future, even though the total loss will not be sustained until later in the future.

In order to make a reasonable adjustment for the present use of money representing a lump-sum payment of anticipated future loss, you must apply what is called a below-market discount rate.

In making that calculation you should first determine the net, after-tax income the Plaintiff would have received during the remainder of the Plaintiff's working life, including any increases the Plaintiff would have received as a result of any factors other than inflation. This future income stream must then be discounted or reduced by applying a below-market discount rate, which represents the estimated market interest rate the award could be expected to earn over the period of the loss (adjusted for the effect of any income tax on the interest so earned), and then reduced by the estimated rate of future price inflation.

You have heard the testimony of the economists concerning this calculation and their opinions concerning the appropriate below-market discount rate; and, while you are not bound by those opinions, you may rely upon them as an aid in resolving this issue.

ANNOTATIONS AND COMMENTS

In Jones &. Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 547-548,103 S.Ct. 2541, 2566, 76 L.Ed.2d 768 (1983), the Supreme Court held that the fact-finder should consider inflation in determining an appropriate damage award for future economic damages. The court also emphasized, however, that courts must not allow the adjustment for inflation to convert "'[t]he average accident trial . . . into a graduate seminar on economic forecasting.'" Id. 462 U.S. at 548, 103 S.Ct. at 2556 (quoting Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 39 (2d Cir. 1980)).

In Culver v. Slater Boat Co., 722 F.2d 114, 117 (5th Cir. 1983), the former Fifth Circuit held that, in the absence of a stipulation by the parties concerning the method to be used, fact-finders shall determine and apply an appropriate below-market discount rate as the sole method to adjust loss-of-future-earnings awards to present value. "While expert testimony and jury instructions must be based on this method, juries may be instructed either to return a general verdict or to answer special interrogatories concerning the computation of damages." Id.

The court further held that the parties may stipulate to using any of three methods: the case-by-case method; the below-market discount method; or the "total-offset" method. If the parties choose the below-market discount method, they may also stipulate to the below-market discount rate itself. If they are unable to do so, they may introduce expert testimony concerning the appropriate rate, but all other evidence about the effect of price inflation is inadmissible. Id. at 122.

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988), involved a FELA action in state court in which no expert testimony was introduced by either side concerning the reduction to present value of any award to the Plaintiff for lost future income, and the trial court instructed the jury to apply the "total offset" method. The Supreme Court held this approach to be error because it "improperly took from the jury the essentially factual question of the

appropriate rate at which to discount appellee's FELA award to present value. . . ." Id. at 342.

It appears, therefore, that in the Eleventh Circuit, absent a stipulation by the parties, any evidence concerning reduction to present value calculations should be limited to the below market discount method, and if such evidence is offered, this instruction (Supplemental Damages Instruction 5.1) should be given. If no evidence is offered by either party concerning the appropriate below market discount rate, the committee recommends that no instruction be given (i.e., the parties by their silent acquiescence have effectively agreed to the "total offset" method).

6.1
Attorneys Fees And Court Costs

If you find for the Plaintiff you must not take into account any consideration of attorneys fees or court costs in deciding the amount of Plaintiff's damages. [The matter of attorney's fees and court costs will be decided later by the Court.]