

**Duty of Jury to Find Facts and Follow Law**

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. Also, you must not read into these instructions or into anything the court may have said or done as giving any suggestion as to what verdict you should return - that is a matter entirely up to you.

**What Is Evidence**

The evidence from which you are able to decide what the facts are consists of:

1. the sworn testimony of witnesses;
2. the exhibits which have been received into evidence; and
3. any facts to which the lawyers have agreed or stipulated.

**What Is Not Evidence**

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their openings statements and closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court=s ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

**Direct and Circumstantial Evidence**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eye witness. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. As a general rule, the law makes no distinction between the weight to be given to other direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

**Deposition Testimony**

During the trial, you have heard reference to the terms "examination under oath" and "deposition." As it applies in this case, these terms mean sworn testimony, under oath, given by a witness before this trial began. To the extent that you have heard reference to and quotations from such "deposition" or "examination under oath," you may give it the same credibility or weight as live witness testimony, if any, as you think it may deserve.

**Credibility of Witnesses**

In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it at all. You do not have to believe all or any part of a witness' testimony, even if that testimony is uncontradicted. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice the witness may have;
5. whether other evidence contradicted the witness' testimony; and
6. the reasonableness of the witness' testimony in light of all the evidence.

If a witness testifies at trial in a manner inconsistent with his or her earlier statement, you may consider that not only in deciding whether to believe that statement on which contradiction exists, but also in deciding whether to believe any part of his or her trial testimony. If you do not believe the testimony of a witness

as to a fact, disbelief of that testimony does not constitute proof of the opposite fact.

**Witness - Impeachment - Prior Statements**

In assessing the credibility of a witness, you may also consider whether, on some prior occasion, the witness made statements that contradict the testimony he or she gave at the time of trial. If you conclude that a witness did, at some prior time, make statements that were materially different from what the witness said during this trial, you may take this into account in assessing the credibility of such witness, or determining the weight that you will give to such witness's testimony.

**Exhibits**

In addition to assessing the credibility of the witnesses and the weight to be given to their testimony, you should also evaluate the exhibits which you will have with you in the jury room. Examine them and consider them carefully.

However, bear in mind that merely because an exhibit has been admitted into evidence does not mean that you are required to accept it at face value. Like the testimony of a witness, the significance of an exhibit or the weight you attach to it will depend upon your evaluation of that exhibit in light of all the facts and circumstances of the case.

**Conduct of Court - General**

As I have said before, it is up to you to determine the facts in this case. You should not interpret anything I have said or done during this trial as expressing an opinion on my part as to what the facts in this case are. I have not intended to express any such opinion and you should not be concerned about what my opinions might be regarding the facts. That is a matter for you to decide.

**Objections by Counsel**

During this trial there have been occasions when the attorneys have objected to a question that was asked of a witness. You should not penalize an attorney, or more importantly, his client, for objecting. It is the attorney's right and duty to protect a client's interests by objecting to what the attorney may believe is evidence that does not satisfy the requirements of the rules of evidence.

If I sustained the objection, it is important that you not speculate about what the answer to the objected to question might have been. By sustaining the objection, the court has determined that the evidence should not be considered by you.

**Corporations**

Defendant, Customerlinx Corporation, is a corporation. The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this case. At all times, you should consider treating this matter as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life or in the community. Corporations act through their agents and employees.

**Selection of Foreman and Duty to Deliberate**

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that should. Do not come to a decision simply because other jurors think it is right.

**Communications with the Court**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

**Return of Verdict**

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.

**Verdict - Unanimity Required**

In order to return a verdict in this case, all of you must agree as to what that verdict will be. You cannot return a verdict for either party unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

**Jury Recollection Controls - Rehearing Testimony**

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. Understand that in a short trial, generally, your collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. However keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

**Copy of Instructions**

I have instructed you on the law that governs your deliberations. I will send into the jury room a written copy of my instructions. You are reminded, however, that the law is as I have given it to you from the bench; and the written copy is merely a guide to assist you.

### **Overview of Claims**

Mr. Gupta ("the Plaintiff") asserts claims against Customerlinx Corporation ("the Defendant" or "Customerlinx") for (1) fraud, based on an unpaid bonus to which Plaintiff claims he is entitled, and (2) breach of an express or implied contract, **[or, in the alternative, breach of an implied duty of good faith and fair dealing,]** based on an unpaid sales commission to which Plaintiff claims he is entitled, arising out of the RCA sale.

**Burden of Proof - Preponderance of the Evidence**

The burden of proof is on the Plaintiff to prove each and every essential element of his claims by a preponderance of all of the credible evidence. If the evidence should fail to establish any one of the essential elements of the Plaintiff's claims, or if the evidence is equally balanced as to any of the essential elements of the Plaintiff's claims, then you must find for the Defendant.

The standard of preponderance of the evidence means the greater weight of the evidence. A preponderance of the evidence is such evidence which, when considered and compared with any opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more probably true than not true. A proposition is proved by a preponderance of the evidence if, after you have weighed the evidence, the proposition is made to appear more likely or probable in the sense that there exists in your minds an actual belief in the truth of that proposition derived from the evidence, notwithstanding any doubts that may still linger in your minds. Simply stated, a matter has been proven by preponderance if you determine, after you have weighed all of the evidence, that the matter is more probably true than not true. Another description of the state of mind which is satisfied by a fair preponderance

of the evidence is a firm and abiding conviction in the truth of the plaintiff's case.

**Fraud - Election**

A party who has been induced by fraud to enter into a contract may pursue either one of two remedies. He may elect to cancel the contract, or he may sue for damages in an action for fraud. In the present case, [P's text deleted] Plaintiff has elected to pursue the claim of fraud against Defendant, based upon an unpaid bonus to which Plaintiff claims he is entitled. [incorporating part of D's suggested language]

**Fraud - Elements of Fraud**

The elements of a fraud claim are as follows:

- (1) that the Defendant made a false representation or provided false information concerning existing facts/circumstances;
- (2) that the representation/information was false at the time it was made;
- (3) that the Defendant knew or should have known that the information was to be relied upon by the plaintiff in a business transaction;
- (4) that the Defendant failed to exercise reasonable care in obtaining or communicating the information in question;
- (5) that the Plaintiff did rely on the false representation/information;
- (6) that the Plaintiff's reliance on the false representation/information was reasonable under the circumstances; and
- (7) that the Plaintiff suffered some financial loss or harm as a proximate result of the representation/information. **[P's instruction 3 has been deleted as duplicative; joint instruction used]**

**Fraud - Standard of Proof**

The applicable standard of proof on the fraud claim is proof a preponderance of the evidence. Fraud may be proven by circumstantial evidence. Circumstantial evidence may be considered on the question of fraud, and reasonable inferences may be drawn therefrom as long as they are not based on mere suspicion or conjecture. **[incorporating D's text].** The jury may draw **["any and all" deleted]** reasonable inferences from evidentiary facts in order to establish proof of fraud.

**Fraud - Misrepresentation Defined**

A misrepresentation is defined as any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the true facts.

A misrepresentation must be one of an existing fact, that is, statements of opinion are not representations of existing facts and may not form the basis of a claim for misrepresentation. [D's text added]

A misrepresentation may take the form of an oral statement or it may be conduct or a course of conduct intended to deceive as to the fact, circumstance, or conditions actually existing.

**Fraud - Misrepresentation of Intention or Promise**

A misrepresentation of intention or promise may be fraudulent. If you find that Jeff McDermott, as an officer of Customerlinx, represented to the Plaintiff that Customerlinx wanted to structure a bonus program including individual performance incentives, and if at the time this representation was made to the Plaintiff, Customerlinx did not in fact want to structure a bonus program in that fashion, then this was a false representation of material fact [Discuss - see D's objection].

**Fraud - Silence or Nondisclosure as Misrepresentation**

A misrepresentation need not always be an express statement or an affirmative assertion. Under certain circumstances, the law views silence or nondisclosure as amounting to a misrepresentation. Silence or nondisclosure will amount to a misrepresentation when the law imposes a duty to speak, and (for purposes of the present case) the law imposes such a duty to speak in two different circumstances.

**Fraud - Silence or Nondisclosure as Misrepresentation -  
Incomplete Disclosures; Half-Truths**

The first circumstance in which the law imposes a duty to speak is when further disclosure is necessary for correction of a partial disclosure or a half-truth. Incomplete information may be as misleading as active misrepresentation, and half-truths may be as actionable as whole lies. A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.

Thus, a defendant who does speak to a plaintiff with reference to a given point of information is bound to speak honestly and to disclose to the plaintiff all the material facts bearing on the point that lie within his knowledge. One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading. [slight alteration] [DISCUSS - see D's objection re: not conforming to pleadings]

**Fraud - Silence or Nondisclosure as Misrepresentation  
- Subsequently Acquired Information**

Second, a duty to speak arises where a defendant makes a statement believing it to be true and complete at the time, but the defendant subsequently becomes aware that the statement was untrue and/or incomplete.

Silence will amount to a misrepresentation if the defendant had made a positive statement believing it to be true and complete, but thereafter learns the statement is untrue and/or incomplete and remains silent. The defendant must disclose the true facts to the other person or his silence under the circumstances will amount to a misrepresentation.

Thus, one party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, subsequently acquired information that he knows will make untrue or misleading a previous representation that, when made, was true or believed to be true. This obligation regarding disclosure of subsequent information applies not only to information known by the defendant, but also to information within the control of the defendant, and to information discoverable by defendant through the exercise of reasonable care. [DISCUSS  
**- see D.'s objection re: not conforming to pleadings]**

**Fraud - Material Fact Defined**

A material fact is one which is likely to affect the conduct of a reasonable person entering into the transaction in question. It is a fact which would induce a reasonable person either to act or not act in the context of the undertaking at issue.

A misrepresentation of fact becomes material when it is likely to affect the conduct of a reasonable person with respect to a transaction with another person. **[D's text added].**

**Fraud - Material Fact - Nondisclosure**

With respect to facts not disclosed by a defendant to a plaintiff, the standard for determining the materiality of a nondisclosure is whether a reasonable person in plaintiff's position would attach importance (to the fact not disclosed) in determining his choice of action in the transaction in question. An omitted fact is material if there is a substantial likelihood that a reasonable person in the plaintiff's position would consider it important. [DISCUSS  
- see D's objections re: not conforming to pleadings]

**Fraud - Reasonable Reliance Defined**

Plaintiff must prove that he/she reasonably relied on the false representation alleged to have been made by the defendant. The reasonableness or unreasonableness of a plaintiff's reliance is to be measured against the circumstances as were confronting the plaintiff at the time. You must decide whether the Plaintiff's reliance, if any, on Defendant's representation was reasonable or not based on all of the facts and circumstances which you find were proved at trial. **[slight alteration]**

**Fraud - Reasonable Reliance - Nondisclosures**

With respect to nondisclosures by the Defendant, proof of Plaintiff's reliance on nondisclosures is not necessary where materiality has been established. Therefore, if you find that Defendant failed to disclose material facts to Plaintiff, then reasonable reliance by Plaintiff is established. [DISCUSS - see D's objection re: not conforming to pleadings]

**Fraud - Plaintiff Has No Duty to Investigate**

The plaintiff on a fraud claim - in this case, Mr. Gupta - is permitted to recover even though he failed to make any investigation into the truth or falsity of statements made to him. Unless the fraudulent statements are on their face absurd or patently ridiculous, the plaintiff to whom the statements were made has no duty to investigate into the truth of the statements.

Where one relies upon another's representation of an existing fact and is thereby misled to his damage he may maintain an action for fraud, notwithstanding his failure to make further inquiry which was open to him at the time and which would have disclosed the falsity of such representation.

**Fraud - Contributory Negligence Not a Defense**

Contributing negligence of the victim of fraud is not a defense to liability for fraud. Consequently, any allegation of negligence by the victim of fraud -- in this case, by the Plaintiff -- is irrelevant. [DISCUSS - see D's objection]

**Fraud - Respondent Superior Liability**

Defendant is liable for any fraudulent misrepresentation committed by any of its employees acting within the scope of their employment, including Jeff McDermott. [Discuss - see D's objection] [Could perhaps substitute with holding in Harold case: An agent's attempt to defraud is attributable to his principal, if the agent is acting within the scope of his authority.]

**Fraud - Knowledge of Agent Imputable to Principal**

Notice to and/or knowledge of an agent is notice to and/or knowledge of his principal as to matters within the actual or apparent scope of the agent's authority.

As a matter of law, Jeff McDermott was an agent of defendant Customerlinx regarding all the transactions and communications at issue. Therefore, as a matter of law, Customerlinx had notice and imputed knowledge of all facts known to McDermott within the scope of his duties as President of Customerlinx. [Discuss - see D's objection] [perhaps delete second paragraph in light of D's objection].

**Fraud - Causation**

The maker of a fraudulent misrepresentation is subject to liability for pecuniary (i.e. monetary or economic) loss suffered by plaintiff who justifiably relies upon the truth of the matter misrepresented, if the plaintiff's reliance is a substantial factor in determining the course of conduct that results in his loss.

It is not, however, necessary that the plaintiff's reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. It is not even necessary that he would not have acted or refrained from acting as he did unless he had relied on the misrepresentation. It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing the plaintiff's decision. Thus it is immaterial that the plaintiff is influenced by other considerations, if he is also substantially influenced by the misrepresentation in question.

**Claim for Sales Commissions**

The Plaintiff also brings a claim for breach of an express or implied contract, based upon an unpaid sales commission arising out of the RCA sale. The Plaintiff contends that the initial written contract of employment was subsequently modified, making him eligible for such a commission. [DISCUSS - see D's objection re: unfair "summary"]

**Modification - Adequate Consideration**

The parties to a contract can mutually assent to modify the contract if the modification is supported by adequate consideration.

All contracts, express or implied, must include valid consideration. Consideration consists of some right, interest or benefit flowing to one party or some forbearance, detriment or responsibility undertaken by the other. The parties must have bargained for this consideration and the consideration must induce performance by the party receiving it. If the parties have bargained for and received consideration, then the consideration is deemed to be legally adequate. [Discuss - see D's objection re: statute of frauds/parol evidence issue]

**Modification - Written Contract Modified by  
Unwritten Implied Agreement**

A written contract may be modified by an oral agreement. A written contract may also be modified by an unwritten implied agreement. [Discuss - see D's objection re: statute of frauds/parol evidence issue]].

**Modification - Burden of Proof**

The burden of proving the existence of the modification rests with the party alleging the new agreement. To satisfy this burden, the party alleging the modification must show that the parties demonstrated both subjective and objective intent to be bound by the terms of the alleged modification.

**[Discuss - see D's objection re: statute of frauds/parol evidence issue]**

**Consideration for Modification**

Deleted. [Discuss - see D's objection re: statute of frauds/parol evidence issue; motion in limine denying instruction that contract is unambiguous].

**Express Modification**

A modified contract for sales commissions, like any contract modification, may be express or implied. If Jeff McDermott, who was an agent of Customerlinx, expressly stated to Plaintiff that he would be eligible for commission compensation on sales made by the Plaintiff, this would constitute an express modification. [Discuss - see D's objection re: statute of frauds/parol evidence issue].

**Implied Modification/Implied-in-Fact**

An implied contract is a form of contract where the elements of the contract are found in and determined from the relations of and the communications between the parties, rather than from a single clearly expressed written document or oral agreement. An implied contract has the same effect as one clearly expressed in a written document or oral agreement.

In order to establish an implied contract, the same elements required to prove an express contract must be present. The only difference between the two forms of contracts, express and implied, is the way in which mutual assent is manifested. An implied contract arises where the intention of the parties is not affirmatively expressed, but there is an agreement implied or presumed from the conduct of the parties or where the circumstances and/or course of dealings establish a mutual intent on behalf of the parties to enter into a contract. **[P's language substituted with language of model instructions].**

**Breach of Contract**

To establish that Defendant breached a contract with Plaintiff, Plaintiff must prove, by a fair preponderance of the evidence:

- (1) the existence of a valid and binding contract;
- (2) that Plaintiff has complied with the contract and performed his own obligations under it; and
- (3) Defendant's breach of the contract causing damages.

### **Contract**

As previously discussed, before the Defendant can be held liable for breach of contract, it must first be proved that a contract existed. It is for you, the jury, to determine whether all of the necessary elements of a contract have been proved.

A contract is a legally enforceable promise or agreement made between two or more individuals. It is a promise or agreement that creates an obligation to do or not to do a certain thing. It is a consensual endeavor, that is, it is based upon mutual, informed and voluntary consent between the contracting parties. In order to form a valid contract, each party to the contract must have the intent to promise that which he/she has promised. Each party must also intend to be bound by that promise or agreement.

Every contract has certain elements. These elements must be present in order for the contract to be valid, that is, legally binding on the parties to it. The elements of a contract are:

- a) an offer;
- b) an acceptance of that offer;
- c) consideration, that is, some form of value given in exchange for the promise;
- d) a mutual or reciprocal agreement; and

e) a mutual or reciprocal obligation.

Before a contract can be said to have been created, the agreement between the parties must be a mutual one. The parties must share a reciprocal desire to be legally bound by the terms of the contract. They also must have, of course, a meeting of the minds on the material terms of the contract and they must each agree to all of those terms. When we use the term "meeting of the minds" we simply mean that the parties to the contract each have a full understanding of what is required by the contract and of what is required of them under that contract. When we refer to the material terms of the contract we are meaning the important or substantial terms, that is, those terms which are more than mere inconsequential details.

A contract arises when the parties manifest their mutual assent to its terms and consideration is given. Ordinarily, the expression of mutual assent takes the form of an offer by one party manifesting its willingness to enter into the proposed agreement and an acceptance of that offer by the other party

As a general rule, silence in response to an offer to enter into a contract does not constitute an acceptance of the offer. There is, however, an exception to the rule

against acceptance by silence "where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation."

**Materiality of the Breach**

A material breach of a contract is to be determined by applying the following factors:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

The determination of materiality, like other aspects of contract interpretation, must be based largely on a standard of objective reasonableness rather than purely subjective belief. In other words, a party cannot transmogrify a provision that, from an objective standpoint, has only

marginal significance into one of central salience by the simple expedient of saying in retrospect that he believed it to be very important.

Mere testimony that without one particular contract provision he would not have signed the employment agreement cannot make this otherwise unremarkable provision into one that goes to the essence of the contract.

**[P. disputes that materiality is an issue - see P's memo  
re: objections]**

**Implied Modification - Implied-in-Law (Quasi Contract)**

Whenever a person (such as the Plaintiff) performs services which are outside the scope of an express contract obligation, and another party (in this case, Customerlinx) derives a benefit from such services, the law imposes an implied obligation upon the party receiving the benefit to pay for the reasonable value of the services.

**Implied Modification - Implied-in-Law (Quasi Contract) - Elements**

Under the doctrine of unjust enrichment, if a person confers a benefit upon another with a valid reason for doing so, by way of act and/or service, the law imposes an obligation on the other person to pay for the service that was performed for his/her benefit. We say that a quasi-contract has been implied by the law. A quasi-contract arises out of the facts and circumstances and is not based on words spoken between the parties, nor is it based on the intention of the parties.

The essential elements required to establish a quasi-contract are: **[P's language substituted with language of model instructions]**

- a. the plaintiff must confer a benefit upon the defendant;
- b. the defendant must appreciate the benefit; and
- c. the acceptance or retention by the defendant of the benefit under the circumstances would be inequitable without the payment of compensation to the plaintiff for the value of the benefit received.

**[P's duplicative language deleted].** Under the doctrine of unjust enrichment, if a person confers a benefit upon

another with a valid reason for doing so, by way of act  
an/or service, the law imposes an obligation on the other  
person to pay the fair and reasonable value for the service  
that was performed for his/her benefit. The fair and  
reasonable value is the going rate in the trade or industry  
in the relevant vicinity. [DISCUSS - see D's objection re:  
**"fair and reasonable value"**]

**Customary Practice**

An agreement, or a modification to an agreement, or term thereof, need not be stated in words if the parties manifest assent to it by other conduct, and such assent is often manifested by conduct in accordance with customary practices. [Discuss - see D's objection re: statute of frauds/parol evidence issue]

Parties are presumed to contract with reference to the customary practices relevant to the subject matter of the contract, and this principle applies to modification of contracts as well. Any express or implied agreement between the Plaintiff and Customerlinx regarding eligibility for and amount of sales commissions is to be interpreted in accordance with Customerlinx' customary practices regarding sales commissions. [P's bracketed text deleted] [DISCUSS statute of frauds/parol evidence issue].

If the meaning attached by the Plaintiff to any express or implied agreement with Customerlinx regarding sales commissions was in accordance with Customerlinx' customary practices regarding sales commissions, then Customerlinx is treated as having known or had reason to know the meaning attached by Plaintiff to the agreement. [Discuss - statute of frauds/parol evidence issue].

**Customary Practice - Supplies Missing Terms**

Any express or implied agreement between the Plaintiff and Customerlinx regarding his performance of sales is deemed to be supplemented or qualified by Customerlinx' customary practices regarding sales commissions in employment agreements with Customerlinx sales employees, if both Plaintiff and Customerlinx knew or had reason to know of these customary practices, and neither party knew or had reason to know that the other party had an intention inconsistent with these customary practices.

In other words, even if there were no express or implied agreement between Customerlinx and Plaintiff regarding his eligibility for sales commissions in connection with his performance of sales functions, nonetheless the customary practices of Customerlinx regarding sales commissions would be deemed to be a supplementary term of their agreement. [Discuss - statute of frauds/parol evidence issue]

**Damages - Introductory**

I will now turn to the question of damages. In discussing damages, I do not, in any way, mean to suggest an opinion that Defendants are legally responsible or liable for the damages being claimed. That is a matter for you to decide. I am instructing you about damages only so that if you find that Defendants are liable, you will know what principles govern an award of damages.

You are instructed on damages in order that you may reach a sound and proper determination of the amount you will award as damages, if any, in the event that you find Defendants are liable. You need consider the question of damages only if you find that Defendants are liable. If you do not find liability, no award of damages can be made.

Damages must be proven. If, on the other hand, the Plaintiff has proven to you that the Defendant acted unlawfully against him, you must decide the amount of damages, if any, that will fairly compensate the Plaintiff [incorporating D's text]. The burden of proof as to the existence and extent of damages is on the party claiming to have suffered those damages. In other words, you may make an award for damages only to the extent that you find damages have been proven by the evidence. You may not base an award of damages or the amount of any such award on

speculation or guesses. You must base any award of damages on the evidence presented and on what you consider to be fair and adequate compensation for such damages as you find have been proved. The purpose of an award of compensatory damages is to make the plaintiff whole for all of the losses that he has suffered because of the defendant's unlawful conduct. Although uncertainty in the amount of damages does not bar recovery and mathematical precision is not required, you must not speculate, conjecture or guess in awarding damages **[incorporating D's text]**.

**Measure of Damages -  
Precision Not Required**

The basic precondition for the recovery of lost profits is that such a loss be established with reasonable certainty. [D's text added] In proving the amount of damages, mathematical precision is not required; the jury should ["merely" deleted per D's objection] be provided with some rational model of how the loss occurred and on what basis it has been computed. [DISCUSS - see D's objection re: caselaw discussing "lost profits"]

**Measure of Damages on Fraud Claim - Benefit of Bargain**

The measure of damages for fraudulent misrepresentations which induce the plaintiff to enter a contract is the "benefit of the bargain" rule. The "benefit of the bargain" measure protects the plaintiff's expectancy interest, giving the plaintiff the benefit of what was promised. The plaintiff is allowed to recover the difference between the actual value of what he has received and the value it would have had if it had been as represented.

**Measure of Damages on Fraud Claim - Bonus Compensation - Definition**

In the present case, the Plaintiff's claimed measure of damages is based upon the provisions for bonus payments set forth in the written employment contract. A bonus is defined as a type of compensation paid for services in addition to or in excess of the basic compensation which would ordinarily be given.

The representations by Customerlinx regarding bonus compensation do not by definition mean that the employer, Customerlinx, had to earn profits before the employee would become eligible for bonus compensation.

**[DISCUSS - see D's objection re: causing confusion].**

Bonus compensation may be based on criteria other than company profits. For example, bonus compensation may be based upon sales or revenues, or growth in sales or revenues, even where the company is not profitable.

Bonus compensation may be based upon the quantity or quality of the individual employees work. Bonus may be based upon the outcome of some specific project to which the employee is assigned. A bonus may also be based upon reduction of costs, or an employee's substituting for a superior in managing the business

during the superior's absence. [DISCUSS - see D's  
objection re: causing confusion].

**Measure of Damages on Breach of Contract Claim**

With regard to Plaintiff's claim for breach of contract, Plaintiff is entitled to recover the value of the bargain that was originally contemplated by the parties when they entered into the contract. You may award that amount of damages that will put the Plaintiff in the same position he/she would have been had the breach not occurred. The underlying rationale on a breach of contract action is to place the innocent party in the position he/she would have been in if the contract had been fully performed.

**Measure of Damages - Uncertainty Caused By Defendant**

A defendant cannot be heard to complain that damages cannot be measured with precision if Defendant's own wrongful conduct is a reason that precise damages cannot be ascertained. [DISCUSS spoliation issue]

**Measure of Damages - Party's Failure to Produce Evidence**

You have heard about business records of Customerlinx which have not been produced. Counsel for Plaintiff has argued that these records were in Defendant's control and would have proven facts material to the matter in controversy: specifically, the amount of gross revenues received by defendant for purposes of calculating the amount of sales commissions due to the Plaintiff.

If you find that the Defendant could have produced the evidence, and that the evidence was within its control, and that this evidence would have been material in deciding among the facts in dispute in this case, then you are permitted, but not required, to infer that the evidence would have been unfavorable to the Defendant.

In deciding whether to draw this inference, you should exercise your common sense and consider all of the facts and circumstances in this case. You may also consider whether the Defendant had a reason for not producing this evidence, and whether the defendant explained the alleged reason to your satisfaction.

In addition, in deciding whether to draw this inference, and in deciding whether to believe defendant's alleged reason for not producing the records, you should consider the law regarding the obligations of business

corporations to keep and retain records of account. [DISCUSS  
**spoliation issue**]

**Measure of Damages - Party's Failure to Produce Evidence -  
Legal Obligation to Keep and Retain Records of Account**

The Defendant, as a business corporation, is required under applicable federal and state laws to keep records accounting for all of its revenues, as well as records of deductions and offsets against revenues. The purpose of such record-keeping requirements includes, but is not limited to, reporting and paying federal and state income tax.

Customerlinx is obligated under these laws to retain such records for a period of at least three years after the filing of its income tax returns, which is at the earliest in the year following the year in which the revenues are accrued or received. Therefore, with regard to revenues for the year 2002, Customerlinx is obligated by law to keep and retain records at least until the year 2006. With regard to revenues for the year 2003, Customerlinx is obligated by law to keep and retain records at least until the year 2007.

**[DISCUSS spoliation issue]**

**Measure of Damages - Legal Obligation to Keep and Retain  
Records of Account - Good Faith and Fair Dealing**

Under Rhode Island law, all contracts contain an implied covenant of good faith and fair dealing. This obligation of good faith and fair dealing required that Customerlinx keep and retain business records for purposes of calculation of sales commissions claimed to be due to the Plaintiff. Customerlinx is not permitted to derive advantage in litigation through its own breach of its obligation of good faith and fair dealing. [DISCUSS spoliation issue]

43. deleted [per Defendant's declining to assert claim]

**Contracts, Modifications, Determined by Objective Manifestations, Not By Unexpressed Subjective Intent**

The formation of contractual agreements under law, and the terms of any such agreements, are determined solely by the objective expressions and manifestations of the parties. The unexpressed, subjective intent or state of mind of a party is not relevant to the formation of a contractual agreement under law, or to determination of the terms of such agreements.

These same rules apply to agreements for the modification of contracts, and the determination of the terms of any such modification.

Therefore, if Mr. McDermott's expressions and/or manifestations to the Plaintiff objectively indicated, expressly and/or impliedly, an agreement that the Plaintiff would be eligible for sales commission, then such objective expressions and/or manifestations would be legally binding even if Mr. McDermott's secret or unexpressed intent was that the Plaintiff would not be eligible for sales commissions.

**Description of Discovery Methods, Interrogatories and Requests for Admissions**

After the Plaintiff commences a civil action by filing a complaint, and before the commencement of the trial, the parties have rights under the applicable rules of civil procedure to take discovery of relevant facts and documents from one another.

The methods of discovery provided by the rules include depositions, requests for production of documents, interrogatories, and requests for admissions regarding facts and documents.

Interrogatories are written questions served to the opposing party, which are required to be answered in writing within thirty days after service.

Requests for admissions are written requests that the opposing party admit the truth of stated facts, and/or admit the authenticity and/or nature of specified documents. The opposing party served with requests for admissions is required to make written responses within thirty days.

**[delete, per D's objection?]**