

1.00 GENERAL INSTRUCTIONS

1.01 FUNCTIONS OF THE COURT AND THE JURY

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. [Do not allow [sympathy/prejudice/fear/public opinion] to influence you.] [You should not be influenced by any person's race, color, religion, national ancestry, or sex.]

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

1.02 NO INFERENCE FROM JUDGE'S QUESTIONS

During this trial, I have asked a witness a question myself. Do not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be.

1.03 ALL LITIGANTS EQUAL BEFORE THE LAW

In this case [one/some] [of] the [defendants/plaintiffs/parties] [is a/are] corporation[s]. All parties are equal before the law. A corporation is entitled to the same fair consideration that you would give any individual person.

1.04 EVIDENCE

The evidence consists of the testimony of the witnesses [,] [and] the exhibits admitted in evidence [, and stipulation[s]].

[A stipulation is an agreement between both sides that [certain facts are true] [that a person would have given certain testimony].]

[I have taken judicial notice of certain facts. You must accept those facts as proved.]

1.05 DEPOSITION TESTIMONY

During the trial, certain testimony was presented to you by [the reading of a deposition/depositions] [and video]. You should give this testimony the same consideration you would give it had the witness[es] appeared and testified here in court.

1.06 WHAT IS NOT EVIDENCE

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or exhibits or struck any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. [This includes any press, radio, Internet or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.]

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by an objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

1.07 NOTE-TAKING

Any notes you have taken during this trial are only aids to your memory. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollections or impressions of each juror about the testimony.

1.08 CONSIDERATION OF ALL EVIDENCE REGARDLESS OF WHO PRODUCED

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

1.09 LIMITED PURPOSE OF EVIDENCE

You will recall that during the course of this trial I instructed you that I admitted certain evidence for a limited purpose. You must consider this evidence only for the limited purpose for which it was admitted.

1.10 EVIDENCE LIMITED TO CERTAIN PARTIES

Each party is entitled to have the case decided solely on the evidence that applies to that party. You must consider the evidence concerning [describe evidence if practicable] only in the case against [*Party*]. You must not consider it against any other party.

1.11 WEIGHING THE EVIDENCE

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this “inference.” A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

1.12 DEFINITION OF “DIRECT” AND “CIRCUMSTANTIAL” EVIDENCE

You may have heard the phrases “direct evidence” and “circumstantial evidence.” Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a the witness who says, “I was outside a minute ago and I saw it raining.” Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

1.13 TESTIMONY OF WITNESSES (DECIDING WHAT TO BELIEVE)

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, [including any party to the case,] you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the witness's intelligence;
- the manner of the witness while testifying;
- [the witness's age];
- and the reasonableness of the witness's testimony in light of all the evidence in the case.

1.14 PRIOR INCONSISTENT STATEMENTS [OR ACTS]

You may consider statements given by [Party] [Witness under oath] before trial as evidence of the truth of what he said in the earlier statements, as well as in deciding what weight to give his testimony.

With respect to other witnesses, the law is different. If you decide that, before the trial, one of these witnesses made a statement [not under oath] [or acted in a manner] that is inconsistent with his testimony here in court, you may consider the earlier statement [or conduct] only in deciding whether his testimony here in court was true and what weight to give to his testimony here in court.

[In considering a prior inconsistent statement[s] [or conduct], you should consider whether it was simply an innocent error or an intentional falsehood and whether it concerns an important fact or an unimportant detail.]

1.15 IMPEACHMENT OF WITNESS – CONVICTIONS

You have heard evidence that [Name] has been convicted of a crime. You may consider this evidence only in deciding whether [Name's] testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

1.16 LAWYER INTERVIEWING WITNESS

It is proper for a lawyer to meet with any witness in preparation for trial.

1.17 NUMBER OF WITNESSES

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

1.18 ABSENCE OF EVIDENCE

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

1.19 ADVERSE INFERENCE FROM MISSING WITNESS

[Witness] was mentioned at trial but did not testify. You may, but are not required to, assume that [Witness's] testimony would have been unfavorable to [Plaintiff] [Defendant].

1.20 SPOILIATION/DESTRUCTION OF EVIDENCE

[Party] contends that [Other Party] at one time possessed [describe evidence allegedly destroyed]. However, [Other Party] contends that [evidence never existed, evidence was not in its possession, evidence was not destroyed, loss of evidence was accidental, etc.].

You may assume that such evidence would have been unfavorable to [Other Party] only if you find by a preponderance of the evidence that:

- (1) [Other Party] intentionally [destroyed the evidence] [caused the evidence to be destroyed]; and
- (2) [Other Party] [destroyed the evidence] [caused the evidence to be destroyed] in bad faith.

1.21 EXPERT WITNESSES

You have heard [a witness] [witnesses] give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the [witness's/witnesses'] qualifications, and all of the other evidence in the case.

1.22 TRANSLATED LANGUAGE

You should consider only the evidence provided through the official interpreter. Although some of you may know [language(s) used], it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translation.

1.23 SUMMARIES

Stipulated

The parties agree that [describe summary in evidence] accurately summarizes the contents of documents, records, or books. You should consider these summaries just like all of the other evidence in the case.

Not Stipulated

Certain [describe summary in evidence] [is/are] in evidence. [The original materials used to prepare those summaries also are in evidence.] It is up to you to decide if the summaries are accurate.

1.24 DEMONSTRATIVE EXHIBITS

Certain [describe demonstrative exhibit, e.g., models, diagrams, devices, sketches] have been shown to you. Those [short description] are used for convenience and to help explain the facts of the case. They are not themselves evidence or proof of any facts.

1.25 MULTIPLE CLAIMS; MULTIPLE PLAINTIFFS/DEFENDANTS

You must give separate consideration to each claim and each party in this case. [Although there are [number] defendants, it does not follow that if one is liable, any of the others is also liable.] [Although there are [number] plaintiffs, it does not follow that if one is successful, the others are, too.]

NOTE: The Committee suggests identifying each party by name in this paragraph.

[If evidence was admitted only as to fewer than all defendants or all claims:] In considering a claim against a defendant, you must not consider evidence admitted only against other defendants [or only as to other claims].

1.26 DISMISSED/WITHDRAWN DEFENDANT

[Former Party] is no longer a defendant in this case. You should not consider any claims against [Former Party]. Do not speculate on the reasons. You should decide this case as to the remaining parties.

1.27 BURDEN OF PROOF

When I say a particular party must prove something by “a preponderance of the evidence,” or when I use the expression “if you find,” or “if you decide,” this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

1.28 CLEAR AND CONVINCING EVIDENCE

When I say that a particular party must prove something by “clear and convincing evidence,” this is what I mean: When you have considered all of the evidence, you [are convinced that it is highly probable that it is true] [have no reasonable doubt that it is true].

[This is a higher burden of proof than “more probably true than not true.” Clear and convincing evidence must persuade you that it is “highly probably true.”]

1.29 BURDEN FOR AFFIRMATIVE DEFENSE/BURDEN-SHIFTING THEORY

No general instruction.

1.30 PROXIMATE CAUSE

No general instruction.

1.31 NO NEED TO CONSIDER DAMAGES INSTRUCTION

If you decide for the defendant[s] on the question of liability, then you should not consider the question of damages.

1.32 SELECTION OF PRESIDING JUROR: GENERAL VERDICT

Upon retiring to the jury room, you must select a presiding juror. The presiding juror will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

[Forms of verdict read.]

[Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in, date, and sign the appropriate form.]

OR

[Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in and date the appropriate form, and all of you will sign it.]

1.33 COMMUNICATION WITH COURT

I do not anticipate that you will need to communicate with me. If you do need to communicate with me, the only proper way is in writing. The writing must be signed by the presiding juror, or, if he or she is unwilling to do so, by some other juror. The writing should be given to the marshal, who will give it to me. I will respond either in writing or by having you return to the courtroom so that I can respond orally.

[If you do communicate with me, you should not indicate in your note what your numerical division is, if any.]

1.34 DISAGREEMENT AMONG JURORS

The verdict[s] must represent the considered judgment of each juror. Your verdict[s], whether for or against the parties, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a unanimous verdict.

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

2.00 IN-TRIAL INSTRUCTIONS; LIMITING INSTRUCTIONS

2.01 CAUTIONARY INSTRUCTION BEFORE RECESS

We are about to take our first break during the trial, and I want to remind you of the instruction I gave you earlier. Until the trial is over, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone approaches you and tries to talk to you about the case, do not tell your fellow jurors but advise me about it immediately. Do not read or listen to any news reports of the trial. Finally, remember to keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

I may not repeat these things to you before every break that we take, but keep them in mind throughout the trial.

2.02 IN-TRIAL INSTRUCTION ON NEWS COVERAGE

I understand that reports about this trial [or about this incident] are appearing in the newspapers and [or] on radio and television [and the internet]. The reporters may not have heard all the testimony as you have, may be getting information from people whom you will not see here under oath and subject to cross examination, may emphasize an unimportant point, or may simply be wrong.

You must not read anything or listen to anything or watch anything with regard to this trial. It would be a violation of your oath as jurors to decide this case on anything other than the evidence presented at trial and your common sense. You must decide the case solely and exclusively on the evidence that will be received here in court.

2.03 EVIDENCE ADMITTED ONLY AGAINST ONE PARTY

Some of the evidence in this case is limited to one of the parties, and cannot be considered against the others. Each party is entitled to have the case decided solely on the evidence which applies to that party.

The evidence you [are about to hear] [just heard] can be considered only in the case against [name party].

2.04 STIPULATED TESTIMONY

The parties have stipulated or agreed what [name's] testimony would be if [name] were called as a witness. You should consider that testimony in the same way as if it [name] had given the testimony here in court.

2.05 STIPULATIONS OF FACT

The parties have stipulated, or agreed, that [stipulated fact]. You must now treat this fact as having been proved for the purpose of this case.

2.06 JUDICIAL NOTICE

I have decided to accept as proved the fact that [e.g., the city of Milwaukee is north of the city of Chicago]. You must now treat this fact as having been proved for the purpose of this case.

2.07 TRANSCRIPT OF RECORDING

You are about to hear a recording that has been received in evidence. This recording is proper evidence and you may consider it, just as any other evidence.

You will be given a transcript to use as a guide to help you follow as you listen to the recording. The transcript is not evidence of what was actually said and who said it. If you notice any difference between what you heard on the recording and what you read in the transcript, you must rely on what you heard, not what you read. And if after careful listening, you cannot hear or understand certain parts of the recording, you must ignore the transcript as far as those parts are concerned.

[You may consider the actions of a person, facial expressions and lip movements that you can observe on videos to help you to determine what was actually said and who said it.]

2.08 DEPOSITION AS SUBSTANTIVE EVIDENCE

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

The deposition of [Witness], which was taken on [date], is about to be presented to you. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

[Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]

2.09 USE OF INTERROGATORIES (TO BE USED ONLY WHEN INTERROGATORIES ARE READ WITHOUT ADMISSION INTO EVIDENCE)

Evidence will now be presented to you in the form of written answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before this trial in response to written questions.

You must give the answers the same consideration as if the answers were made from the witness stand.

2.10 CROSS-EXAMINATION OF CHARACTER WITNESS

The questions and answers you have just heard were permitted only to help you decide what this witness really knew about the reputation of [name] for truthfulness. You may not use the questions and answers you have just heard for any other purpose.

2.11 IMPEACHMENT BY CONVICTION OF CRIME

You have heard evidence that witness [Name] has been convicted of [a crime/crimes]. You may use that evidence only to help you decide whether to believe the witness and how much weight to give [his/her] testimony.

2.12 SUMMARIES OF RECORDS AS EVIDENCE

Stipulated

The parties agree that [Describe summary in evidence] accurately summarize[s] the contents of documents, records, or books. You should consider these summaries just like all of the other evidence in the case.

Not Stipulated

Certain [describe summary in evidence] is/are in evidence. [The original materials used to prepare those summaries also are in evidence.] It is up to you to decide if the summaries are accurate.

2.13 WITHDRAWAL OF CLAIMS

[Former Party] is no longer a defendant in this case. You should not consider any claims against [Former Party]. Do not speculate on the reasons. Your focus must be on the remaining parties.

2.14 JUDGE'S COMMENTS TO LAWYER

I have a duty to caution or warn an attorney who does something that I believe is not in keeping with the rules of evidence or procedure. You are not to draw any inference against the side whom I may caution or warn during the trial.

3.00 EMPLOYMENT DISCRIMINATION: TITLE VII, ADEA

3.01 GENERAL EMPLOYMENT DISCRIMINATION INSTRUCTIONS

Plaintiff claims that he/she was [adverse employment action] by Defendant because of [protected class]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that he/she was [adverse employment action] by Defendant because of his/her [protected class]. To determine that Plaintiff was [adverse employment action] because of his/her [protected class], you must decide that Defendant would not have [adverse employment action] Plaintiff had he/she been [outside protected class] but everything else had been the same.

If you find that Plaintiff has proved this by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove this by a preponderance of the evidence, then you must find for Defendant.

3.02 RETALIATION

Plaintiff claims that he/she was [adverse action] by Defendant because of [protected activity]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant [adverse action] him/her because of his/her [protected activity]. To determine that Plaintiff was [adverse action] because of his/her 'protected activity', you must decide that Defendant would not have [taken adverse action against] Plaintiff if he/she had [not engaged in protected activity] but everything else had been the same.

If you find that Plaintiff has proved this by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove this by a preponderance of the evidence, then you must find for Defendant.

3.03 PATTERN OR PRACTICE

Plaintiff claims that Defendant had a pattern or practice of discriminating against [protected class]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that [protected class] discrimination was Defendant's regular practice, rather than something unusual. If you find that Plaintiff has not proved this, you must find for Defendant.

If you find that Plaintiff has proved that Defendant had a pattern or practice of discriminating, then you must answer another question: Did Defendant prove by a preponderance of the evidence that it would have [adverse employment action] Plaintiff even if it had not made a regular practice of [protected class] discrimination. If you find that Defendant has proved this by a preponderance of the evidence, your verdict should be for Defendant. If you find that Defendant has not proved this, your verdict should be for Plaintiff.

3.04 HARASSMENT BY CO-EMPLOYEE OR THIRD PARTY

In this case, Plaintiff claims that he/she was [e.g., racially/sexually] harassed at work. To succeed on this claim, Plaintiff must prove seven things by a preponderance of the evidence:

1. Plaintiff was subjected to [alleged conduct];
2. The conduct was unwelcome;
3. The conduct occurred because Plaintiff was [e.g., race/sex]’
4. The conduct was sufficiently severe or pervasive that a reasonable person in Plaintiff’s position would find Plaintiff’s work environment to be hostile or abusive;
5. At the time the conduct occurred, Plaintiff believed that the conduct made his/her work environment hostile or abusive;
6. Defendant knew or should have known about the conduct; and
7. Defendant did not take reasonable steps to [correct the situation]/prevent harassment from recurring].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him/her, then you must find for Plaintiff. However, if Plaintiff did not prove by a preponderance of the evidence each of the things required of him/her, then you must find for Defendant.

3.05-A. SUPERVISOR HARASSMENT WITH TANGIBLE EMPLOYMENT ACTION

Plaintiff claims that he/she was [e.g., racially/sexually] harassed by [Alleged Supervisor]. To succeed on this claim, Plaintiff must prove seven things by a preponderance of the evidence.

1. [Name] was Plaintiff's supervisor. A supervisor is someone who can affect the conditions of Plaintiff's employment. By this I mean someone who has the power to [hire, fire, demote, transfer or discipline Plaintiff] [significantly change Plaintiff's benefits].
2. Plaintiff was subjected to [alleged conduct];
3. The conduct was unwelcome;
4. The conduct occurred because Plaintiff was [e.g., race/sex];
5. The conduct was sufficiently severe or pervasive that a reasonable person in Plaintiff's position would find Plaintiff's work environment to be hostile or abusive;
6. At the time the conduct occurred, Plaintiff believed that the conduct made his/her work environment hostile or abusive; and
7. [Name's] conduct caused Plaintiff [adverse employment action].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him/her, then you must find for Plaintiff. However, if Plaintiff did not prove by a preponderance of the evidence each of the things required of him/her, then you must find for Defendant.

3.05-B SUPERVISOR HARASSMENT WITH NO TANGIBLE EMPLOYMENT ACTION

Plaintiff claims that he/she was [e.g., racially/sexually] harassed by [Alleged Supervisor]. To succeed on this claim, Plaintiff must prove six things by a preponderance of the evidence.

1. [Name] was Plaintiff's supervisor. A supervisor is someone who can affect the conditions of Plaintiff's employment.
2. Plaintiff was subjected to [alleged conduct];
3. The conduct was unwelcome;
4. The conduct occurred because Plaintiff was [e.g., race/sex];
5. The conduct was sufficiently severe or pervasive that reasonable person in Plaintiff's position would find Plaintiff's work environment to be hostile or abusive.
6. At the time the conduct occurred, Plaintiff believed that the conduct made his/her work environment hostile or abusive.

If you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him/her, then you must find for Defendant. If, on the other hand, Plaintiff has proved each of these things, you must go on to consider whether Defendant has proved two things by a preponderance of the evidence:

1. Defendant exercised reasonable care to prevent and correct any harassing conduct in the workplace.
2. Plaintiff unreasonable failed to take advantage of opportunities provided by Defendant to prevent or correct harassment, or otherwise avoid harm.

If you find that Defendant has proved these two things by a preponderance of the evidence, your verdict should be for Defendant. If you find that Defendant has not proved both of these things, your verdict should be for Plaintiff.

3.06 WILLFULNESS: WHERE AGE DISCRIMINATION IS ALLEGED

If you find for Plaintiff, you must then decide whether Defendant willfully violated the Age Discrimination in Employment Act. To show this, Plaintiff must prove by a preponderance of the evidence that Defendant knew that it was violating the Age Discrimination in Employment Act, or was indifferent to whether its actions violated the Age Discrimination in Employment Act, and not simply that Defendant was aware that it was engaging in age discrimination.

3.07 CAUTIONARY INSTRUCTION ON REASONABLENESS OF DEFENDANT'S ACTION

In deciding Plaintiff's claim, you should not concern yourselves with whether Defendant's actions were wise, reasonable, or fair. Rather, your concern is only whether Plaintiff has proved that Defendant [adverse employment action] him/her [because of race/sex] [in retaliation for complaining about discrimination].

3.08 DISPARATE IMPACT

No general instruction.

3.09 DAMAGES: GENERAL

If you find that Plaintiff has proved [any of] his claim[s] against [any of] Defendant[s], then you must determine what amount of damages, if any, Plaintiff is entitled to recover. Plaintiff must prove his damages by a preponderance of the evidence.

If you find that Plaintiff has failed to prove [any of] his/her claim[s], then you will not consider the question of damages.

3.10 COMPENSATORY DAMAGES

You may award compensatory damages only for injuries that Plaintiff has proved by a preponderance of the evidence were caused by Defendant's wrongful conduct.

Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

In calculating damages, you should not consider the issue of lost wages and benefits. The court will calculate and determine any damages for past or future lost wages and benefits. You should consider the following types of compensatory damages, and no others:

- [1. The physical [and mental/emotional] pain and suffering [and disability/loss of a normal life] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental/emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate Plaintiff for the injury he/she has sustained.]
- [2. The reasonable value of medical care that Plaintiff reasonably needed and actually received [as well as the present value of the care that he/she is reasonably certain to need and receive in the future.]]
- [3. Describe any expenses, other than lost pay, that Plaintiff reasonably incurred or will incur in the future as a direct result of the Defendant's discrimination/retaliation.]
- [4. Describe any loss (other than lost pay) caused by Defendant in Plaintiff's future earning capacity.]

3.11 BACK PAY

If you find that Plaintiff has proven his/her claim of [discrimination/retaliation] by a preponderance of the evidence, you may award him/her as damages any lost wages and benefits he would have received from the Defendant if he/she had not been [adverse employment action] [minus the earnings and benefits that plaintiff received from other employment during that time [that he would not otherwise have received]]. [It is Plaintiff's burden to prove that he/she lost wages and benefits and their amount. If he/she fails to do so for any periods of time for which he/she seeks damages, then you may not award damages for that time period.]

3.12 MITIGATION

Defendant argues that Plaintiff's claim for lost wages and benefits should be reduced by [describe the reduction].

If you find that

1. Plaintiff did not take reasonable actions to reduce his/her damages, and
2. Plaintiff reasonably might have found comparable employment if he/she had taken such action,

you should reduce any amount you might award Plaintiff for [lost wages' [benefits] [other damages] by the amount Plaintiff reasonably would have earned during the period for which you are awarding [lost wages] [benefits] [other damages].

Defendant must prove both that the reduction should be made and its amount.

3.13 PUNITIVE DAMAGES

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for his/her conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that [his/her conduct] [the conduct of Defendant's [managerial employees, officers],] was in reckless disregard of Plaintiff's rights. An action is in reckless disregard of Plaintiff's rights if taken with knowledge that it may violate the law.

[Plaintiff must prove by a preponderance of the evidence that Defendant's [managerial employees, officers] acted within the scope of their employment and in reckless disregard of Plaintiff's right not to be [discriminated and/or retaliated] against. [In determining whether [Name] was a managerial employee of Defendant, you should consider the kind of authority Defendant gave him/her, the amount of discretion he/she had in carrying out his/her job duties and the manner in which he/she carried them out.] You should not, however, award Plaintiff punitive damages if Defendant proves that it made a good faith effort to implement an anti-discrimination policy.]

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should reconsider the following factors:

- the reprehensibility of Defendant's conduct;
- the impact of Defendant's conduct on Plaintiff;
- the relationship between Plaintiff and Defendant;
- the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- [● Defendant's financial condition;]
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

4.00 EMPLOYMENT DISCRIMINATION: AMERICANS WITH DISABILITIES ACT

4.01 NATURE OF ADA CLAIM AND DEFENSE

Plaintiff has brought this lawsuit under a federal law called the Americans with Disabilities Act, which is often referred to by its initials, “ADA.” Under the ADA, it is illegal for an employer to discriminate against person with a disability if that person is qualified to do the essential functions of his/her job and the employer is aware of his/her limitations.

In this case, Plaintiff claims that Defendant discriminated against him/her by [not accommodating his/her disability] / [not hiring/not promoting/firing him because he/she had a disability]. Defendant denies that it discriminated against Plaintiff and says that [describe Defendant’s theory of defense, if applicable].

As you listen to these instructions, please keep in mind that many of the terms I will use have a special meaning under the law. So please remember to consider the specific definitions I give you, rather than using your own opinion as to what these terms mean.

4.02 ELEMENTS OF AN ADA CLAIM – DISPARATE TREATMENT (NON-ACCOMMODATION) CASES

To succeed in this case, Plaintiff must prove four things by a preponderance of the evidence:

1. [Plaintiff had/Defendant regarded Plaintiff as having/Plaintiff had a record of] a disability. I will define “disability” and several other important terms for you in a few minutes;
2. Plaintiff was “qualified” to perform the job;
3. Defendant [describe adverse employment action] Plaintiff;
4. Defendant would not have [taken action] if Plaintiff had not had a disability, but everything else had been the same.

[If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff’s damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant.]

NOTE: If the defendant has raised an affirmative defense, a court may replace the prior paragraph with the following language:

If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant. If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you must then consider Defendant’s argument that [describe affirmative defense]. If Defendant has proved this by a preponderance of the evidence, your verdict should be for Defendant. If Defendant has not proved this by a preponderance of the evidence, you should turn to the issue of Plaintiff’s damages.

4.03 ELEMENTS OF PLAINTIFF’S CLAIM – REASONABLE ACCOMMODATION CASES

In this case, Plaintiff claims that Defendant unlawfully refused to give him/her a “reasonable accommodation.” To succeed, Plaintiff must prove five things by a preponderance of the evidence:

1. Plaintiff had a disability. I will define “disability” and several other important terms for you in a few minutes;
2. Plaintiff was qualified to perform the job;
3. Plaintiff requested an accommodation;
4. Defendant was aware of Plaintiff’s disability at the time of Plaintiff’s request;
5. Defendant failed to provide Plaintiff with a reasonable accommodation.

[If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff’s damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant.]

NOTE: If the defendant has raised an affirmative defense, a court may replace the prior paragraph with the following language:

If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant. If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you must then consider Defendant’s argument that [describe affirmative defense]. If Defendant has proved this by a preponderance of the evidence, your verdict should be for Defendant. If Defendant has not proved this by a preponderance of the evidence, you should turn to the issue of Plaintiff’s damages.

4.04 DEFINITION OF “DISABILITY”

Under the ADA, the term “disability” means a [physical/mental] impairment that “substantially limits” [describe major life activity or activities involved in the case]. I will now define some of these terms in more detail. Again, I remind you to consider the specific definitions I give you, and not to use your own opinion as to what these terms mean.

NOTE: If the case involves a factual dispute about whether a physical or mental impairment exists, the Committee suggests that the following language be added after the instruction’s first paragraph:

“The term ‘physical impairment’ means any condition that prevents the body from functioning normally. The term ‘mental impairment’ means any condition that prevents the mind from functioning normally.” (If more detail is necessary, add language from the actual regulation on this point.)

NOTE: If the question of whether the activity at issue is a “major life activity” is contested, consider replacing this sentence with the following:

Under the ADA, the term “disability” includes a [physical/mental] impairment that “substantially limits” a “major life activity.” Major life activities are activities that are of central important to everyday life. They are activities that an average person can do without much difficulty. Examples include: care for yourself, doing manual tasks (such as household chores), bathing, brushing teeth, walking, talking, seeing, hearing, breathing, learning, and working.

(a) *Substantially Limiting*

Under the ADA, an impairment “substantially limits” a person’s ability to [describe relevant activity] if it prevents or severely restricts him/her from [relevant activity], compared to the average person in the general population.

To decide if Plaintiff’s [alleged] impairment substantially limits Plaintiff’s ability to [relevant activity], you should consider the nature and severity of the impairment, how long it is expected to last, and its expected long-term impact.

NOTE: If the plaintiff alleges work as the relevant major life activity, replace this paragraph of the instruction with the following:

(a) *Substantially Limiting: Work as Major Life Activity*

Let me start by telling you what I mean by “substantially limiting.” An impairment substantially limits a person’s ability to work if it significantly restricts him/her from performing a class of jobs, or a broad range of jobs in

various classes, compared to someone with similar knowledge, skills, and training. Being unable to do a particular job, however, is not by itself a substantial limitation on the ability to work.

Only impairments with a permanent or long-term impact are disabilities under the ADA. Temporary injuries and short-term impairments are not disabilities. [Even so, some disabilities are permanent, but only appear from time to time. For example, if a person has a mental or physical disease that usually is not a problem, but flares up from time to time, that can be a disability if it substantially limits a major life activity.]

(b) Definition of “Regarded As” (Use this instruction only if “regarded as” is an issue.)

Under the ADA, a person is “regarded as” having a disability if:

1. The employer believes that the person has a physical or mental impairment that substantially limits his ability to [describe relevant activity]; or
2. The employer believes that an actual impairment substantially limits his ability to [relevant activity] when it does not, because of the attitude that others have about the impairment; or
3. The person does not have any impairment, but the employer treats him as having an impairment that substantially limits his ability to [relevant activity].

(c) Definition of “Record Of” (Use this instruction only if “Record of” is an issue.)

Under the ADA, a person has “a record of a disability” if he has a record of a physical or mental impairment that substantially limits a person’s ability to perform one or more major life activities. This includes someone who has had a substantially limiting impairment but is now recovered. It also includes someone whose substantially limiting impairment is currently in remission or is controlled by medication.

4.05 DEFINITION OF “QUALIFIED”

Under the ADA, Plaintiff was “qualified” if he had the skill, experience, education, and other requirements for the job and could do the job’s essential functions, either with or without [describe requested accommodation]. You should only consider Plaintiff’s abilities at the time when [describe challenged employment decision].

Not all job functions are “essential.” Essential functions are a job’s fundamental duties. In deciding whether a function is essential, you may consider the reasons the job exists, the number of employees Defendant has to do that kind of work, the degree of specialization the job requires, Defendant’s judgment about what is required, the consequences of not requiring an employee to satisfy that function, and the work experience of others who held position.

[In addition to specific job requirements, an employer may have general requirements for all employees. For example, the employer may expect employees to refrain from abusive or threatening conduct toward others, or may require a regular level of attendance.]

4.06 REASONABLE ACCOMMODATION: GENERAL INSTRUCTION

Under the ADA, to “accommodate” a disability is to make some change that will let a person with a disability [perform/apply for/be eligible for] the job. An accommodation is “reasonable” if it is effective and its costs are not clearly disproportionate to the benefits that it will produce.

A reasonable accommodation may include a change in such things as ordinary work rules, facilities, conditions, or schedules, but does not include elimination or change of essential job functions, assignment of essential job functions to other employees, or lower productivity standards.

4.07 REASONABLE ACCOMMODATION: SUPPLEMENTAL INSTRUCTIONS FOR SPECIFIC ACCOMMODATION ISSUES

(a) Choice between Alternate Accommodations

[Plaintiff may not insist on a particular accommodation if another reasonable accommodation was offered.]

(b) Effect of Continuing Duty; Past Attempts to Accommodate

[Defendant's duty to provide a reasonable accommodation is a continuing one. You must evaluate the reasonableness of an accommodation as of the time [it was requested] [the need became apparent to Defendant].

(c) Reassignment As a Reasonable Accommodation

[If no reasonable accommodation was available in Plaintiff's present job, the ADA requires Defendant to try to assign him to a vacant position for which he is qualified. If the reassignment was practical and did not require Defendant to turn away a more qualified applicant, Defendant must have made the reassignment. Defendant was not required to create a new job or give a promotion to Plaintiff.]

(d) Reassignment Where There Is a Union Contract or Seniority System

[An accommodation is not reasonable if it conflicts with an established seniority system, unless Plaintiff proves by a preponderance of the evidence that "special circumstances" make an exception reasonable. For example, an exception might be reasonable if exceptions were often made to the seniority policy. Another example might be where the seniority system already contains its own exceptions so that, under the circumstances, one more exception is not significant.]

(e) Reallocating Job Duties

[A reasonable accommodation may include transferring non-essential job duties to another employee. However, Defendant does not have to transfer essential job duties.]

4.08 INTERACTIVE PROCESS

Once an employer is aware of an [employee's/applicant's] disability and an accommodation has been requested, the employer must discuss with the [employee/applicant] [or, if necessary, with his doctor[]] whether is a reasonable accommodation that will permit him to [perform/apply for] the job. Both the employer and the [employee/applicant] must cooperate in this interactive process in good faith.

Neither party can win this case simply because the other did not cooperate in this process, but you may consider whether a party cooperated in this process when deciding whether [a reasonable accommodation existed] [to award punitive damages].

4.09 UNDUE HARDSHIP DEFENSE

Under the ADA, Defendant does not need to accommodate Plaintiff if it would cause an “undue hardship” to its business. An “undue hardship” is something too costly or something that is so disruptive that it would fundamentally change the nature of Defendant’s business or how Defendant runs its business.

Defendant must prove to you by a preponderance of the evidence that Plaintiff’s proposed accommodation would be an “undue hardship.” In deciding this issue, you should consider the following factors:

1. The nature and cost of the accommodation;
2. Defendant’s overall financial resources. This might include the size of its business, the number of people it employs, and the types of facilities it runs;
3. The financial resources of the facility where the accommodation would be made. This might include the number of people who work there and the impact that the accommodation would have on its operations and costs; and
4. The way that Defendant conducts its operations. This might include its workforce structure; the location of its facility where the accommodation would be made compared to Defendant’s other facilities; and the relationship between these facilities.

4.10 DIRECT THREAT DEFENSE

In this case, Defendant says that it [did not accommodate/did not hire/fired] Plaintiff because [accommodating/hiring/retaining] him would have created a significant risk of substantial harm to [Plaintiff and/or others in the workplace]. [Defendant must have based this decision on a reasonable medical judgment that relied on [the most current medical knowledge] [the best available objective evidence] about whether Plaintiff could safely perform the essential functions of the job at the time.] If Defendant proves this to you by a preponderance of the evidence, you must find for Defendant.

In deciding if this is true, you should consider the following factors: (1) how long the risk will last; (2) the nature and severity of the potential harm; (3) how likely it is that the harm will occur; and (4) whether the potential harm is likely to occur in the near future.

[Defendant must prove that there was no reasonable accommodation that it could make which would eliminate the risk or reduce it so that it was no longer a significant risk of substantial harm.]

4.11 DAMAGES -- BACK PAY

See Instruction No. 3.11.

4.12 DAMAGES – MITIGATION

See Instruction No. 3.12.

4.13 COMPENSATORY DAMAGES

See Instruction No. 3.10.

4.14 PUNITIVE DAMAGES

See Instruction No. 3.13.

4.15. SPECIAL VERDICT FORM

1. Did Plaintiff have a disability?

Answer Yes or No: _____

(If you answered "Yes," answer Question 2; otherwise, sign, and return this verdict form)

2. Was Plaintiff qualified to perform [his job] [the job he sought]?

Answer Yes or No: _____

(If you answered "Yes," then answer Question 3; otherwise, sign and return this verdict form.)

3. Did Plaintiff request an accommodation?

Answer Yes or No: _____

(If you answered "Yes," then answer Question 4; otherwise, sign and return this verdict form.)

4. Was Defendant aware of Plaintiff's disability at the time of Plaintiff's request?

Answer Yes or No: _____

(If you answered "Yes," then answer Question 5; otherwise, sign and return this verdict form.)

5. Did Defendant fail to provide Plaintiff with a reasonable accommodation?

Answer Yes or No: _____

(If you answered "Yes," then answer Question 6; otherwise, sign and return this verdict form.)

6. Would giving Plaintiff a reasonable accommodation have been an undue hardship on Defendant's business?

Answer Yes or No: _____

(If you answered "Yes," sign and return this verdict form; otherwise, answer Question 7.)

7. Has Plaintiff suffered a net loss of wages and benefits as a result of [describe adverse action]?

Answer Yes or No: _____

(If you answered "Yes," then answer Question 8; otherwise sign, and return this verdict form.)

8. What was the amount of net wages and benefits that Plaintiff lost up to the time of trial?

Answer: \$ _____

(Answer Question 9.)

9. Has Plaintiff suffered emotional pain and mental anguish as a result of [describe adverse action]?

Answer Yes or No: _____

(If you answered "Yes," then answer Question 10; if you answered "No," to this question, then answer Question 11.)

10. What amount will fairly compensate Plaintiff for his emotional pain and mental anguish as a result of [describe adverse action]?

Answer: \$ _____

(Answer Question 11.)

11. Did [Name] act with reckless disregard of Plaintiff's rights under ADA?

Answer Yes or No: _____

(If you answered "Yes," then answer Question 10; otherwise, sign and return this verdict form.)

12. Did Defendant itself act in good faith to attempt to comply with ADA by implementing policies and procedures to prohibit discrimination in violation of ADA?

Answer Yes or No: _____

(If you answered "Yes," sign and return this verdict form; otherwise, answer Question 13.)

13. What amount of punitive damages, if any, should be assessed against Defendant?

Answer: \$ _____

Dated this ____ day of _____, 201_.

PRESIDING JUROR:

5.0 EQUAL PAY ACT

5.01 ESSENTIAL ELEMENTS OF A CLAIM

Plaintiff claims that Defendant violated a law called the “Equal Pay Act.” This law is designed to prevent wage discrimination by employers based on sex. To succeed on this claim, Plaintiff must prove three things by a preponderance of the evidence:

1. Plaintiff did work that was “substantially equal” to male employees at [Defendant’s workplace];
2. Plaintiff and a male employee did their jobs under similar working conditions;
3. Defendant paid Plaintiff less money than a male employee doing substantially equal work.

5.02 SUBSTANTIALLY EQUAL

In deciding whether jobs are “substantially equal,” you should compare the skill, effort, and responsibility needed to do the work. The jobs do not need to be identical in these areas, so you should ignore minor differences between them.

5.03 EQUAL SKILL

In deciding whether jobs require “equal skill,” you should consider whether people need essentially the same [experience/training/education/ability to do the work]. Jobs may require “equal skill” even if one job does not require workers to use these skills as often as another job.

5.04 EQUAL EFFORT

In deciding whether jobs require “equal effort,” you should consider the physical or mental energy that a person must use at work. “Equal effort” does not require people to use effort in exactly the same way. If there is no substantial difference in the amount or degree of effort needed to do the jobs, they require “equal effort.”

5.05 EQUAL RESPONSIBILITY

In deciding whether jobs involve “equal responsibility,” you should consider how accountable someone is in doing his or her job, including how much authority an employee has and the importance of his or her job.

5.06 JOB TITLES

In deciding whether two jobs are “substantially equal,” you should consider the actual job requirements. Job classifications, descriptions, and titles are not controlling.

5.07 RATES OF PAY

In deciding whether Plaintiff was paid less than her male co-worker[s] for equal work, you can consider evidence about how much Plaintiff's co-workers earned, even if the co-workers worked in different departments.

5.08 COMPARABLE TIME PERIODS

Plaintiff must prove that at least one male employee received more pay than Plaintiff for substantially equal work. In comparing Plaintiff's work and pay with other employees, you can look at the work and pay of employees who did substantially equal work before or after the Plaintiff.

5.09 INTENT

Plaintiff does not have to prove that Defendant meant to discriminate against Plaintiff because she was female.

5.10 AFFIRMATIVE DEFENSES

Even if Defendant paid Plaintiff less than male employees for substantially equal work, you should find in favor of Defendant if it proves by a preponderance of the evidence that the difference was because of:

1. A seniority system, or a merit-based system, that is not based on an employee's sex; or
2. A system based on the quality or quantity of each employee's production; or
3. [describe any factor other than sex on which Defendant claims its pay differential was based].

5.11 DAMAGES

If you find in favor of Plaintiff, then you should award Plaintiff damages consisting of the difference between Plaintiff's pay and the pay of the male employee(s) who did substantially equal work during comparable time periods.

If you award damages, they are limited to the following time period:
[Relevant dates]

5.12 WILLFULNESS

If you find for Plaintiff, you must then decide whether Defendant willfully violated the Equal Pay Act. To show this, Plaintiff must prove by a preponderance of the evidence that Defendant knew that it was violating the Equal Pay Act, or was indifferent to whether its actions violated the Equal Pay Act, and not simply that Defendant was aware that it was discriminating in pay.

6. PUBLIC EMPLOYEE AND PRISONER RETALIATION

6.01 PUBLIC EMPLOYEE'S FIRST AMENDMENT RETALIATION CLAIM

In this case, Plaintiff claims that Defendant violated his constitutional right to free speech by [alleged retaliatory conduct] because he [describe protected speech or conduct].

To succeed on this claim, Plaintiff must prove several things by a preponderance of the evidence:

1. Plaintiff [describe protected speech or conduct];
2. Defendant intentionally [alleged retaliatory conduct] (while acting "under color of law." By this I mean that a person performs, or claims to perform, official duties under any state, county, or municipal law, ordinance, or regulation);
3. Plaintiff's [protected speech or conduct] was a reason, alone or with other reasons, that Defendant relied on when it [alleged retaliatory conduct], or that moved Defendant toward its decision to [alleged retaliatory conduct];
4. Plaintiff was harmed [describe harm].

If Plaintiff has proved each of these things by a preponderance of the evidence, then you must consider Defendant's claim that it would have [alleged retaliatory conduct] anyway. To succeed on this claim, Defendant must prove by a preponderance of the evidence that even though Plaintiff's [protected speech or conduct] was a reason for its decision to [alleged retaliatory conduct], there were other reasons which would have led Defendant to [alleged retaliatory conduct] even if Plaintiff had not [protected speech or conduct].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, and that Defendant has not proved its claim by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, or if you find that Defendant proved its claim, then you must find for Defendant.

6.02 PRISONER'S RIGHT OF ACCESS RETALIATION CLAIM

In this case, Plaintiff claims that Defendant retaliated against him for seeking access to the legal system by [filing a lawsuit, seeking materials from the library, seeking counsel, etc.]

To succeed on this claim, Plaintiff must prove several things by a preponderance of the evidence:

1. Plaintiff [attempt to access legal system];
2. Defendant intentionally [alleged retaliatory conduct] [while acting "under color of law." By this I mean that a person uses or misuses authority that he has because of his official position.];
3. Plaintiff's [attempt to access legal system] was a reason, alone or with other reasons, that Defendant relied on when it [alleged retaliatory conduct], or that moved Defendant toward its decision to [alleged retaliatory conduct];
4. Plaintiff [describe loss of claim or actionable harm].

If Plaintiff has proved each of these things by a preponderance of the evidence, then you must consider Defendant's claim that it would have [alleged retaliatory conduct] anyway. To succeed on this claim, Defendant must prove by a preponderance of the evidence that even though Plaintiff's [protected speech or conduct] was a reason in its decision to [alleged retaliatory conduct], there were other reasons which would have led Defendant to [alleged retaliatory conduct] even if Plaintiff had not [attempt to access legal system].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, and that Defendant has not proved its claim by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, or if you find that Defendant proved its claim, then you must find for Defendant.

6.03 DAMAGES

Use Instructions 7.22, 7.23 and 7.24, as appropriate, listing those elements of damages relevant to the case.

7.00 CONSTITUTIONAL TORTS: 42 U.S.C. §1983

7.01 GENERAL: POLICE DEPARTMENT/MUNICIPALITY NOT A PARTY

Defendant(s) [is/are] being sued as [an] individual[s]. Neither the [State or county police department or correctional agency] nor [State, county, or city] is a party to this lawsuit.

7.02 GENERAL: REQUIREMENT OF PERSONAL INVOLVEMENT

Plaintiff must prove by a preponderance of the evidence that [*Name of Individual Defendant*] was personally involved in the conduct that Plaintiff complains about. You may not hold [Name] liable for what other employees did or did not do.

7.03 GENERAL: “UNDER COLOR OF LAW”

When I say that a person acts “under color of law,” I mean that a person uses or misuses authority that he has because of his official position.

7.04 LIMITING INSTRUCTION CONCERNING EVIDENCE OF STATUTES, ADMINISTRATIVE RULES, REGULATIONS, AND POLICIES

You have heard evidence about whether Defendant's conduct [*complied with / violated*] [*a state statute / administrative rule / locally-imposed procedure or regulation*]. You may consider this evidence in your deliberations. But remember that the issue is whether Defendant [*describe constitutional violation claimed, e.g., "falsely arrested Plaintiff," "used excessive force on Plaintiff"*], not whether a [*statute / rule / procedure / regulation*] might have been [*complied with / violated.*]

7.05 FOURTH AMENDMENT: FALSE ARREST – ELEMENTS

In this case, Plaintiff claims that Defendant falsely arrested him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant arrested Plaintiff;
2. Defendant did not have probable cause to arrest Plaintiff; and
3. Defendant was acting under color of law.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

7.06 FOURTH AMENDMENT: FALSE ARREST - DEFINITION OF “PROBABLE CAUSE”

Let me explain what “probable cause” means. There is probable cause for an arrest if at the moment the arrest was made, a prudent person would have believed that Plaintiff [had committed/was committing] a crime. In making this decision, you should consider what Defendant knew and what reasonably trustworthy information Defendant had received.

[It is not necessary that Defendant had probable cause to arrest Plaintiff for [offense in case], so long as Defendant had probable cause to arrest him for some criminal offense.] [It is not necessary that Defendant had probable cause to arrest Plaintiff for all of the crimes he was charged with, so long as Defendant had probable cause to arrest him for one of those crimes.]

Probable cause requires more than just a suspicion. But it does not need to be based on evidence that would be sufficient to support a conviction, or even a showing that Defendant’s belief was probably right. [The fact that Plaintiff was later acquitted of [offense in case] does not by itself mean that there was no probable cause at the time of his arrest.]

7.07 FOURTH AMENDMENT: FALSE ARREST - FAILURE TO INVESTIGATE

If there was probable cause, [Officer] did not need to do more investigation to uncover evidence that Plaintiff was innocent.

**7.08 FOURTH AMENDMENT/FOURTEENTH AMENDMENT:
EXCESSIVE FORCE AGAINST ARRESTEE OR PRETRIAL
DETAINEE – ELEMENTS**

In this case, Plaintiff claims that Defendant used excessive force against him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant used unreasonable force against Plaintiff;
- [2. Because of Defendant’s unreasonable force, Plaintiff was harmed;]
- [3. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff did not prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

**7.09 FOURTH AMENDMENT/FOURTEENTH AMENDMENT:
EXCESSIVE FORCE - DEFINITION OF “UNREASONABLE”**

You must decide whether Defendant’s use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant’s use of force was unreasonable, you must not consider whether Defendant’s intentions were good or bad.

In performing his job, an officer can use force that is reasonably necessary under the circumstances.

[An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect’s actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm. [It is not necessary that this danger actually existed.] [An officer is not required to use all practical alternatives to avoid a situation where deadly force is justified.]]

7.10 EIGHTH AND FOURTEENTH AMENDMENTS: PRISON/JAIL CONDITIONS OF CONFINEMENT – ELEMENTS

To succeed in his claim about the conditions of his confinement, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff was incarcerated under conditions that posed a substantial risk of serious harm to his health or safety;
2. Defendant was deliberately indifferent to Plaintiff's health or safety;
- [3. Defendant's conduct caused harm to Plaintiff];
- [4. Defendant acted under color of law].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

7.11 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROTECT – ELEMENTS

To succeed on his claim of failure to protect, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [Describe who the attackers were and what they did, e.g., hit, kicked or struck the Plaintiff];
2. Defendant was deliberately indifferent to the substantial risk of [that] attack; [such an]
3. As a result of Defendant's conduct, Plaintiff was harmed;
- [4. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

7.12 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROVIDE MEDICAL ATTENTION - ELEMENTS

To succeed on his claim of failure to provide medical attention, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff had a serious medical need;
2. Defendant was deliberately indifferent to Plaintiff's serious medical need;
3. Defendant's conduct caused harm to Plaintiff; [4. Defendant acted under color of law].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

7.13 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROVIDE MEDICAL ATTENTION - DEFINITION OF “SERIOUS MEDICAL NEED”

When I use the term “serious medical need,” I mean a condition that a doctor says requires treatment, or something so obvious that even someone who is not a doctor would recognize it as requiring treatment. In deciding whether a medical need is serious, you should consider the following factors:

- the severity of the condition;
- the harm [including pain and suffering] that could result from a lack of medical care;
- whether providing treatment was feasible; and
- the actual harm caused by the lack of medical care.

7.14 EIGHTH AND FOURTEENTH AMENDMENTS: CONDITIONS OF CONFINEMENT / FAILURE TO PROTECT / FAILURE TO PROVIDE MEDICAL CARE – DEFINITION OF “DELIBERATELY INDIFFERENT”

When I use the term “deliberately indifferent,” I mean that Defendant actually knew of a substantial risk of [[serious harm] or [*describe specific harm to Plaintiff’s health or safety*]], and that Defendant consciously disregarded this risk by failing to take reasonable measures to deal with it. [In deciding whether Defendant failed to take reasonable measures, you may consider whether it was practical for him to take corrective action.]

[If Defendant took reasonable measures to respond to a risk, then he was not deliberately indifferent, even if Plaintiff was ultimately harmed.]

7.15 EIGHTH AMENDMENT: EXCESSIVE FORCE AGAINST CONVICTED PRISONER - ELEMENTS

To succeed on his claim of excessive use of force, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant used force on Plaintiff;
2. Defendant intentionally used extreme or excessive cruelty toward Plaintiff for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline;
3. Defendant's conduct caused harm to Plaintiff; [4. Defendant acted under color of law].

In deciding whether Plaintiff has proved that Defendant intentionally used extreme or excessive cruelty toward Plaintiff, you may consider such factors as:

- the need to use force;
- the relationship between the need to use force and the amount of force used;
- the extent of Plaintiff's injury;
- whether Defendant reasonably believed there was a threat to the safety of staff or prisoners;
- any efforts made by Defendant to limit the amount of force used.

[In using force against a prisoner, officers cannot realistically be expected to consider every contingency or minimize every possible risk.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

**7.16 FOURTH, EIGHTH, AND FOURTEENTH AMENDMENTS:
CLAIM FOR FAILURE OF “BYSTANDER” OFFICER TO
INTERVENE - ELEMENTS**

To succeed on his failure to intervene claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [Name of Officer alleged to have committed primary violation] [describe constitutional violation claimed, e.g., “falsely arrested Plaintiff,” “used excessive force on Plaintiff”];
2. Defendant knew that [Officer] was/was about to [describe constitutional violation claimed, e.g., “falsely arrest Plaintiff” “use excessive force on Plaintiff”];
3. Defendant had a realistic opportunity to do something to prevent harm from occurring;
4. Defendant failed to take reasonable steps to prevent harm from occurring;
5. Defendant’s failure to act caused Plaintiff to suffer harm;
- [6. Defendant acted under color of law].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

7.17 LIABILITY OF SUPERVISORS: ELEMENTS

To succeed on his claim against [Supervisor], Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [Name of Officer alleged to have committed primary violation] [describe constitutional violation claimed, e.g., “falsely arrested Plaintiff,” “used excessive force on Plaintiff”];
2. [Supervisor] knew that [Officer] was about to [describe constitutional violation claimed];

OR

- [2. [Supervisor] knew that [Officer/Officers he supervised] had a practice of [describe constitutional violation claimed] in similar situations;]
3. [Supervisor] [approved/assisted/condoned/purposely ignored] [Officer’s] [describe constitutional violation claimed];
4. As a result, Plaintiff was injured.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

7.18 QUALIFIED IMMUNITY

No instruction.

7.19 LIABILITY OF MUNICIPALITY

If you find that Plaintiff has proved [these things] [any of his claims] by a preponderance of the evidence, you must consider whether [Municipality] is also liable to Plaintiff. [Municipality] is not responsible simply because it employed [Officer]. [Municipality] is liable if Plaintiff proves by a preponderance of the evidence that Defendant's conduct was a result of its official policy.

7.20 LIABILITY OF MUNICIPALITY: DEFINITION OF “OFFICIAL POLICY”

When I use the term “official policy,” I mean:

- [• A rule or regulation passed by [Municipality]’s legislative body.]
- [• A decision or policy statement made by [Name], who is a policy-making official of [Municipality]. [This includes [Name]’s approval of a decision or policy made by someone else, even if that person is not a policy-making official.]
- [• A custom of [describe acts or omissions alleged to constitute constitutional violation] that is persistent and widespread, so that it is [Municipality]’s standard operating procedure. A persistent and widespread pattern may be a custom even if [Municipality] has not formally approved it, so long as Plaintiff proves that a policy-making official knew of the pattern and allowed it to continue. [This includes a situation where a policy-making official must have known about a subordinate’s actions/failures to act by virtue of the policy-making official’s position.]

7.21 LIABILITY OF MUNICIPALITY FOR FAILURE TO TRAIN: ELEMENTS

To succeed on his claim against [Municipality] for failure to train, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [Municipality's] training program was not adequate to train its [officers/employees] to properly handle recurring situations;
2. [Official/ Policymaker/ Policymaking Body] knew that more [and/or different] training was needed to avoid likely [describe alleged constitutional violation(s)], or that this was obvious to [Official/ Policymaker/ Policymaking Body]; and
3. [Municipality's] failure to provide adequate training caused [describe alleged violation(s) of Plaintiff's constitutional rights].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

7.22 DAMAGES: PREFATORY INSTRUCTION

If you find that Plaintiff has proved [*any of*] his claim[s] against [*any of*] Defendant(s), then you must determine what amount of damages, if any, Plaintiff is entitled to recover.

If you find that Plaintiff has failed to prove [*all of*] his claim[s], then you will not consider the question of damages.

7.23 DAMAGES: COMPENSATORY

If you find in favor of Plaintiff, then you must determine the amount of money that will fairly compensate Plaintiff for an injury that you find he sustained [and is reasonably certain to sustain in the future] as a direct result of [insert appropriate language, such as “the failure to provide plaintiff with medical care,” etc.] [These are called “compensatory damages.”] NOTE: The Committee suggests that a court use the phrase “compensatory damages” only if the case also involves a claim for punitive damages.

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

- [1. The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received [as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.]]
- [2. The [wages, salary, profits, earning capacity] that Plaintiff has lost [and the present value of the [wages, salary, profits, earning capacity] that Plaintiff is reasonably certain to lose in the future] because of his [inability / diminished ability] to work.] [When I say “present value,” I mean the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those monetary losses at the times in the future when they will be sustained.]
- [3. The physical [and mental / emotional] pain and suffering [and disability/loss of a normal life] that Plaintiff has experienced [and is reasonably certain to experience in the future.]. No evidence of the dollar value of physical [or mental / emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate the Plaintiff for the injury he has sustained.]

[If you find in favor of Plaintiff but find that the plaintiff has failed to prove compensatory damages, you must return a verdict for Plaintiff in the amount of One Dollar (\$1.00).

7.24 DAMAGES: PUNITIVE

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for his conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that his conduct was malicious or in reckless disregard of Plaintiff's rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring Plaintiff. Conduct is in reckless disregard of Plaintiff's rights if, under the circumstances, it reflects complete indifference to Plaintiff's safety or rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of Defendant's conduct;
- the impact of Defendant's conduct on Plaintiff;
- the relationship between Plaintiff and Defendant;
- the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- **Defendant's financial condition;**
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

8.00 PRISONER'S RIGHT OF ACCESS TO COURTS

8.01 DESCRIPTION OF CLAIM

In this case, Plaintiff claims that Defendant intentionally denied him meaningful access to the courts. Plaintiff says that Defendant did this by [describe conduct.]

Let me explain the concept of “access to courts” in a bit more detail. The Constitution gives us the right to go to court when we have disputes with others. People who are in prison also have a right of “access to courts.” By this I mean that a prisoner is entitled to get meaningful help in [preparing and/or filing] his lawsuit. [This might include talking to people with legal training, such as lawyers, law students, or paralegals. Or it might simply mean access to a law library or legal reference materials.]

A prison official can consider security risks in deciding what kind of access to give the prisoner. [For example, a prison official does not need to give a prisoner personal access to a library if that would be dangerous. Instead, the official can find other ways of giving the prisoner materials that he needs to file his lawsuit and make legal arguments.] Inconvenient or highly restrictive regulations may be appropriate if they do not completely deny meaningful access to courts.

In the end, there is no one way for a prison official to provide access to courts. Instead, you must consider the prison official's program as a whole to see if it provides meaningful access.

8.02 DENIAL OF PRISONER'S ACCESS TO COURT

To succeed in his claim of denial of access to court, Plaintiff must prove each of the following things by a preponderance of the evidence.

1. Defendant intentionally did at least one of the following things:
[Describe conduct];
- [2. Defendant acted "under color of law." By this I mean that a person performs, or claims to perform, official duties under any state, county, or municipal law, ordinance, or regulation;]
3. Defendant's conduct hindered his efforts to pursue a legal claim;
- [4. The case which Plaintiff wanted to bring to court was not frivolous. A claim is frivolous if it is so trivial that there is no chance it would succeed in court or be settled out of court after it was filed;]
5. Plaintiff was harmed by Defendant's conduct.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

8.03 DAMAGES

Use Instructions 7.22, 7.23 and 7.24, as appropriate, listing those elements of damages relevant to the case, as well as:

- the reasonable value of any judgment or settlement Plaintiff would have received if

Defendant had not hindered his efforts to pursue his legal claim.

9.00 FEDERAL EMPLOYEE LIABILITY ACT AND SIMILAR STATUTES

9.01 PLAINTIFF'S FELA CASE

Plaintiff brings this action under the Federal Employers Liability Act or FELA. FELA requires Defendant to exercise reasonable care to provide a reasonably safe workplace.

To succeed in his FELA claim, Plaintiff must prove two things by a preponderance of the evidence:

1. Defendant was negligent;
2. Defendant's negligence caused or contributed to Plaintiff's injuries.

Negligence is the failure to use the care that a reasonably prudent person would use in the same circumstances. The law does not say how a reasonably prudent person should act. That is for you to decide.

9.02 DEFINITION OF “CAUSATION”

Defendant “caused or contributed to” Plaintiff’s injury if Defendant’s negligence played a part – no matter how small – in bringing about the injury. [There can be more than one cause contributing to an injury.] The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

9.03 Elements - Defendant's FELA Case

If you find that Defendant's negligence played a part in bringing about Plaintiff's injuries, you must consider Defendant's argument that Plaintiff should share responsibility for his own injuries. Defendant must prove two things by a preponderance of the evidence:

1. That Plaintiff was negligent; and
2. That Plaintiff's negligence caused or contributed to his own injuries.

If Defendant proves these things, you must then decide what percentage of the injuries was due to Plaintiff's own negligence.

9.04 DAMAGES

[If you find in favor of Plaintiff, then] [Regardless of how you have answered the questions concerning negligence and causation] you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained [and is reasonably certain to sustain in the future].

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

- [1. The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received [as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.]
- [2. The [wages, salary, fringe benefits, profits, earning capacity] that Plaintiff has lost [and the present value of the [wages, salary, fringe benefits, profits, earning capacity] that Plaintiff is reasonably certain to lose in the future] because of his [inability/diminished ability] to work.]
- [3. The reasonable value of household services Plaintiff has been unable to perform for himself to date [and the present value of household services Plaintiff is reasonably certain to be unable to perform for himself in the future).] [When I say “present value,” I mean the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those monetary losses at the times in the future when they will be sustained.]
- [4. The physical [and mental/emotional] pain and suffering [and disability/loss of a normal life] [including any aggravation of a pre-existing condition] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental/emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount

that will fairly compensate the Plaintiff for the injury he has sustained.]

[If you find for the plaintiff, any damages you award will not be subject to income taxes, so you should consider after-tax income in fixing the amount of damages.]

[Do not make any reduction in the amount of damages that you award based on any percentage of negligence that you have determined. I will reduce the damages that you award by the percentage of negligence that you assign to Plaintiff.] [Reduce the total amount of Plaintiff's damages by the percentage of negligence attributed to Plaintiff.]

9.05 MITIGATION OF DAMAGES

See Seventh Circuit Pattern Civil Jury Instruction 3.12.

9.06 DAMAGES (DEATH CASE)

[If you find in favor of Plaintiff, then] [Regardless of how you have answered the questions concerning negligence and causation] you must determine the amount of money that will fairly compensate Plaintiff on behalf of Decedent's family.

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

1. The loss of support and other financial benefits [he] [they] would have received from Decedent;
2. Loss of services that Decedent would have provided to [him] [them];
3. In the case of Decedent's minor children, Plaintiff may recover for the loss of Decedent's care, attention, instruction, training, advice and guidance;
- 1.4 Any pain and suffering experienced by Decedent before he died; and
- 1.5. The reasonable expense of medical care and supplies reasonably needed by and actually provided to Decedent.

Do not make any reduction in the amount of damages that you award based any percentage of negligence that you have determined. I will reduce the damages that you award by the percentage of negligence that you assign to Decedent.] [Reduce the total amount of Plaintiff's damages by the percentage of negligence attributed to Decedent].

**9.07 LOCOMOTIVE/BOILER INSPECTION ACT; FEDERAL
SAFETY APPLIANCE ACT**

Plaintiff [also] claims that Defendant violated the _____ Act, which requires a railroad to obey certain regulations about railroad operations. Those regulations require a railroad to [describe regulated conduct].

[Some of the standards under the _____ Act are different than the standards I described under FELA. In your deliberations, you must address Plaintiff's FELA claim separately from its _____ Act claim.]

To succeed in his _____ Act claim, Plaintiff must prove two things by a preponderance of the evidence:

1. Defendant violated [this] [one of these] regulation[s];
2. Defendant's violation caused or contributed to Plaintiff's injuries.

If you find Plaintiff has proved these things by a preponderance of the evidence, then Plaintiff is entitled to recover damages from Defendant [without showing that the Defendant was negligent.] [Any negligence on Plaintiff's part is not a matter for your consideration under the ___Act.]

9.08 SAMPLE SPECIAL VERDICT FORM

1. Do you find that Defendant was negligent and that Defendant’s negligence caused or contributed to Plaintiff’s injuries?

Answer Yes or No: _____

If you answer “no” to Question 1, do not answer any more questions.

2. (Without taking into consideration any possible negligence by Plaintiff), what sum of money do you find to be the total amount of Plaintiff’s damages?

Answer: \$ _____

3. Do you find that Plaintiff was negligent and that Plaintiff’s negligence caused or contributed to his own injuries?

Answer Yes or No: _____

Answer Question 4 only if you answered “Yes” to Question 3.

4. What percentage of Plaintiff’s damages do you find to have been caused by the negligence of the respective parties?

(Answer in terms of percentages totaling 100%):

Plaintiff _____%

Defendant _____%

- [5. The total amount of the damages \$_____ (from #2) X the percentage of Defendant's fault _% (from #4(b)) = Net Verdict _____.

Dated this ____ day of _____, 201_.

PRESIDING JUROR:

10.00 FAMILY MEDICAL LEAVE ACT

10.1 NATURE OF FMLA CLAIM

Plaintiff claims that Defendant violated the “Family and Medical Leave Act,” which is often referred to by its initials, “FMLA.” This law entitles an eligible employee to take up to 12 [26] weeks of unpaid leave during any 12-month period

[because of the birth of a [son] [daughter]]

OR

[because of the placement of a [son] [daughter] for adoption or foster care]

OR

[to care for a [spouse] [son] [daughter] [parent] with a serious health condition]

OR

[because of the employee’s serious health condition that makes him unable to perform the functions of his position]

OR

[because of [describe qualifying exigency] arising [from the call] [the notice of a call] to active duty in the [Armed Forces] [National Guard] [Reserves] of the employee’s [spouse] [son] [daughter] [parent]

OR

[to care for a member of the Armed Forces who is the employee’s [spouse] [son or daughter] [parent] [nearest blood relative] and who is undergoing [medical treatment] [recuperation] [therapy] [in outpatient status] [on temporary disability retired status] for a serious illness or injury].

The FMLA gives the employee the right following FMLA leave [either] to return to the position he held when the leave began [or to an equivalent position].

10.2 ELEMENTS OF FMLA INTERFERENCE CLAIM

To succeed on this claim, Plaintiff must prove all of the following by a preponderance of the evidence:

1. [Plaintiff] [Plaintiff's defined family member] had [specify condition].
2. The condition was a serious health condition. I will define "serious health condition" for you in a moment.
3. Defendant had appropriate notice of Plaintiff's need for leave. I will define "appropriate notice" for you in a moment.
4. Defendant interfered with his right to take FMLA leave by [not giving him leave] [terminating him] [not allowing him to return to his job or an equivalent position] [discouraging him from taking leave] [not giving him written notice detailing his rights and obligations under the FMLA] [describe other alleged interference].

10.3 SUPPLEMENTAL INSTRUCTIONS FOR SPECIFIC ISSUES

- a. Substitution of paid leave: Paid [vacation] [personal] [family] [medical] [sick] leave may be substituted for all or part of the 12 [26] weeks of unpaid leave provided for by the FMLA.
- b. Definition of “son” or “daughter”: This case involves Plaintiff’s [biological child] [adopted child] [a foster child] [stepchild] [legal ward], who is considered his [son][daughter] for purposes of this law.
- c. In loco parentis: Although [name] is not Plaintiff’s biological [parent][son][daughter], he is considered a [“parent”][“son”][“daughter”] under the law because he occupied the same role in Plaintiff’s life that a biological [parent][son][daughter] would be expected to occupy.
- d. Return to former position: An employee need not be returned to that position if [his job would have been eliminated if he had not taken leave] [he was a key employee].]

10.4 ELEMENTS OF FMLA RETALIATION CLAIM

To succeed on this claim, Plaintiff must prove, by a preponderance of the evidence, that his [protected activity] was a motivating factor in Defendant's decision to [adverse action] him. The term "motivating factor" means a reason why Defendant took the action that it did. It does not have to be the only reason.

If you find that Plaintiff's [protected activity] motivated Defendant to [adverse action] him, you must find for Plaintiff - unless you decide that Defendant has proved by a preponderance of the evidence that it would have [adverse action] him even if Plaintiff had not [protected activity].

If you find that Defendant has proved that, then you must find for Defendant. If you find that Defendant has not proved that, then you must find for Plaintiff.

10.5 DEFINITION OF “EQUIVALENT POSITION”

An equivalent position is one that is virtually identical to the employee’s former position in terms of pay, benefits and working conditions, including privileges, perks and status. It must involve the same or substantially the same duties, which must entail substantially equivalent skill, effort, responsibility, and authority.

10.6 DEFINITION OF “SERIOUS HEALTH CONDITION”

The phrase “serious health condition” means an [illness] [injury] [impairment] [physical condition] [mental condition] that involves [inpatient care in a [hospital] [hospice] [residential medical care facility]] [continuing treatment by a health care provider].

[To establish continuing treatment by a health care provider, plaintiff must prove that [he][his][spouse][son][daughter][parent]:

[was unable to [work], [attend school], [or perform other regular daily activities] due to that condition, and [was treated two or more times by a health care provider [absent extenuating circumstances]] [was treated on at least one occasion by a health care provider resulting in a regimen of continuing treatment under the supervision of the health care provider]

OR

[was unable to [work], [attend school], [or perform other regular daily activities] due to pregnancy or for prenatal care]

OR

[was unable to [work], [attend school], [or perform other regular daily activities] due to a chronic serious health condition. A chronic serious health condition is one that requires periodic visits for treatment by a health care provider, continues over an extended period of time or causes episodic incapacity.]

OR

[was unable to [work], [attend school], [or perform other regular daily activities] on a permanent or long-term basis due to a condition for which treatment may not be effective]

OR

[was absent to receive multiple treatments by a health care provider either for surgery after an accident or injury or for a condition that would likely prevent him from [working], [attending school], [or performing other regular daily activities] for more than three consecutive days without medical care.]]

10.7 DEFINITION OF “SERIOUS ILLNESS OR INJURY” IN ARMED FORCES CASES

As used in these instructions, the phrase “serious illness or injury” means an injury or illness incurred by a service member [in the line of duty on active duty] [that existed before the service member’s active duty and was aggravated by service in the line of duty on active duty] that may render him medically unfit to perform the duties of his [office] [grade] [rank] [rating].

10.8 NOTICE

Plaintiff must give Defendant at least 30 days' notice before FMLA leave was to begin. If that was not possible, Plaintiff must have given notice as soon as both possible and practical, taking into account all of the facts and circumstances. Plaintiff must have given at least verbal notice sufficient to make Defendant aware that he needed FMLA leave. Plaintiff did not need to mention the FMLA or use any specific words if he gave Defendant enough information that Defendant knew, or should have known, that Plaintiff needed FMLA leave.

OR

Plaintiff did not need to give advance notice to Defendant if [Plaintiff could not have foreseen his need for leave] [Plaintiff was incapable of giving notice]. As soon as both possible and practical, taking into account all of the facts and circumstances, Plaintiff should have given notice. Plaintiff [someone acting on Plaintiff's behalf] must have given at least verbal notice sufficient to make Defendant aware that he needed FMLA leave. Plaintiff did not need to mention the FMLA or use any specific words if he gave Defendant enough information that Defendant knew, or should have known, that he needed FMLA leave.

OR

Plaintiff did not need to request FMLA leave if the Defendant knew or should have known from the circumstances that Plaintiff needed FMLA leave or was so incapacitated that he could not provide notice of his need for leave.

10.9 DAMAGES: LOST WAGES OR BENEFITS

If you find that Plaintiff has proved his claim by a preponderance of the evidence, you should award him as damages any lost wages and benefits he would have received from Defendant if he had [been granted a FMLA leave] [been reinstated following his FMLA leave] [[not been] [adverse employment action]]. [You should then reduce this amount by any wages and benefits that Plaintiff received from other employment during that time [that he would not otherwise have earned]]. It is Plaintiff's burden to prove that he lost wages and benefits and the amount of his loss.

10.10 DAMAGES: MITIGATION

Defendant argues that Plaintiff's claim for [lost wages][benefits] should be reduced by [describe the reduction]. Defendant must prove by a preponderance of the evidence that (1) Plaintiff did not take reasonable actions to reduce his damages, and (2) Plaintiff reasonably might have found comparable employment if he had taken such action. If you find that Defendant has proven both those things, you should reduce any amount you might award Plaintiff for [lost wages] [benefits] by the amount he reasonably would have earned during the period for which you are awarding [lost wages] [benefits].

10.11 DAMAGES: WHERE NO LOST WAGES OR BENEFITS

If you find that Plaintiff has proved his claim by a preponderance of the evidence, you should award him any actual monetary losses he sustained as a result. It is Plaintiff's burden to prove that he had monetary losses and the amount of those losses.

11.0 PATENTS

Preliminary Instructions to be given at outset of trial

11.1.1 THE PARTIES AND THE NATURE OF THE CASE

This is a patent case. It involves U.S. Patent No[s]. ____, ____, and _____. Patents are often referred to by their last three digits. I will call the patent[s] in this case the ____, ____, and ____ patent[s].

The ____ patent relates to [briefly describe technology or subject matter involved; repeat as necessary for each patent]. During the trial, the parties will offer testimony to familiarize you with this [technology; subject matter].

Plaintiff contends that Defendant [infringed; is infringing] the ____ patent by its [making / using / selling / offering for sale / importing] _____. Plaintiff contends that it is entitled to recover damages caused by that infringement. [Plaintiff also contends that Defendant's infringement was willful.]

Defendant [denies that it [infringed; is infringing] the ____ patent] [and] [contends that the ____ patent is invalid].

I will explain these contentions to you later. First, I will give you some background about the U.S. patent system, the parts of a patent, and how a person gets a patent.

11.1.2 THE PATENT SYSTEM

Patents are issued by the United States Patent and Trademark Office, which is part of our government.

A patent is granted to the inventor for a set period of time, which, in this case, is [20 years from the time the application for the patent was filed] / [17 years from the date the patent issued].

During the term of the patent, if another person makes, uses, offers to sell, or sells in the United States or imports something that is covered by the patent without the patent owner's consent, that person is said to infringe the patent. The patent owner enforces a patent against persons believed to be infringers in a lawsuit in federal court, such as in this case.

The invention covered by a patent is described in the part of the patent that is called the "patent claim" or "patent claims." The patent claims are found in separately-numbered paragraphs at the end of the patent. When I use the word "claim" or "claims," I am referring to those numbered paragraphs.

[To be entitled to patent protection, an invention must be new, useful and non-obvious. A patent is not valid if it covers [a product; a process] that was already known or that was obvious at the time the invention was made. That which was already known at the time of the invention is called "prior art." I will give you more instructions about what constitutes prior art at the end of the case.]

11.1.3 HOW A PATENT IS OBTAINED

When an applicant for a patent files a patent application with the Patent and Trademark Office, the application is assigned to a Patent Examiner. The Patent Examiner reviews the application to determine whether or not the invention described in the patent application and set out in the claims meets the requirements of the patent laws for patentable inventions.

The Patent Examiner advises the applicant of his findings in a paper called an “office action.” The Examiner may “reject” the claims, that is, refuse to issue a patent containing those claims, if he or she believes the claims do not meet the requirements for patentable inventions. The applicant may respond to the rejection with arguments to support the claims, by making changes or amendments to the claims, or by submitting new claims. If the Examiner ultimately determines that the legal requirements for a patent have all been satisfied, he “allows” the claims, and the Patent and Trademark Office issues a patent.

This process, from the filing of the patent application to the issuance of the patent, is called “patent prosecution.” The record of papers relating to the patent prosecution is called the prosecution history or file history. The prosecution history becomes available to the public when the patent is issued or the application is published by the PTO (normally 18 months after filing).

11.1.4 THE PARTS OF A PATENT

A patent includes two basic parts: a written description of the invention, and the patent claims. The written description, which may include drawings, is often called the “specification” of the patent.

You have been provided with a copy of the ___ patent. Please look at the patent as I identify its different sections. [Other patents are also involved in this case. I am using this particular patent as an example to describe the various parts of a patent.]

The first page of the ___ patent provides identifying information, including the date the patent issued and patent number along the top, as well as the inventor’s name, the filing date, [the assignee, which is the company or individual that currently owns the patent], and a list of the prior art publications considered in the Patent Office during the time the patent was being sought.

The specification of the patent begins with a brief statement about the subject matter of the invention, which is called an abstract. This is found on the first page.

[Next, are the drawings, which appear as Figures ___ to ___ on the next pages. The drawings depict various aspects or features of the invention. They are described in words later in the patent specification.]

The written description of the invention appears next. In this portion of the patent, each page is divided into two columns, which are numbered at the top of the page. The lines on each page are also numbered. The written description of the ___ patent begins at column 1, line 1, and continues to column __, line __. [It includes a background section, a summary of the invention, and a detailed description of the invention, including some specific examples.]

The written description is followed by one or more numbered paragraphs, which are called the claims. The claims may be divided into a number of [parts or steps], which are called “claim limitations” or “claim requirements.” In the patent, the claims begin at column __, line __ and continue to the end of the patent, at column __, line __.

11.1.5 THE PATENT CLAIMS

The claims of a patent define the invention covered by the patent. [In other words, the claims describe what the patent does and does not cover, somewhat like the way a property deed describes the boundaries of a parcel of land.]

When a [product; process] is accused of infringing a patent, the patent claims must be compared to the accused [product; process] to determine whether infringement has been proven. [The claims are also at issue when the validity of a patent is challenged.] [In reaching your determinations with respect to infringement [and invalidity], you must consider each claim of the patent separately.]

In this case, we are concerned with claims ___ of the __ patent. Plaintiff contends that Defendant infringed [this; these] claims. Defendant denies this [and contends that claims ___ are invalid].

The language of patent claims may not be clear to you, or the meaning or the claims may be disputed by the parties. I will tell you what certain words in the patent claims mean. You must use the meanings I give you when you decide whether the patent is infringed [and whether it is invalid].

11.1.6 ISSUES TO BE DECIDED

I will now give you some information about the law and the issues that will be presented to you at this trial. At the close of the trial, I will give you specific instructions about the law you are to follow as you deliberate to reach your verdict. You must follow the law as I describe it to you.

11.1.7 INFRINGEMENT; BURDEN OF PROOF

Plaintiff contends that Defendant [infringes; has infringed; has induced someone else to infringe; has contributed to infringement of] the __ patent[s]. Defendant denies [this; these] contention[s]. Plaintiff is required to prove infringement by a preponderance of the evidence. This means that Plaintiff must persuade you that its contentions are more probably true than not true. I will describe Plaintiff's contentions regarding the issue of infringement.

11.1.8 DIRECT INFRINGEMENT

Plaintiff contends that Defendant infringes claims ____ of the patent by its [use, sale, or offer for sale of product/use of process]. [This is called “direct infringement.”]

To establish direct infringement, Plaintiff must prove that every requirement in [the particular claim of Plaintiff’s patent that you are considering; Plaintiff’s patent] is found in Defendant’s [product; process]. A requirement of a claim is found in Defendant’s [product; process] if the requirement is in the [product; process] exactly as it is in the claim [or] [if the requirement is in the [product; process] in a manner that is equivalent to what is in the claim. A [part of Defendant’s product; step in Defendant’s process] is equivalent to a claim requirement if it performs substantially the same function, in substantially the same way, to reach substantially the same result. In my instructions at the end of the case, I will explain in more detail how you make this determination.]

[Describe specific product/process accused of infringement and which claims are alleged to be infringed.]

11.1.9 INDIRECT INFRINGEMENT

Plaintiff contends that Defendant induced [someone; name of alleged direct infringer] to infringe [claims ___, ___, ___ of] Plaintiff's patent. Plaintiff contends that Defendant induced [someone; name of alleged direct infringer] to infringe [claims ___, ___, ___ of] Plaintiff's patent. To succeed on this contention, Plaintiff must prove that Defendant knew of Plaintiff's patent, [acted; encouraged; instructed] [insert name or other description of direct infringer] to [[use/make] a product; perform a process] in a manner that infringed Plaintiff's patent, and knew or should have known that its acts would cause [insert name or other description of direct infringer] to infringe Plaintiff's patent.

Plaintiff [also] contends that Defendant contributed to the infringement of [claims ___ of] Plaintiff's patent. To succeed on this contention, Plaintiff must prove that Defendant knew of Plaintiff's patent, [sold; supplied] a component that forms a significant part of the patented invention and that is not a commonly available item with other uses. Plaintiff must also prove that another person infringed Plaintiff's patent by using this component and that Defendant knew the component was especially made for a use that would infringe Plaintiff's patent.

11.1.10 WILLFUL INFRINGEMENT

Plaintiff contends that Defendant infringed Plaintiff's patent willfully. To prove willful infringement, Plaintiff must prove by clear and convincing evidence that Defendant knew it was highly likely that its actions constituted infringement of a valid patent, and defendant either knew of this high likelihood, or it was so apparent that Defendant should have known. "Clear and convincing" evidence means evidence that convinces you that it is highly probable that the particular proposition is true. This is more demanding than the "preponderance of the evidence" requirement that applies to infringement generally.

At the conclusion of the case, I will explain in more detail how you are to decide the issue of willful infringement.

11.1.11 DAMAGES

Plaintiff contends that it has suffered damages as a result of Defendant's infringement in the form of [lost profits that Plaintiff would have made if Defendant had not infringed] [and/or] [a reasonable royalty on each of Defendant's sales of an infringing [product; process]]. I will explain to you at the end of the case [how lost profits are calculated [and/or] how a reasonable royalty is determined].

Plaintiff must prove its damages by a preponderance of the evidence.

11.1.12 INVALIDITY

Defendant contends that claims ___ of the __ patent(s) are invalid. Only a valid patent may be infringed. Plaintiff denies that these claims are invalid.

The law presumes each claim of the ___ patent(s) to be valid. For this reason, Defendant has the burden of proving invalidity by clear and convincing evidence. “Clear and convincing” evidence [has the same definition that I just provided to you.] [means evidence that convinces you that it is highly probable that the particular proposition is true. This is a higher burden of proof than “preponderance of the evidence.”]

If you find that any one of the requirements for a valid patent is not met for a patent claim, then that claim is invalid. You must consider the issue of validity separately for each claim that is at issue.

I will now explain to you briefly the legal requirements for each of the grounds on which Defendant relies to contend that the patent claims are invalid. I will provide more details for each ground in my final instructions.

11.1.13 INVALIDITY — ANTICIPATION

Defendant contends that the invention covered by claims ____ of the ____ patent is not new because it was “anticipated” by the prior art. “Prior art,” in general, includes anything that was publicly known prior to Plaintiff’s invention. I will provide you with a more specific definition following the conclusion of the evidence.

To prove that a claim is anticipated by the prior art, Defendant must prove by clear and convincing evidence that each and every requirement of the claim is present in a single item of prior art and that a person with an ordinary level of skill in the field of the invention who looked at the prior art would have been able to make and use the invention disclosed in the claim.

11.1.14 INVALIDITY — OBVIOUSNESS

Defendant contends that claims ____ of the ____ patent are invalid for obviousness. A patent claim is invalid for obviousness if a person with an ordinary level of skill in the field of the invention who knew about all the prior art existing at the time of the invention would have come up with the invention at that time. [“Prior art” in general, includes anything that was publicly known prior to Plaintiff’s invention. I will provide you with a more specific definition following the conclusion of the evidence.] [Unlike anticipation, obviousness may be shown by considering more than one item of prior art.]

11.1.15 INVALIDITY – WRITTEN DESCRIPTION/CLAIMING REQUIREMENTS

Defendant contends that claims ___ of the ___ patent are invalid because the patent does not contain [a written description of the invention/an enabling description of the invention/a description of the best mode of the invention]. To succeed on this contention, Defendant must prove that:

- The specification section of the patent does not contain an adequate written description of each and every requirement of the particular patent claim that is at issue.]
- The specification section of the patent does not contain enough information to enable a person of ordinary skill in the field of the invention to make and use the invention without undue experimentation.]
- The written description of the patent does not describe the “best mode,” or best way, to [make; use; carry out] the [product; process] covered by the patent that was known to the inventor at the time he applied for the patent.]

I will explain in more detail at the end of the case how you decide [this; these] issue[s].

11.1.16 PERSON OF ORDINARY SKILL

In these instructions, I have used the concept of a “person of ordinary skill in the field of the invention.” In this case, the field of the invention is [insert]. It will be up to you to decide the level of ordinary skill in that field. I will give you further instructions about this at the end of the case.

FINAL INSTRUCTIONS

INFRINGEMENT

11.2.1 THE PATENT SYSTEM

At the beginning of the trial, I gave you some general information about patents and the patent system and a brief overview of the patent laws relevant to this case. I will now give you more detailed instructions about those aspects of patent law that specifically relate to this case.

11.2.2 PERSON OF ORDINARY SKILL

Some issues in patent cases are determined by reference to a “person of ordinary skill in the field of the invention,” a term that I will use later in these instructions. In this case, the field of the invention is [insert].

It is up to you to decide the level of ordinary skill. In making this decision, you should consider all the evidence, including:

- the levels of education and experience of persons working in the field;
- the types of problems encountered in the field; and
- the sophistication of the technology in the field.

11.2.3 THE PARTS OF A PATENT

A patent includes two basic parts: a written description of the invention, and the patent claims. The written description, which may include drawings, is often called the “specification” of the patent.

You have been provided with a copy of the ___ patent. Please look at the patent as I identify its different sections. [Other patents are also involved in this case. I am using this particular patent as an example to describe the various parts of a patent.]

The first page of the ___ patent provides identifying information, including the date the patent issued and patent number along the top; the name(s) of the inventor(s), the filing date; [the assignee, which is the company or individual that owned the patent on the date it was issued]; and a list of documents considered in the Patent Office during the time the patent was being sought.

The specification of the patent begins with a brief statement about the subject matter of the invention, which is called an abstract. This is found on the first page.

[Next, are the drawings, which appear as Figures ___ to ___ on the next pages. The drawings depict various aspects or features of the invention. They are described in words later in the patent specification.]

The written description of the invention appears next. In this portion of the patent, each page is divided into two columns, which are numbered at the top of the page. The lines on each page are also numbered. The written description of the ___ patent begins at column 1, line 1, and continues to column __, line __. [It includes a background section, a summary of the invention, and a detailed description of the invention, including some specific examples.]

The written description is followed by one or more numbered paragraphs, which are called the claims.

11.2.4 THE PATENT CLAIMS

The claims of a patent are the numbered sentences at the end of the patent. The claims describe what the patent owner may prevent others from doing.

Claims are usually divided into [parts; steps], called “limitations” or “requirements.” For example, a claim that covers the invention of a table may describe the tabletop, four legs and glue that holds the legs and the tabletop together. The tabletop, legs and glue are each a separate limitation or requirement of the claim.

We are concerned with claims _ of the__ patent. Plaintiff contends that Defendant infringed _ claims. Defendant denies this [and contends that claims ___ are invalid].

To decide whether Defendant infringed the patent, you must compare the claims to [the accused product; process]. [Similarly, in deciding a challenge to the validity of a patent, you must compare the claims to the asserted prior art.] [In reaching your determinations with respect to infringement [and invalidity], you must consider each claim of the patent separately.]

11.2.5 INFRINGEMENT: INTERPRETATION OF THE PATENT CLAIMS

The owner of a patent has the right to prevent others from [making; using; offering for sale; selling; importing] the invention covered by the patent. A [product; process] infringes a patent if that [product; process] is covered by at least one claim of the patent.

I will tell you the meaning of any disputed terminology in the patent claims. You must use the meanings I give you when you decide whether the patent is infringed [and whether it is invalid].

11.2.6 INDEPENDENT AND DEPENDENT CLAIMS

Patent claims may exist in two forms, called independent claims and dependent claims. An independent claim stands on its own and does not refer to any other claim of the patent. A dependent claim refers to at least one other claim in the patent. A dependent claim includes each of the requirements of the other claim[s] to which it refers, as well as the requirements in the dependent claim itself.

Earlier I described a hypothetical patent claim for a table that described the tabletop, four legs, and glue to hold the legs and tabletop together. That is an example of an independent claim. In that same hypothetical patent, a dependent claim might be one that stated, “the same table in the initial claim, where the tabletop is square.”

11.2.7 MEANS-PLUS-FUNCTION CLAIMS

Some parts of a patent claim describe a “means” of doing something, rather than the physical “structure” that performs the function. These are called “means-plus-function” claims.

For example, let’s say that a patent describes a table with legs glued to the tabletop. As I said before, one way to make a patent claim for the table is to describe the tabletop, four legs, and glue between the legs and the tabletop. Another way to make the claim is to describe the tabletop and the legs, but use the phrase a “means for securing the legs to the tabletop” rather than describing the glue. This would be a “means-plus-function” requirement. In other words, it describes a “means” for performing the “function” of securing the legs to the tabletop, rather than expressly describing the glue.

A means-plus-function requirement also covers structures that are equivalent to those described in the patent, such as using an equivalent to glue to secure the legs to the tabletop.

Claims ___ of the ___ patent include means-plus-function requirements. In instructing you about the meaning of a means-plus-function claim requirement, I will tell you, first, the function that each of the means-plus-function claim requirements performs; and second, the structure disclosed in the patent specification that corresponds to each means-plus-function requirement.

11.2.8 “COMPRISING” / “CONSISTING OF” / “CONSISTING ESSENTIALLY OF”

[When a patent claim uses the term “comprising,” it means that the invention includes the listed requirements, but is not limited to those requirements.]

[When a patent claim uses the term “consisting of,” it means that the invention includes the listed requirements, and only those requirements.]

[When patent claim uses the words “consisting essentially of,” it means that a [product; process] containing [structures; steps] beyond those described in the claim is covered only if those additional [structures; steps] do not have a significant effect on the basic and novel characteristics of the invention.]

11.2.9 INTERPRETATION OF THE PATENT CLAIMS

I [have provided you; will provide you] with a copy of Plaintiff's patent. I have previously defined certain [words; phrases] in [some of] the claims. You must use these definitions in making your decision. The [words; phrases] I have defined are as follows:

(list claim terms and definition from claim construction by the Court or stipulations by the parties)

11.2.10 DIRECT INFRINGEMENT — ELEMENTS

Plaintiff contends that Defendant has infringed [claims __, __, and __ of] Plaintiff's patent. To succeed on this contention, Plaintiff must prove the following by a preponderance of the evidence:

1. Every requirement in [the particular claim of Plaintiff's patent that you are considering; Plaintiff's patent] is found in Defendant's [product; process]; and
2. Defendant [made, used, sold, offered for sale, or imported] that [product; process] [in; into] the United States.

11.2.11.1 DEFINITION OF “INFRINGEMENT”

As I stated in the previous instruction, infringement occurs if each requirement of a claim is found in Defendant’s [product; process]. As I have explained, Plaintiff contends that Defendant infringed [claims __, __, and __] of Plaintiff’s patent. To determine whether Defendant infringed Plaintiff’s patent, you must compare Defendant’s [product; process] against each one of these claims.

To determine whether a dependent claim has been infringed, you must compare Defendant’s [product; process] to both the dependent claim and the claim[s] it/they refer[s] to. For example, if claim 2 is dependent from claim 1, it may say, “2. The [product; process] according to claim 1, wherein . . .” In this situation, dependent claim 2 cannot be infringed unless claim 1 is also infringed. For this reason, in the example you would have to compare Defendant’s [product; process] to all the requirements of both claims 1 and 2.

A requirement of a claim is found in Defendant’s [product; process] if the requirement is in the [product; process] exactly as it is in the claim [or] [if the requirement is in the [product; process] in a manner that is equivalent to what is in the claim.

[If all of the requirements of the claim are in Defendant’s [product; process] exactly as they are in the claim, that is called “literal infringement.”]

[If all of the requirements of the claim are in Defendant’s [product; process], but one or more of them is equivalent to what is in the claim, that is called “infringement by equivalence.”]

[The following claim requirements must be met literally; infringement by equivalence does not apply to these requirements: (list claim terms that must be met literally, and definition from claim construction by the Court or stipulations by the parties)]

11.2.11.2 INFRINGEMENT — DOCTRINE OF EQUIVALENTS

A [part of Defendant’s product; step in Defendant’s process] is equivalent to a claim requirement if a person of ordinary skill in the field of the invention would regard any differences between them as insubstantial.

[[A [part; step] is also equivalent to a claim requirement if it performs substantially the same function, in substantially the same way, to reach substantially the same result.]] [One factor you may consider in making that determination is whether a person of ordinary skill in the field of the invention would have regarded Defendant’s [part; step] to be interchangeable with the claim requirement.]]

In determining infringement by equivalence, you must still use the meanings for the claim requirements that I have provided.

11.2.11.3 INFRINGEMENT — MEANS-PLUS-FUNCTION CLAIM LANGUAGE

Claim[s] _____ in Plaintiff’s patent contain[s] [a] requirement[s] that [is; are] written in a particular form, called “means plus function” form. Specifically, claim ____ contains the following “means plus function” language:

[fill in]

You must use the definition[s] I have previously given you regarding [this part; these parts] of the claim.

Plaintiff must prove that the entire claim is infringed. The “means plus function” language is only part of the entire claim. The paragraphs numbered 1 and 2 below concern only the “means plus function” part[s] of the claim. You must use the other rules that I have already given you for the other parts of the claim.

As with the other claim requirements, Plaintiff must prove that the “means plus function” claim requirement[s] [is; are] met literally, or by equivalence. The rules for determining whether [this; these] claim requirement[s] [is; are] met by equivalence are the same as the ones I have already given you.

In determining whether “means plus function” claim requirement[s] [is; are] met literally, different rules apply than the ones I gave you earlier. Specifically, to prove that the “means plus function” claim requirement[s] [is; are] met literally, Plaintiff must prove the following [as to each “means plus function” claim requirement]:

1. Defendant’s product includes structure that performs the identical function in this claim requirement, as I defined the function for you [on page ____ of these instructions] [earlier, namely (recite the function)]; and
2. That structure is the same as, or equivalent to, the structure in this claim requirement, as I identified it for you [on page __ of these instructions] [earlier, namely (recite the corresponding structure)].

For purposes of this instruction, two structures are “equivalent” if they are substantially the same. [One way structures may be substantially the same is if they achieve substantially the same result in substantially the same way. [Another way is if the differences between them are not substantially

different.]] You should make this determination from the point of view of a person with ordinary skill in the field of the invention.

11.2.11.4 DETERMINING INFRINGEMENT

You must decide whether there is infringement separately for each claim. [There is one exception to this rule. If you decide that an independent claim is not infringed, then there cannot be infringement of any dependent claim that refers directly or indirectly to that independent claim.]

11.2.12 INDIRECT INFRINGEMENT — INDUCEMENT

Plaintiff contends that Defendant induced [someone; name of alleged direct infringer] to infringe [claims __, __, __ of] Plaintiff's patent. To succeed on this contention, Plaintiff must prove the following by a preponderance of the evidence:

1. Defendant knew of Plaintiff's patent.
2. Defendant [acted; encouraged; instructed] [insert name or other description of direct infringer] to [[use / make] a product; perform a process] in a manner that directly infringed Plaintiff's patent, as defined in other instructions that I have given you.
3. Defendant knew or should have known that its acts would cause [insert name or other description of direct infringer] to infringe Plaintiff's patent.

11.2.13 INDIRECT INFRINGEMENT — CONTRIBUTORY INFRINGEMENT

Plaintiff contends that Defendant contributed to the infringement of [claims __, __, __ of] Plaintiff's patent. To succeed on this contention, Plaintiff must prove the following by a preponderance of the evidence:

1. Defendant knew of Plaintiff's patent.
2. Defendant [sold; supplied] a component that forms a significant part of the invention described in a claim in Plaintiff's patent.
3. [Another person; insert name] infringed Plaintiff's patent by using this component.
4. Defendant knew the component was especially made or adapted for a use that would infringe Plaintiff's patent.
5. The component was not a commonly available item or a product with substantial non-infringing uses.

11.2.14 WILLFUL INFRINGEMENT

Plaintiff contends that Defendant infringed Plaintiff's patent willfully. You are required to decide this issue because it may be relevant to other issues that I may have to consider.

You are to consider the issue of willful infringement only if you have found that Defendant infringed Plaintiff's patent. Not all infringement is willful.

The standard of proof for willful infringement is higher than the standard for infringement generally. Specifically, Plaintiff must prove willful infringement by clear and convincing evidence. "Clear and convincing" evidence means evidence that convinces you that it is highly probable that the particular proposition is true. [You also may have heard of a burden of proof used in criminal cases called "beyond a reasonable doubt," which is a higher burden of proof than "clear and convincing" evidence. You should not apply the criminal standard in this case.]

To succeed on its contention that Defendant infringed the patent willfully, Plaintiff must prove two things by clear and convincing evidence:

1. There was a high likelihood that Defendant's actions constituted infringement of a valid patent. In making this determination, you may not consider Defendant's actual state of mind. [You may consider the normal standards of fair commerce.]
2. Defendant knew of the high likelihood that it was infringing a valid patent, or this likelihood was so apparent that Defendant should have known of it.

11.3 INVALIDITY

11.3.1 VALIDITY — GENERAL

Defendant has challenged the validity of the ___ patent(s) claim(s) on [state the grounds].

Each of the claims of the ___ patent(s) is presumed to be valid. For that reason, Defendant has the burden of proving invalidity by clear and convincing evidence. “Clear and convincing” evidence means evidence that convinces you that it is highly probable that the particular proposition is true. [You also may have heard of a burden of proof used in criminal cases called “beyond a reasonable doubt,” which is a higher burden of proof than “clear and convincing” evidence. You must not apply the criminal standard in this case.]

You must evaluate and determine separately the validity of each claim of the patent(s).

11.3.2 INVALIDITY — SPECIFICATION REQUIREMENTS

The patent law contains certain requirements for a patent specification. Defendant contends that claim(s) ___ of the ___ patent [is/are] invalid because the specification fails to satisfy the law's [written description,] [enablement,] [and/or] [best mode] requirements.

If you find that Defendant has proved by clear and convincing evidence that any one of these requirements is not met for an asserted claim, then that claim is invalid. I will now explain to you in detail the specification requirement[s] that Defendant says makes the patent claims invalid.

11.3.2.1 SPECIFICATION REQUIREMENTS — WRITTEN DESCRIPTION

The law requires that the “specification” section of the patent contain an adequate written description of the invention(s) in the patent claim(s).

Defendant contends that claim(s) ____ of Plaintiff’s patent [is/are] invalid because it does not contain an adequate written description. To succeed on this contention, Defendant must prove by clear and convincing evidence that a person of ordinary skill in the field of the invention would not recognize that the specification describes all the requirements of the claim. The specification does not have to use the exact words found in the claim.

If Defendant proves this as to a particular claim, then you should find that claim invalid.

11.3.2.2 SPECIFICATION REQUIREMENTS — ENABLEMENT

The law requires that the “specification” section of the patent contain enough information to enable a person of ordinary skill in the field of the invention to make and use the invention, without an unreasonable amount of experimentation. A patent does not have to state information that persons of ordinary skill in the field would be likely to know or could obtain without undue effort.

Defendant contends that claim(s) ____ of Plaintiff's patent [is/are] invalid because it fails to meet this requirement. To succeed on this contention, [Defendant] must prove by clear and convincing evidence that the specification does not enable a person of ordinary skill in the field of the invention to make and use a [product; process] covered by claim ____, without an unreasonable amount of experimentation. Whether the amount of experimentation is unreasonable depends on the complexity of the field of the invention and the level of expertise and knowledge of persons of ordinary skill in that field.

If Defendant proves this as to a particular claim by clear and convincing evidence, you should find that claim invalid.

11.3.2.3 SPECIFICATION REQUIREMENTS — BEST MODE

The law requires that if an inventor believed, at the time he applied for the patent, that there was a "best mode," or best way, to [make; use; carry out] the [product; process] covered by the patent, he had to disclose it in the patent. The inventor also may disclose other modes, and he need not state which of the modes he discloses in the patent is the best.

Defendant contends that claim(s) ____ of Plaintiff's patent [is/are] invalid for failure to satisfy the "best mode" requirement. If you find by clear and convincing evidence that Defendant has proved this [as to a particular claim], you should find that claim invalid.

11.3.2.4 SPECIFICATION REQUIREMENTS — INDEFINITENESS

No general instruction.

11.3.3 SECTION 102 AND 103 DEFENSES — DEFINITION OF “PRIOR ART”

In addressing some of Defendant’s invalidity defenses, you will have to consider what is disclosed in the “prior art.”

[The parties agree that the following [items; processes; references] are prior art:

[list uncontested prior art].

[The parties dispute that other [items; processes; references] are prior art.]

Before you may consider any disputed [item; process; reference] to be prior art [for purposes of Defendant’s defense of anticipation], Defendant must prove by clear and convincing evidence that the [item; process; reference] was [any one of the following]:

- A disputed [item; process; reference] is not prior art unless Defendant proves by clear and convincing evidence that the [item; process; reference] was [any one of the following]: [use only those that apply in the particular case]
- [known] [or] [used] by someone else in the United States before the date of invention, unless the [knowledge] [or] [use] was private or secret.
- [in public use] [or] [on sale] in the United States more than one year before the patent application was filed;
- patented by someone else [before the date of the invention] [or] [more than one year before the patent application was filed];
- described in a publication [before the date of the invention] [or] [more than one year before the patent application was filed];
- described in a published patent application filed in [the United States; a foreign country] before the date of invention.

11.3.4 SECTION 102 DEFENSES — PRIOR ART — DEFINITIONS

(a) “date of invention”

The term “date of invention,” as used in the previous instruction, means [insert agreed upon date, if applicable] [the date the patent application was filed [, insert effective filing date], unless Plaintiff proves by a preponderance of the evidence that the invention was conceived and actually reduced to practice at an earlier date. An invention is “conceived” when the inventor has formed the idea of how to make and use every aspect of the claimed invention. An invention is “actually reduced to practice” when it is made or when the inventor determines that it will work for its intended purpose.]

[To establish an earlier date, Plaintiff must prove by a preponderance of the evidence that [the invention was actually reduced to practice at an earlier date, in which case that date is the invention date] [, or] [the inventor conceived the invention before the date of the prior art and used reasonable diligence before the date of the prior art to reduce the invention to practice, in which case the date of the invention is the date when the invention was conceived.] Reasonable diligence means the inventor worked continuously to reduce the invention to practice, allowing for everyday interruptions].

(b) “on sale”

An [item; process] is “on sale,” as that term is used in these instructions, if it was the subject of a commercial offer for sale in the United States more than one year before the patent application date[, and if, at that time, there was reason to believe that the [item; process] would work for its intended purpose]. A single offer to sell, primarily for profit rather than for experimental purposes, is sufficient, even if no actual sale was made.

(c) “publication”

To qualify as a “publication,” as that term is used in these instructions, the [article; patent; other reference] must be disseminated or reasonably accessible to persons interested in the field of the invention.

11.3.5 SECTION 102 DEFENSES — ELEMENTS

A patent claim is invalid if the invention it describes is not new. If there is “prior art” that already shows the same invention covered by a patent claim, then the claim is invalid because it is “anticipated” by the prior art.

Defendant contends that [Plaintiff’s patent; claim[s] ___, ___, ___ of Plaintiff’s patent] [is; are] invalid because [it is; they are] anticipated by prior art.

To succeed on this contention, Defendant must prove two things by clear and convincing evidence:

1. All of the requirements of the [claim(s) you are considering] are expressly stated or inherent in a single item of prior art.
2. A person of ordinary skill in the field of the invention, looking at the single prior art item, would be able to make and use the invention disclosed in the claim [without an unreasonable amount of experimentation. Whether the amount of experimentation is unreasonable depends on the complexity of the field of the invention and the level of expertise and knowledge of persons of ordinary skill in that field.] If you find that Defendant has proved each of these by clear and convincing evidence as to a particular patent claim, then you must find for Defendant on that patent claim.

11.3.6 OBVIOUSNESS

Defendant contends that [Plaintiff's patent; claim[s] ___, ___, ___ of Plaintiff's patent] [is; are] invalid because [it is; they are] obvious.

To succeed on this contention, Defendant must prove by clear and convincing evidence [as to the particular claim you are considering] that a person of ordinary skill in the field of the invention, who knew about all the prior art existing at the time the invention was made, would have come up with the invention at that time. [Unlike anticipation, obviousness may be shown by considering two or more items of prior art in combination.]

In deciding obviousness, you should put yourself in the position of a person with ordinary skill in the field at the time of the claimed invention. You must not use hindsight; in other words, you may not consider what is known now or what was learned from Plaintiff's patent. In addition, you may not use Plaintiff's patent as a roadmap for selecting and combining items of prior art.

[In deciding obviousness, you may also consider whether a person of ordinary skill in the field would have been discouraged from following the path the inventor took, keeping in mind that Plaintiff is not required to show such discouraging factors. As I have stated, Defendant has the burden of proving obviousness by clear and convincing evidence.]

In making your decision regarding obviousness, you should consider the following:

1. The scope and content of the prior art. You may consider prior art that was reasonably relevant to the problem the inventor faced, including prior art in the field of the invention and prior art from other fields that a person of ordinary skill would consider when attempting to solve the problem.
2. Any differences between the prior art and the invention in the patent claim.
3. The level of ordinary skill in the field of the invention at the time of the invention.
- [4] Any of the indications of non-obviousness described in the next instruction that are shown by the evidence.]

11.3.6.1 OBVIOUSNESS — ADDITIONAL FACTORS INDICATING NON- OBVIOUSNESS

As I stated in the previous instruction, in deciding obviousness you should consider any of the following factors that, if present in the case, may indicate the invention was not obvious.

- the invention achieved commercial success, so long as the commercial success resulted from the claimed invention, rather than from something else, such as innovative marketing;
- the invention satisfied a long-felt need;
- others failed in attempting to make the invention;
- others copied the invention;
- the invention achieved unexpected results;
- [Defendant; others in the field] praised the invention;
- others sought or obtained rights to the patent from the patent holder;
- [experts; persons of ordinary skill in the field of the invention] expressed surprise at the making of the invention; or
- the inventor proceeded contrary to accepted wisdom.

Not all of these factors may be present. No single factor is more or less important than the others.

11.3.6.2 OBVIOUSNESS — COMBINING OF PRIOR ART REFERENCES

[Because most inventions are built on prior knowledge,] The fact that each of the elements of the claim may be found in prior art is not enough, by itself, to prove obviousness. In determining whether Defendant has proved obviousness, you may combine multiple items of prior art only if there was an apparent reason for a person of ordinary skill in the field to combine them in the same way as in Plaintiff's claimed invention. In deciding this, you may consider, among other things, any of the following factors:

- what the prior art suggests about combining;
- the knowledge possessed by persons who have ordinary skill in the field of the invention; and
- the effects of market pressures and design needs that existed at the time, and the number of identified and predictable solutions for those demands.

11.3.7 INEQUITABLE CONDUCT

No general instruction.

DAMAGES

11.4.1 DAMAGES – GENERAL

If you find that Defendant infringed any valid claim of the [’_____ Patent], you must then consider what amount of damages to award to Plaintiff. Plaintiff must prove damages by a preponderance of the evidence.

I will now instruct you about the measure of damages. By instructing you on damages, I am not suggesting which party should win on any issue. If you find infringement, you are to award Plaintiff damages adequate to compensate Plaintiff for that infringement. The damages you award are intended to compensate the patent holder, not to punish the infringer.

11.4.2 TWO TYPES OF DAMAGES — LOST PROFITS AND REASONABLE ROYALTY

There are two types of damages that Plaintiff may be entitled to recover: lost profits, or a reasonable royalty.

Lost profits consist of any actual reduction in business profits Plaintiff suffered as a result of the Defendant's infringement. A reasonable royalty is defined as the amount the patent owner and someone wanting to use the patented invention would agree upon as a fee for use of the invention. I will describe shortly what Plaintiff must prove to recover either type of damages.

Plaintiff is entitled to recover no less than a reasonable royalty for each infringing [sale; fill in other infringing act], even if Plaintiff cannot prove that it suffered lost profits in connection with that [sale; fill in other infringing act].

11.4.3 LOST PROFITS

To recover lost profits, Plaintiff must prove three things:

1. A reasonable probability that, if Defendant had not infringed, Plaintiff would have made additional sales of the patented [product; process] that Defendant made.
2. The amount of profit Plaintiff would have made on those sales. Plaintiff does not need to prove this amount with precision [, and if there are uncertainties regarding the specific amount of lost profits, you may resolve those uncertainties against Defendant].
- [3. Defendant reasonably should have foreseen that Plaintiff would have lost profits.]

There are alternative ways for Plaintiff to establish an entitlement to recover lost profits. I will discuss these in the following instructions.

11.4.3.1 LOST PROFITS — PANDUIT TEST

[One way that] Plaintiff may establish that it is reasonably probable that it would have made additional sales of the patented [or competing][product; process] [is] by proving three things:

1. There was a demand for the patented [or competing] product;
2. There was no acceptable, non-infringing substitute for the patented product; and
3. Plaintiff was capable of satisfying the demand.

An “acceptable, non-infringing substitute” is a product that has the advantages of the patented invention that were important to the purchasers of Defendant’s product. If purchasers of the Defendant’s product were motivated to purchase that product because of features that were available only from that product and the Plaintiff’s patented product, then other products are not acceptable substitutes, even if they otherwise competed with Plaintiff’s and Defendant’s products.

11.4.3.2 LOST PROFITS — TWO SUPPLIER MARKET

[An alternative way that] Plaintiff may establish that it is reasonably probable that it would have made additional sales of the patented [product; process] [is] by proving two things:

1. Plaintiff and Defendant are the only suppliers for the product in the market; and
2. Plaintiff was capable of making all of the sales made by Defendant.

If Plaintiff proves these things, it is entitled to recover its lost profits on all of the sales made by Defendant.

11.4.3.3 LOST PROFITS — MARKET SHARE METHOD

[An alternative way that] Plaintiff may establish that it is reasonably probable that it would have made additional sales of the patented [product; process] [is] by proving two things:

1. Plaintiff would have made some portion of Defendant's infringing sales if Defendant's infringing product had not been available; and
2. Plaintiff was capable of making those additional sales.

If Plaintiff proves these things, it is entitled to recover its lost profits on the percentage of Defendant's sales that reflects what Plaintiff proves was its share of the market. [You may reach this conclusion even if acceptable, non-infringing substitute products were available from others.]

11.4.3.4 LOST PROFITS — COLLATERAL SALES

Plaintiff contends that the patented product is normally sold along with other collateral products, such as [identify the collateral products]. To recover lost profits for such collateral sales, Plaintiff must prove two things:

1. It is reasonably probable that plaintiff would have sold the collateral products if the defendant had not infringed; and
2. The collateral products function together with the patented product as a functional unit. Plaintiff may not recover lost profits on other products or services that might be sold along with the patented product for convenience or business advantage, but that are not functionally part of the patented product.

11.4.3.5 LOST PROFITS — PRICE EROSION/ COST INCREASES

Plaintiff [also] contends that it lost profits [because it had to charge lower prices for its products because of Defendant's infringement] [[and;or] [because it incurred increased costs because of Defendant's infringement] [insert alternative theory of price erosion, e.g., foregone price increases]. To be recoverable, any such lost profits must have been reasonably foreseeable to Defendant.

If Plaintiff proves this, it is entitled to recover the profits it lost as a result of its [lowered prices; increased costs; alternative theory, e.g., foregone price increases], in addition to any profits it lost due to sales it did not make because of Defendant's infringement.

11.4.3.6 LOST PROFITS — AMOUNT

If you conclude that Plaintiff has proved that it lost profits because of Defendant's infringement, the lost profits that you award should be the amount that Plaintiff would have made on any sales that Plaintiff lost because of the infringement, minus the additional costs that Plaintiff would have incurred in making those sales [, plus the amount by which Plaintiff's profits on its own sales were decreased as a result of reduced prices or increased costs caused by Defendant's infringement].

Plaintiff is required to prove the amount of its lost profits to a reasonable probability and may not recover amounts that are speculative. However, mathematical certainty is not required[, and if the reason Plaintiff has difficulty proving the amount of its lost profits is that Defendant did not maintain adequate records, then you should resolve any doubts as to the amount of lost profits in Plaintiff's favor.]

11.4.4 REASONABLE ROYALTY

Plaintiff seeks to recover a reasonable royalty.

[Plaintiff is entitled to recover a reasonable royalty for any of Defendant's infringing sales for which Plaintiff did not prove lost profits.]

A royalty is a payment made to the owner of a patent by someone else so that he can [make; use; sell; import] the patented invention. A "reasonable royalty" is the amount Plaintiff and Defendant would have agreed upon as a royalty at the time Defendant's infringement began.

In determining a reasonable royalty, you should assume that Plaintiff would have been willing to allow Defendant to [make; use; sell; import] the patented invention and that Defendant would have been willing to pay Plaintiff to do so. You should take into account what Plaintiff's and Defendants' expectations would have been if they had negotiated a royalty and had acted reasonably in their negotiations. You should assume that both Plaintiff and Defendant would have believed that Plaintiff's patent was valid and infringed. You should also assume that Defendant would have been willing to pay, and Plaintiff would have been willing to accept, the reasonable royalty they negotiated. Your role is to determine what Plaintiff and Defendant would have agreed upon if they had negotiated in this manner, not just what either Plaintiff or Defendant would have preferred.

In determining a reasonable royalty, you may consider the following factors, in addition to any others that are shown by the evidence:

- Royalties that others paid to Plaintiff for the patented invention;
- Royalties that Defendant paid to others for comparable patents;
- Whether Plaintiff had a policy of licensing or not licensing the patents;
- Whether Plaintiff and Defendant are competitors;
- Whether use of the patented invention helps to make sales of other products or services;
- Whether the product made using the patent is commercially successful, as well as its profitability;

- The advantages of using the patented invention over products not covered by the patent;
- The extent of Defendant's use of the patented invention and the value of that use to Defendant;
- Any royalty amounts that are customary for similar or comparable patented inventions;
- The portion of the profit on sales that is due to the patented invention, as opposed to other factors, such as unpatented elements or processes, features, or improvements developed by Defendant;
- Expert opinions regarding what would be a reasonable royalty.

**11.4.5 SINGLE/MULTIPLE RECOVERIES FOR
INFRINGEMENT ACT**

No general instruction.

11.4.6 REQUIREMENT OF NOTICE (CLAIMS INVOLVING PRODUCTS)

Plaintiff can recover damages only for infringement that occurred after Plaintiff gave notice of its patent rights. Plaintiff must prove by a preponderance of the evidence that it gave notice.

There are two ways a patent holder can give notice of its patent rights.

The first way is to give notice to the public in general, by placing the word “patent” or the abbreviation “PAT.” with the number of the patent on substantially all the products it sold that included the patented invention. [Anyone that Plaintiff licensed to use the patented invention must also mark in the same manner substantially all of its products that include the patented invention.] This type of notice is effective from the date Plaintiff [and its licensees] began to mark in this manner substantially all of [its; their] products that included the patented invention.

The second way to give notice of patent rights is by directly informing Defendant that it is infringing a particular patent and identifying the infringing product. This type of notice is effective from the time it is given.

If Plaintiff did not give notice in either of these ways before filing this lawsuit, then Plaintiff can recover damages only for infringement that occurred after it filed the lawsuit, on [date.]

11.4.7 TOTALING THE DAMAGE AWARD

Any amounts that you award for lost profits and for reasonable royalties should be set out separately on the verdict form that I will give you.

12.0 COPYRIGHT

12.1.1 COPYRIGHT — ALLEGATION DEFINED

Plaintiff claims that Defendant has infringed Plaintiff's copyright in [describe the work] by [describe the alleged infringement].

12.2.1 COPYRIGHT INFRINGEMENT

To succeed on his claim, Plaintiff must prove the following things:

1. [Describe the work] is the subject of a valid copyright;
2. Plaintiff owns the copyright; and
3. Defendant copied protected expression in Plaintiff's copyrighted work. I will explain what these terms mean.

If you find that Plaintiff has proved each of these things, then you must find for Plaintiff. However, if you find that Plaintiff did not prove each of these things, then you must find for Defendant.

12.3.1 VALIDITY

To be eligible for copyright protection, a work must be original and in a form that can be seen, heard, reproduced, or communicated [either directly or with the aid of a machine or device].

A work is original if it was created independently, as opposed to being copied from another work. It must contain at least some minimal degree of creativity. The work need not be completely new. [A work can be original even if it incorporates elements that are not original to the author. However, only the original elements added by the author are protected by copyright.]

12.4.1 OWNERSHIP

Plaintiff owns a copyright in [describe the work at issue], if he

- [created the work]
- [received the copyright from someone else who owned it]
- [created a joint work. A joint work is a work that two or more persons prepared with the intention that their contributions be merged into inseparable elements of a single work. To own a copyright in a joint work, a person must contribute original expression that, by itself, would be eligible for copyright protection as I have previously defined that term. [Contributions in the nature of research, comments or edits are not sufficient.] [Contributing direction or ideas is not enough.]]

12.4.2 OWNERSHIP — WORKS MADE FOR HIRE

Plaintiff owns a copyright in [describe the work at issue] if the work was

- [prepared by Plaintiff's employee within the scope of his employment.]
- [specially [ordered; commissioned] as [a contribution to a collective work; a part of a motion picture or other audiovisual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; an atlas], and there was a prior agreement, signed by [names of necessary signators] that the work would be a work made for hire.]
- [A supplementary work is a work prepared for publication as an accompaniment to someone else's work to [introduce; conclude; illustrate; explain; revise; comment upon; assist in the use of] that work [for example, a foreword; afterword; pictorial illustration; map; chart; table; editorial note; musical arrangement; answer material for a test; bibliography; appendix; index].]
- [An instructional text is a literary, pictorial, or graphic work prepared for publication for use in systematic instructional activities.]

12.4.3 OWNERSHIP — COMPILATION OR COLLECTIVE WORK

Plaintiff owns a copyright in [describe compilation/collective work] if he selected and arranged the separate [works; materials; data] in an original way. [Plaintiff does not need to own a copyright in the separate [works; materials; data] themselves.] [By assembling the separate [works; materials], a person does not acquire a copyright in any of the separate [works; materials].] [A person who owns a copyright in one of the separate [works; materials; data] does not acquire a copyright in the collective work.]

12.4.4 OWNERSHIP — DERIVATIVE WORK

Plaintiff owns a copyright in [describe derivative work at issue] if he [recast; transformed; adapted] it from an earlier work. Plaintiff owns a copyright only in the original expression that he adds to the earlier work. He does not own a copyright in the expression taken from the earlier work.

[The earlier work may include work that is protected by copyright and used with the copyright owner's permission. [The earlier work [also] may include work that is in the public domain.]]

12.5.1 COPYING

As I stated, Plaintiff must prove that Defendant copied protected expression in his work.

12.5.2 COPYING — DEFINITION OF “PROTECTED EXPRESSION”

“Protected expression” means expression in Plaintiff’s work that was created independently, involving some creativity.

Copyright law protects only original expression in the work. This includes the way that [facts; ideas; procedures; processes; systems; methods of operation; concepts; principles; discoveries; devices] are expressed in the work. It does not include the [facts; ideas; procedures; processes; systems; methods of operation; concepts; principles; discoveries; devices] themselves. [For example, the idea or concept of a secret agent who saves the world from impending disaster is not protected by copyright; but a particular expression of that idea – such as a James Bond movie – may be protected by copyright.]

[Protected expression does not include settings, poses, or characters that are indispensable or at least standard in the treatment of a particular subject. [In this case, protected expression [may] include[s] [fill in]. Protected expression does not include [fill in].]

[The design of a useful item is considered protected expression only if it includes [pictorial; graphic; sculptural] features that can be identified separately from the item itself. The feature must be capable of existing independently of the item’s useful aspects. [For example, a statue of a dancing figure may be protected expression even if it is used as the base of a lamp. The lamp itself is a useful item and is not protected.]]

12.6.1 DERIVATIVE LIABILITY — VICARIOUS INFRINGEMENT

Plaintiff claims that Defendant is liable for [Direct infringer's name]'s infringement of Plaintiff's copyright. To succeed on this claim, Plaintiff must prove the following things:

1. [Direct infringer's name] infringed Plaintiff's copyright, as defined in instructions I have already given you;
2. Defendant profited from the infringement by [Direct infringer's name]; and
3. Defendant had the right and ability to stop or limit the infringement by [Direct infringer's name] but failed to do so.

If you find that Plaintiff has proved each of these things, then you must find for Plaintiff. However, if you find that Plaintiff did not prove each of these things, then you must find for Defendant.

12.6.2 DERIVATIVE LIABILITY — CONTRIBUTORY INFRINGEMENT

Plaintiff claims that Defendant [induced [direct infringer's name] to infringe Plaintiff's copyright] [contributed to [direct infringer's name]'s infringement of Plaintiff's copyright]. To succeed on this claim, Plaintiff must prove each of the following things:

1. [Direct infringer's name] infringed Plaintiff's copyright, as defined in the instructions I have already given you;
2. Defendant [[induced; caused; encouraged] [direct infringer's name] to infringe Plaintiff's copyright] [contributed in a significant way to [direct infringer's name]'s infringement of Plaintiff's copyright]; and
3. Defendant [knew of the infringing activity] [strongly suspected or should have known of the infringing activity but took steps to avoid knowing about the infringing activity].

If you find that Plaintiff has proved each of these things, then you must find for Plaintiff. However, if you find that Plaintiff did not prove each of these things, then you must find for Defendant.

12.7.1 DEFENSES — FAIR USE

Defendant contends that [even if he copied protected expression in Plaintiff's work,] his copying is allowed under what the law calls "fair use." To succeed on this defense, Defendant must prove that he made fair use of Plaintiff's work for the purpose[s] of [criticism; parody; comment; news reporting; teaching; scholarship; research; insert additional types of fair uses at issue].

In deciding this, you should consider the following:

- the purpose and character of Defendant's use, including whether Defendant's use [is of a commercial nature] [is for non-profit educational purposes] [transforms Plaintiff's work into something of a different character];
- the degree of creativity involved in Plaintiff's work;
- whether Plaintiff's work was published or unpublished;
- the amount of Plaintiff's work that Defendant copied, and the significance of the portion copied in relation to Plaintiff's work as a whole; [and]
- how Defendant's use affected the [value of; potential market for] Plaintiff's work; [and]
- insert any other factors that bear on the issue of fair use.] It is up to you to decide how much weight to give each factor.

12.7.2 DEFENSES — ABANDONMENT

Defendant contends that Plaintiff abandoned its copyright in [identify work]. To succeed on this defense, Defendant must prove that Plaintiff [made a statement; performed an action] that demonstrated its intention to give up its copyright interest in the work.

12.7.3 DEFENSES – UNCLEAN HANDS/ ESTOPPEL

No general instruction.

12.8.1 DAMAGES — GENERAL

If you find that Plaintiff has proved that Defendant has infringed Plaintiff's copyright, then you must determine the amount of damages, if any, Plaintiff is entitled to recover. If you find that Plaintiff has failed to prove the claim, then you will not consider the question of damages.

Plaintiff must prove damages by a preponderance of evidence.

[1. If plaintiff seeks to recover only actual damages plus profits:]

Plaintiff may recover for any actual losses he suffered because of the infringement, plus any profits that Defendant made from the infringement. I will define these terms in the following instructions.

[2. If plaintiff seeks to recover only statutory damages:]

[I will define in the next instruction how you are to determine the amount of damages, if any, to award to Plaintiff.]

[3. If plaintiff seeks to have the jury make findings on both actual damages/profits and statutory damages:

Plaintiff may recover for any actual losses he suffered because of the infringement, plus any profits that Defendant made from the infringement. Alternatively, Plaintiff may recover an amount called "statutory damages." I will define these terms in the following instructions.

12.8.2 DAMAGES — ACTUAL DAMAGES

Examples of actual losses from copyright infringement include:

- A decrease in the market value of the copyrighted work caused by the infringement.
- Profits that Plaintiff proves he would have made without the infringement. Profits are the revenue Plaintiff would have made on sales he would have made without the infringement, less any additional expenses he would have incurred in making the sales.
- What a willing buyer reasonably would have paid Plaintiff to obtain a license to [copy; display; use; sell; etc.] Plaintiff's copyrighted work.
- [Other examples]

12.8.3 DAMAGES — DEFENDANT’S PROFITS

[In addition to recovering for his actual losses,] Plaintiff is entitled to recover the profits that Defendant made because of the infringement. [Defendant’s profits are recoverable, however, only to the extent that you have not taken them into account in determining Plaintiff’s actual losses.]

Defendant’s profits are revenues that Defendant made because of the infringement, minus Defendant’s expenses in [producing; distributing; marketing; selling] the [insert description of infringing material, e.g. product, advertisement, book, song, etc.]. Plaintiff need only prove Defendant’s revenues. Defendant must prove his own expenses [and any portion of his profits that resulted from factors other than infringement of Plaintiff’s copyright].

12.8.4 DAMAGES — STATUTORY DAMAGES

You may award as [statutory] damages an amount that you find to be fair under the circumstances. The amount must be between \$750 and \$30,000 for each copyrighted work that you found to be infringed.

In determining the appropriate amount to award, you may consider the following factors:

- the expenses that Defendant saved and the profits that he earned because of the infringement;
- the revenues that Plaintiff lost because of the infringement;
- the difficulty of proving Plaintiff's actual damages;
- the circumstances of the infringement;
- whether Defendant intentionally infringed Plaintiff's copyright; and
- deterrence of future infringement.]

[If Plaintiff proves that Defendant willfully infringed Plaintiff's copyright, then you may, but are not required to, increase the statutory damage award to a sum as high as \$150,000 per copyrighted work. Infringement is considered willful if Plaintiff proves that Defendant knew that his actions constituted infringement of Plaintiff's copyright [or acted with reckless disregard of Plaintiff's copyright].]

[If Defendant proves that he innocently infringed Plaintiff's copyright, then you may, but are not required to, reduce the statutory damage award to a sum as low as \$200 per copyrighted work. Infringement is considered innocent if Defendant proves that he did not know, and had no reason to know, that his acts constituted infringement.]

[You may not find that Defendant was an innocent infringer if a notice of copyright appeared in the correct form and position on the published [copy; copies] of Plaintiff's work to which Defendant had access. A notice is in correct form if it includes [the symbol © (the letter C in a circle); the word "Copyright"; the abbreviation "Copr."], [the name of the copyright owner; an abbreviation by which the copyright owner's name can be recognized; a generally known designation of the copyright's owner]; and the year of first publication of the work.] A notice is in the correct position if it appears in a manner and location that gives reasonable notice of the claim of copyright.]

13.0 TRADEMARK

13.1.1 TRADEMARK/TRADE DRESS INFRINGEMENT – NATURE OF CLAIM

Plaintiff claims that Defendant has infringed Plaintiff's [trademark; trade dress]. [A trademark is a word, symbol, or combination of words or symbols used by a person to identify his product, to distinguish his product from those manufactured or sold by others, and to indicate the source of his product.]

[A trade dress is a type of trademark used by a person to identify his product, to distinguish his product from those manufactured or sold by others, and to indicate the source of his product. The term "trade dress" refers to the total image of a product, product packaging, product label, product design, or a combination of these things. It includes features such as size, shape, color or color combinations, texture, graphics, or particular sales techniques.]

The purpose of trademark law is to prevent confusion among consumers about the source of products and to permit [trademark; trade dress] owners to show ownership of their products and control their product's reputation.

[Plaintiff claims that Defendant infringed Plaintiff's [trademark [describe Plaintiff's symbol or term]] for [describe Plaintiff's product] by [describe nature of allegedly infringing activity]. Defendant denies [describe Defendant's theory of defense, i.e., denies that Plaintiff has a valid trademark or that Defendant's use of its trademark causes a likelihood of confusion] [and says that [describe Defendant's other defense(s), if any]].]

OR

[Plaintiff claims that Defendant infringed Plaintiff's trade dress by [describe nature of allegedly infringing activity and Plaintiff's product design, packaging, label]. Defendant denies [describe Defendant's theory of defense, i.e., denies that Plaintiff has a valid trade dress or that Defendant's use of its trade dress causes a likelihood of confusion] [and says that [describe Defendant's other defense(s), if any]].]

13.1.2 TRADEMARK/TRADE DRESS INFRINGEMENT – ELEMENTS

Plaintiff claims that Defendant infringed Plaintiff's [trademark; trade dress]. To succeed on this claim, Plaintiff must prove the following things by a preponderance of the evidence:

1. [Plaintiff owns [Plaintiff's symbol, term, or product design; packaging; label] as a [trademark; trade dress];
2. [Plaintiff's symbol, term, or product design; packaging; label] is a valid [trademark; trade dress];
3. [Defendant used [symbol, term, product design, packaging or label used by Defendant] in interstate commerce.

[The [symbol, term, product design, packaging or label used by Defendant] is used in interstate commerce if [Defendant's [product; services; commercial activities] are [transferred; advertised; sold] across state lines.]

[The [symbol, term, product design, packaging or label used by Defendant] is used in interstate commerce if Plaintiff's [product; services; commercial activities] are [transferred; advertised; sold] across state lines and Defendant's activities have a substantial effect on Plaintiff's business.]

4. Defendant used [symbol, term, product design, packaging or label used by Defendant] in a manner that is likely to cause [confusion; mistake; deception] as to the [source; origin; sponsorship; approval] of Defendant's product.
- [5. [Plaintiff's claimed trade dress] is not functional.] I will explain what I mean by these terms.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff. However, if Plaintiff did not prove each of these things by a preponderance of the evidence, then you must find for Defendant.

13.1.2.1 OWNERSHIP AND PRIORITY – UNREGISTERED AND CONTESTABLE MARKS

One of the things Plaintiff must prove is that Plaintiff owns [Plaintiff's symbol or term or claimed trade dress] as a [trademark; trade dress].

Plaintiff owns [Plaintiff's symbol or term or claimed trade dress] as a [trademark; trade dress] if Plaintiff used the [symbol, term or trade dress] in a manner that allowed consumers to identify the [symbol, term or trade dress] with Plaintiff or its product before Defendant began to use [Defendant's symbol, term or trade dress] on its [Defendant's product or services].

[Among the factors you may consider are the volume of sales of Plaintiff's product, the nature of Plaintiff's sales and purchasers, and the amount of Plaintiff's advertising, promotion, and publicity relating to the product.]

13.1.2.2 VALIDITY - TRADEMARK /TRADE DRESS

A valid [trademark; trade dress] is a [symbol; term; product design, packaging, label] that is “distinctive,” which means that the [symbol; term; product design, packaging, label] is capable of distinguishing Plaintiff’s product from the products of others. [A trademark is valid if it is inherently distinctive or if it has acquired distinctiveness.] [A trade dress is valid if it is inherently distinctive or if it has acquired distinctiveness, and it is nonfunctional.] I will explain these terms to you.

13.1.2.2.1 VALIDITY - TRADEMARK – INHERENT DISTINCTIVENESS – FANCIFUL, ARBITRARY, AND SUGGESTIVE MARKS

An inherently distinctive trademark is one that almost automatically tells a consumer that it refers to a brand or a source for a product. A trademark is inherently distinctive if it is a [“fanciful”; “arbitrary”; [or] “suggestive”] [symbol; term].

- A “fanciful” [symbol; term] is a newly created word or parts of common words that are used in a fictitious, unfamiliar, or fanciful way. For example, “Exxon” for gasoline is a fanciful mark.]
- An “arbitrary” [symbol; term] is a common [symbol; term] used in an unfamiliar way. For example, “Apple” for computers is an arbitrary mark.]
- A “suggestive” [symbol; term] implies some characteristic or quality of the product. If the consumer must use imagination, reflection, or additional reasoning to understand the meaning of the mark as used with the product, then the mark is suggestive. For example, “Coppertone” for suntan lotion is a suggestive mark because it is suggestive of suntanned skin.]

13.1.2.2.2 VALIDITY - TRADE DRESS – INHERENT DISTINCTIVENESS

An inherently distinctive trade dress is one that consumers would almost automatically recognize as identifying a particular brand or source of the product. [For example, the packaging for M&M’s-brand, chocolate-covered peanut candies, with its yellow background, brown lettering, and illustration of the multicolored candies, is an inherently distinctive trade dress.]

To determine whether [Plaintiff’s trade dress] is inherently distinctive, you should consider it as a whole. Some of the factors you may consider are:

- Whether the [product label; product packaging] is a common basic shape or design (which suggests that the trade dress is not inherently distinctive), or instead is an uncommon shape or design (which suggests that the trade dress is inherently distinctive);
- Whether the [product label; product packaging] is [unique; unusual] in a particular field (which suggests that the trade dress is inherently distinctive), or instead is common in that field (which suggests that the trade dress is not inherently distinctive);
- Whether the [product label; product packaging] is a unique feature for that type of product (which suggests that the trade dress is inherently distinctive), or instead is merely a refinement of a commonly decorative feature for that type of product (which suggests that the trade dress is not inherently distinctive).

If you find that Plaintiff proved that [Plaintiff’s claimed trade dress] is inherently distinctive, then you should consider whether Plaintiff’s claimed trade dress is functional. I will tell you what I mean by functional.

If, on the other hand, you find that Plaintiff did not prove that [Plaintiff’s claimed trade dress] is inherently distinctive, then you must decide (1) whether the claimed trade dress is “descriptive” and has “acquired distinctiveness,” and if so, (2) whether Plaintiff’s claimed trade dress is “functional.” I will tell you what I mean by “descriptive,” “acquired distinctiveness,” and “functional.”

13.1.2.2.3 VALIDITY – DESCRIPTIVE TRADEMARK/TRADE DRESS – ACQUIRED DISTINCTIVENESS

Another type of valid [trademark; trade dress] is a “descriptive” [symbol; term; product package, label, design] that has “acquired distinctiveness.”

A “descriptive” [symbol; term; product package, label, design] directly identifies or describes some characteristic or quality of the product in a straightforward way that requires no imagination or reasoning to understand the meaning of the [trademark; trade dress]. [For example, “All Bran” for cereal is a descriptive trademark because it describes a characteristic of the cereal.] [A descriptive trademark can [also] identify [the geographic location where a product is made (for example, “Omaha” for steaks)] [or] [the name of the person who makes or sells the product (for example, “Mrs. Fields” for cookies).] [For example, a yellow container in the shape of a lemon is a descriptive trade dress when used as a container for lemon juice.]

A descriptive [trademark; trade dress] can be valid only if it has “acquired distinctiveness.”

13.1.2.2.4 VALIDITY – TRADEMARK/TRADE DRESS – ACQUIRED DISTINCTIVENESS

To show that [Plaintiff’s symbol, term, or claimed trade dress] has “acquired distinctiveness,” Plaintiff must prove:

1. A substantial portion of the consuming public identifies [Plaintiff’s symbol, term, or claimed trade dress] with a particular source, whether or not consumers know who or what that source is. The consuming public consists of people who may buy or use, or consider buying or using, the product or similar products; and
2. [Plaintiff’s symbol, term, or claimed trade dress] acquired distinctiveness before Defendant first began to use [Defendant’s symbol, term, or claimed trade dress].

To decide whether [Plaintiff’s symbol, term, or claimed trade dress] has “acquired distinctiveness,” you may consider the following:

- [• the amount and manner of advertising, promotion, and other publicity of Plaintiff’s product using [Plaintiff’s symbol, term, or claimed trade dress]];
- [• the sales volume of Plaintiff’s product using [Plaintiff’s symbol, term, or claimed trade dress]];
- [• the length and manner of use of [Plaintiff’s symbol, term, or claimed trade dress]];
- [• consumer testimony]; [• consumer surveys].

13.1.2.2.5 VALIDITY – GENERIC TRADEMARK/TRADE DRESS

To establish that its [trademark; trade dress] is valid, Plaintiff must [also] prove that the [trademark; trade dress] is not “generic.”

A “generic” [symbol; term; trade dress] is a common or general [symbol for; name of; trade dress for] a product whose primary significance to the consuming public is to identify a [group; class] of similar products, regardless of who [makes; sells] them. The consuming public consists of people who may buy or use, or consider buying or using, the product or similar products. [For example, “cola” is a generic term for a type of soft drink, so it cannot function as a trademark for this type of soft drink.] [For example, bear-shaped gummy candies are common in the candy industry and are generic shapes for this type of candy.]

13.1.2.2.6 VALIDITY – TRADE DRESS – NON-FUNCTIONALITY REQUIREMENT

As I stated earlier, Plaintiff must prove that [Plaintiff's claimed trade dress] is not "functional."

A trade dress is "functional" if it is essential to the operation of the product as a whole. To determine this, you are to consider the following:

- [● Are there other designs that could perform the function equally well? (If so, this is evidence that the design is not functional.)]
- [● Is there a patent that discloses the practical advantages of the design? (If so, this is strong evidence that the design is functional.)]
- [● Does the design provide a practical advantage? (If so, this is evidence that the design is functional.)]
- [● Has Plaintiff advertised or promoted the practical advantages of the design? (If so, this is evidence that the design is functional.)]
- [● Does the design result from a comparatively simple, cheap, or superior method of manufacturing the product? (If so, this is evidence that the design is functional.)]

To determine whether a product's trade dress is functional, you should consider everything that makes up the trade dress.

13.1.2.3 INFRINGEMENT – ELEMENTS – LIKELIHOOD OF CONFUSION – FACTORS

As I have told you, one of the things that Plaintiff must prove is that Defendant used [Defendant’s symbol, term, or trade dress] in a manner that is likely to cause [confusion; mistake; deception] as to the [source; origin; sponsorship; approval] of Defendant’s product.

Plaintiff must prove a likelihood of confusion among a significant number of people who buy or use, or consider buying or using, the product or similar products.

In deciding this, you should consider the following:

- Whether the overall impression created by Defendant’s [trademark; trade dress] is similar to that created by Plaintiff’s [trademark; trade dress] in [appearance; sound; meaning];
- Whether Defendant and Plaintiff use their [trademarks; trade dress] on the same or related products;
- Whether Plaintiff’s and Defendant’s products are likely to be sold in the same or similar stores or outlets, or advertised in similar media;
- The degree of care that purchasers or potential purchasers are likely to exercise in buying or considering whether to buy the product. This may depend on the level of sophistication of potential buyers of the product [and; or] the cost of the product;
- The degree to which purchasers or potential purchasers recognize Plaintiff’s trademark as an indication of the origin of Plaintiff’s product. You may consider my previous instructions concerning distinctiveness to help you assess this factor;
- Whether Defendant’s use of the [trademark; trade dress] has led to instances of actual confusion among purchasers or potential purchasers about the [source; origin; sponsorship; approval] of Defendant’s product. However, actual confusion is not required for finding a likelihood of confusion;
- Whether Defendant intended to pass off his product as that of Plaintiff, or intended to confuse consumers.

The weight to be given to each of these factors is up to you to determine. No particular factor or number of factors is required to prove likelihood of confusion.

13.2.1 CONTRIBUTORY INFRINGEMENT

Plaintiff claims that Defendant is [also] liable for contributory [trademark; trade dress] infringement based on the actions of [fill in name of direct infringer]. To succeed on this claim, Plaintiff must prove two things by a preponderance of the evidence:

1. [Name of direct infringer] infringed Plaintiff's [trademark; trade dress], as I [defined; will define] that term in [my earlier; the following] instructions; and
2. [Defendant intentionally [induced; encouraged; suggested] [that] [name of direct infringer] [to] infringe Plaintiff's [trademark; trade dress]].

[OR]

[Defendant continued to supply a product to [name of direct infringer] when Defendant knew or had reason to know that [name of direct infringer] was infringing Plaintiff's [trademark; trade dress] in its [sale; distribution] of that product.]

[OR]

[[Name of direct infringer] infringed Plaintiff's [trademark; trade dress] on Defendant's premises, and Defendant knew or had reason to know that [name of direct infringer] was infringing Plaintiff's [trademark; trade dress]. [You may find that Defendant knew or had reason to know that [name of direct infringer] was infringing Plaintiff's [trademark; trade dress] if Defendant suspected wrongdoing and deliberately failed to investigate].]

If you find that Plaintiff has proved both of these things, then you must find for Plaintiff. If, on the other hand, you find that Plaintiff did not prove both of these things, then you must find for Defendant.

13.3.1 FALSE ADVERTISING UNDER LANHAM ACT – ELEMENTS OF CLAIM

Plaintiff claims that Defendant engaged in false advertising. To succeed on this claim, Plaintiff must prove five things by a preponderance of the evidence:

1. [Defendant made a false [or misleading] statement of fact in a commercial advertisement about the [nature; quality; characteristic; geographic origin] of [its own [product; service; commercial activities]] [or] [Plaintiff's [product; service; commercial activities].] [A statement is misleading if it conveys a false impression and actually misleads a consumer.] [A statement can be misleading even if it is literally true or ambiguous.]
2. The statement actually deceived or had the tendency to deceive a substantial segment of Defendant's audience.
3. The deception was likely to influence the purchasing decisions of consumers.
4. [Defendant caused the false statement to enter interstate commerce.] [A false statement enters interstate commerce if [Defendant's [product; services; commercial activities] are [transferred; advertised; sold] across state lines] [or] [if Plaintiff's [product; services; commercial activities] are [transferred; advertised; sold] across state lines and Defendant's activities have a substantial effect on Plaintiff's business].
5. Plaintiff has been or is likely to be injured as a result of the false statement. Injury includes [direct diversion of sales from itself to Defendant; a loss of goodwill associated with its products.]

If you find that Plaintiff has proved each of these things, then you must find for Plaintiff. If, on the other hand, you find that Plaintiff has failed to prove any one of these things, then you must find for Defendant.

13.4.1 TRADEMARK DILUTION – ELEMENTS

No general instruction.

13.5.1 AFFIRMATIVE DEFENSES – NOMINATIVE FAIR USE

Defendant claims that its use of Plaintiff's trademark is permitted because Defendant made fair use of the trademark.

To succeed on this defense, Defendant must prove the following three things by a preponderance of the evidence:

1. Defendant used the trademark to refer to a product of Plaintiff that cannot be easily identified without using the trademark;
2. Defendant used [only as much of the trademark; the trademark only as much] as was reasonably necessary to identify the product; and
3. Defendant did not do anything in connection with using the trademark to suggest that Plaintiff sponsored or endorsed Defendant or its product.

[A product cannot be easily identified without using the trademark if there are no equally informative words to identify the product, or there is no other effective way to compare, criticize, refer to or identify it without using the trademark.]

[A reasonably necessary use of a trademark occurs [when no more of the trademark's appearance is used; when the trademark is used no more prominently] than is needed to identify the product and enable consumers to understand the reference.]

[Defendant's use of the Plaintiff's trademark to compete with Plaintiff, or to make a profit, does not by itself prevent Defendant from proving fair use.]

13.5.2 AFFIRMATIVE DEFENSES – CLASSIC FAIR USE

Defendant claims that its use of Plaintiff's trademark is permitted because Defendant made fair use of the trademark.

To succeed on this defense, Defendant must prove the following three things by a preponderance of the evidence:

1. Defendant used [describe Defendant's usage] in a way other than to indicate the source of Defendant's product.
2. [Describe Defendant's usage] accurately describes Defendant's product.
3. Defendant only used [describe Defendant's usage] to describe its product.

13.5.3 AFFIRMATIVE DEFENSES – LACHES/ACQUIESCENCE

No general instruction.

13.5.4 AFFIRMATIVE DEFENSES – ABANDONMENT

Defendant claims that Plaintiff has abandoned its [trademark; trade dress].

To succeed on this defense, Defendant must prove by [clear and convincing evidence] [a preponderance of the evidence] that Plaintiff stopped using its [trademark; trade dress] and intended not to resume use.

13.5.5 AFFIRMATIVE DEFENSES – CONTINUOUS PRIOR USE – REGISTERED MARKS

Defendant contends that it has the right to use the [trademark; trade dress] within the [specific geographic region].

To succeed on this defense, Defendant has the burden of proving three things by a preponderance of the evidence:

1. Defendant used the trademark before Plaintiff [applied for registration of the] [registered the] [obtained publication of its application to register the] [trademark; trade dress].
2. Defendant [defendant's assignor] [defendant's licensor or licensee] continuously used the [trademark; trade dress], up until trial, in [specific geographic region].
3. Defendant [defendant's assignor] [defendant's licensor or licensee] began using the trademark without knowledge of Plaintiff's prior use.

[If you find that Defendant has proved all three of these things, then you should find for Defendant on Plaintiff's claim for infringement of its [registered; unregistered] [trademark; trade dress].

13.5.6 AFFIRMATIVE DEFENSES – REGISTERED TRADE DRESS – FUNCTIONALITY

Defendant claims that Plaintiff's trade dress is "functional." To succeed on this defense, Defendant must prove that [Plaintiff's claimed trade dress] is essential to the operation of the product as a whole. To determine this, you should consider the following:

- [• Are there other designs that could perform the function equally well? (If so, this is evidence that the design is not functional.)]
- [• Is there a patent that discloses the practical advantages of the design? (If so, this is strong evidence that the design is functional.)]
- [• Does the design provide a practical advantage? (If so, this is evidence that the design is functional.)]
- [• Has Plaintiff advertised or promoted the practical advantages of the design? (If so, this is evidence that the design is functional.)]
- [• Does the design result from a comparatively simple, cheap, or superior method of manufacturing the product? (If so, this is evidence that the design is functional.)]

To determine whether a product's trade dress is functional, you should consider everything that makes up the trade dress.

13.5.7 AFFIRMATIVE DEFENSES – GENERICNESS – INCONTESTABLE TRADEMARK/TRADE DRESS

Defendant contends that Plaintiff's [trademark; trade dress] is "generic." To succeed on this defense, Defendant must prove that the [trademark; trade dress] is "generic."

A "generic" [symbol; term; trade dress] is a common or general [symbol for; name of; trade dress for] a product whose primary significance to the consuming public is to identify a [group; class] of similar products, regardless of who [makes; sells] them. The consuming public consists of people who may buy or use, or consider buying or using, the product or similar products. [For example, "cola" is a generic term for a type of soft drink, so it cannot function by itself as a trademark for this type of soft drink.] [For example, bear-shaped gummy candies are common in the candy industry and are generic shapes for this type of candy.]

13.5.8 AFFIRMATIVE DEFENSES – FRAUD IN PROCUREMENT

Defendant claims that Plaintiff obtained its [trademark; trade dress] [registration; incontestable status] through fraud on the Patent and Trademark Office.

To succeed on this defense, Defendant must prove by clear and convincing evidence that Plaintiff made [material misrepresentations] [and; or] [failed to disclose material information] to the Patent and Trademark Office, with the intent to deceive the Patent and Trademark Office. [Information that was misrepresented is “material” if it influenced the Patent and Trademark Office’s decision to register the [trademark; trade dress]]. [Information is “material” if it would have caused the Patent and Trademark Office not to register the [trademark; trade dress] had it been disclosed.]

“Clear and convincing” evidence means evidence that convinces you that it is highly probable that the particular proposition is true. [This is a higher burden than “preponderance of the evidence.”]

13.6.1 REMEDIES – TYPES

If you decide for Plaintiff on the question of liability, then you should consider the amount of money to award to Plaintiff [if any]. This should include damages that Plaintiff sustained because of Defendant's [infringement; false advertising], and profits that Defendant made because of its [infringement; false advertising].

If you decide for Defendant on the question of liability, then you should not consider this issue.

13.6.2 REMEDIES – ACTUAL OR STATUTORY NOTICE – REGISTERED MARKS

To recover damages or profits, Plaintiff must prove by a preponderance of the evidence that Defendant knew that Plaintiff's mark was registered, or if:

[Plaintiff displayed with the [trademark; trade dress] the words, "Registered in the U.S. Patent and Trademark Office"];

OR

[Plaintiff displayed with the [trademark; trade dress] the words "Reg. U.S. Pat. & Tm. Off."]; [or]

OR

[Plaintiff displayed with the [trademark; trade dress] the letter R enclosed in a circle ®.

13.6.3 ACTUAL DAMAGES

To recover damages, Plaintiff must prove two things by a preponderance of the evidence:

1. Defendant's [infringement; false advertising] caused actual confusion among consumers; and
2. As a result, Plaintiff sustained injury.

If you find that Plaintiff has proved these things, then you must consider what amount of money to award to Plaintiff as damages [if any].

Damages consist of the amount of money required to compensate Plaintiff for the injury caused by Defendant's [infringement; false advertising]. Plaintiff must prove its damages by a preponderance of the evidence.

You may consider the following types of damages:

- Plaintiff's lost profits on lost sales, which consists of the revenue Plaintiff would have earned but for Defendant's infringement, less the expenses Plaintiff would have sustained in earning those revenues.]
- Loss of royalties. A royalty is a payment for the right to use a trademark. In determining lost royalties, you should determine the royalty that Plaintiff and Defendant would have agreed upon if they had negotiated the terms of a royalty before Defendant's infringement.]
- Loss of goodwill. Goodwill is consumer recognition or drawing power of a [trademark; trade dress].] [In determining loss of goodwill, you should compare the value of Plaintiff's goodwill before the [infringement; false advertising] with the value of Plaintiff's goodwill after the [infringement; false advertising].]
- Cost of corrective advertising. This is [the amount spent by Plaintiff to counteract the effects of Defendant's infringement] [and] [the amount necessary to dispel any public confusion that lingers after Defendant's infringement has stopped.]

13.6.4 DEFENDANT'S PROFITS

In addition to Plaintiff's damages, Plaintiff may recover the profits Defendant gained from the [trademark infringement; trade dress infringement; false advertising] You may not, however, include in any award of profits any amount that you took into account in determining actual damages.

Profit is determined by deducting expenses from gross revenue. Gross revenue is all of the money Defendant received due to its [use of the [trademark; trade dress]] [false advertising].

Plaintiff is required only to prove Defendant's gross revenue. Defendant is required to prove any expenses that it argues should be deducted in determining its profits.

Plaintiff is entitled to recover Defendant's total profits from its [use of the [trademark; trade dress]] [false advertising], unless Defendant proves that a portion of the profit is due to factors other than [use of the [trademark; trade dress]] [false advertising].

13.6.5 INTENTIONAL INFRINGEMENT

If you find that Defendant [infringed Plaintiff's [trademark; trade dress]] [engaged in false advertising], you must also determine whether Plaintiff has proven that, at the time Defendant [used the trademark; trade dress] [engaged in the false advertising] Defendant acted willfully. Defendant acted willfully if it knew that [it was infringing Plaintiff's [trademark; trade dress] [its advertising was [false] [or misleading]] or if it acted with indifference to [Plaintiff's trademark rights] [whether its advertising was false / misleading].