Eleventh Circuit

Civil Pattern Jury Instructions

2013

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Preface

These Pattern Jury Instructions, Civil Cases, Eleventh Circuit (2013 revision) represent a substantial revision from the 2005 edition. However, the instructions build on the earlier works first published in 1980 by a predecessor committee in the former Fifth Circuit and republished in 1990, 1999, and 2005 by a predecessor committee in the Eleventh Circuit.

The Committee has continued the effort begun in the 2010 pattern criminal instructions to improve clarity and juror comprehension through the use of plain English and the removal of complexity and legal terminology when possible. Bryan A. Garner, the editor of Black's Law Dictionary, has again assisted the Committee in this work.

Apart from reflecting evolving changes in the law, the prime objective of the Committee has remained constant – to provide in words of common usage and understanding a body of brief and uniform jury instructions which fully and accurately state the law without needless repetition.

The format is also the same as in earlier editions in order to facilitate rapid assembly of a complete set of jury charges suitable for submission to a jury in each individual civil case. Due to the increase in copyright and trademark case filings, this revision adds instructions for both of these substantive areas. Additionally, because the Alabama, Florida and Georgia state courts have approved and made readily available comprehensive pattern civil instructions, this revision eliminates state claims instructions.

The body of the work has been arranged as follows:

A. Preliminary Instructions;
B. Trial Instructions;
C. Basic Instructions; and
D. Claims Instructions.

A. The Preliminary Instructions constitute a complete charge designed to be given after the jury has been selected and sworn, but before counsel's opening statements. Included is instruction on juror use of electronic communications technologies as recommended by the Judicial Conference Committee on Court Administration and Case Management. An optional instruction on jury questions is offered for guidance to a trial judge who decides to permit jury questions. An instruction with respect to interim statements is also an option for a trial judge who decides to permit interim statements as suggested for certain civil trials by the Seventh American Jury Project.

B. The Instructions for Use During Trial include a collection of explanatory instructions frequently stated to the jury during the trial itself including a modified "Allen" charge for use in appropriate circumstances when the jury reports an impasse.

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

D. The Claims Instructions cover the most common types of federal civil claims or causes of action pending as jury cases in the federal courts as follows:

1. Adverse Employment Actions;
2. Civil Rights and Constitutional Claims;
3. Securities Act Claims;
4. Civil Rico Actions;
5. Jones Act – Unseaworthiness Claims;
6. Copyright Claims; and
7. Trademark Claims

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

In many of the Claims Instructions some of the wording has been bracketed <u>or</u> bracketed and underscored to draw attention to subject matter that must be added, edited, or deleted, in order to adapt the instruction to the individual case. Normally, when words are bracketed but not underscored, it will be necessary to make a choice, i.e., the language used will present alternatives, one of which may not apply in the case. When words are both bracketed and underscored they will normally present an example and it will be necessary to delete the underscored passage and substitute language specially formulated to fit the case. In addition, extreme care should be exercised in every case to insure that the instruction as worded correctly states the current law as applied in that case.

The Committee also recommends the submission of interrogatories to the jury in conjunction with a general charge pursuant to the Federal Rule of Civil Procedure 49. The use of interrogatories not only assists the jury in an orderly decision making process; their use also diminishes the likelihood of a retrial following an appeal. The jury's answer to some interrogatories may moot others; or, in the event error is found on appeal with respect to one claim or one issue, the other responses may render the error moot or harmless or may at least reduce the issues to be retried. The use of a general verdict often forecloses these advantages.

With appreciation we acknowledge the valuable contributions made to the revision of these civil instructions by many practitioners and members of academia who donated time and expertise in the preparation and review of these instructions.

Copyright: Joseph M. Beck, Stanley F. Birch, Jeffrey S. Boyles, Patricia Clotfelter, Summer Austin Davis, Jeffrey D. Dyess, Michael L. Edwards, Linda H. Friedman, Harriet Thomas Ivy, W. Andrew Pequiqnot, Kimberly Till Powell, Paul M. Sykes, Will Hill Tankersly, and J. Dorman Walker.

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We are especially fortunate to have served with departing Committee members Mark Fuller, Beverly Martin and Roger Vinson. Each contributed to these revisions. Roger Vinson served on the Committee for eighteen years and with Terry Hodges, earned the appreciation of those who instruct juries.

Finally, we thank Caroline Castle, Stan Hill, Colleen Conley, Naomi Kipp, and Sylvia Wenger, and Circuit Executive James Gerstenlauer, for their help in preparing this revision.

Judge Donald M. Middlebrooks	Chair
Judge Inge Johnson	Alabama
Judge W. Keith Watkins	Alabama
Judge Patricia C.Fawsett	Florida
Judge William S. Duffey, Jr.	Georgia
Judge Clay Land	Georgia

1--- Preliminary Instructions

1.1 General Preliminary Instruction

Members of the Jury:

Now that you've been sworn, I need to explain some basic principles about a civil trial and your duty as jurors. These are preliminary instructions. I'll give you more detailed instructions at the end of the trial.

The jury's duty:

It's your duty to listen to the evidence, decide what happened, and apply the law to the facts. It's my job to provide you with the law you must apply — and you must follow the law even if you disagree with it.

What is evidence:

You must decide the case on only the evidence presented in the courtroom. Evidence comes in many forms. It can be testimony about what someone saw, heard, or smelled. It can be an exhibit or a photograph. It can be someone's opinion.

Some evidence may prove a fact indirectly. Let's say a witness saw wet grass outside and people walking into the courthouse carrying wet umbrellas. This may be indirect evidence that it rained, even though the witness didn't personally see it rain. Indirect evidence like this is also called "circumstantial evidence" — simply a chain of circumstances that likely proves a fact.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Your job is to give each piece of evidence whatever weight you think it deserves.

What is not evidence:

During the trial, you'll hear certain things that are not evidence and you must not consider them.

First, the lawyers' statements and arguments aren't evidence. In their opening statements and closing arguments, the lawyers will discuss the case. Their remarks may help you follow each side's arguments and presentation of evidence. But the remarks themselves aren't evidence and shouldn't play a role in your deliberations.

Second, the lawyers' questions and objections aren't evidence. Only the witnesses' answers are evidence. Don't decide that something is true just because a lawyer's question suggests that it is. For example, a lawyer may ask a witness, "You saw Mr. Jones hit his sister, didn't you?" That question is not evidence of what the witness saw or what Mr. Jones did — unless the witness agrees with it.

There are rules of evidence that control what the court can receive into evidence. When a lawyer asks a witness a question or presents an exhibit, the opposing lawyer may object if [he/she] thinks the rules of evidence don't permit it. If I overrule the objection, then the witness may answer the question or the court may receive the exhibit. If I sustain the objection, then the witness cannot answer the question, and the court cannot receive the exhibit. When I sustain an objection to a question, you must ignore the question and not guess what the answer might have been.

Sometimes I may disallow evidence—this is also called "striking" evidence—and order you to disregard or ignore it. That means that you must not consider that evidence when you are deciding the case.

I may allow some evidence for only a limited purpose. When I instruct you that I have admitted an item of evidence for a limited purpose, you must consider it for only that purpose and no other.

Credibility of witnesses:

To reach a verdict, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, part of it, or none of it. When considering a witness's testimony, you may take into account:

- ☐ the witness's opportunity and ability to see, hear, or know the things the witness is testifying about;
- the witness's memory;
- the witness's manner while testifying;
- any interest the witness has in the outcome of the case;
- any bias or prejudice the witness may have;
- any other evidence that contradicts the witness's testimony;
- the reasonableness of the witness's testimony in light of all the evidence; and
- any other factors affecting believability.

At the end of the trial, I'll give you additional guidelines for determining a witness's credibility.

Description of the case:

This is a civil case. To help you follow the evidence, I'll summarize the parties' positions. The Plaintiff, [name of plaintiff], claims the Defendant, [name of defendant], [describe claim(s)]. [Name of defendant] denies those claims and contends that [describe counterclaims or affirmative defenses].

Burden of proof:

[Name of plaintiff] has the burden of proving [his/her/its] case by what the law calls a "preponderance of the evidence." That means [name of plaintiff] must prove that, in light of all the evidence, what [he/she/it] claims is more likely true than not. So, if you could put the evidence favoring [name of plaintiff] and the evidence favoring [name of defendant] on opposite sides of balancing scales, [name of plaintiff] needs to make the scales tip to [his/her/its] side. If [name of plaintiff] fails to meet this burden, you must find in favor of [name of defendant].

To decide whether any fact has been proved by a preponderance of the evidence, you may — unless I instruct you otherwise — consider the testimony of all witnesses, regardless of who called them, and all exhibits that the court allowed, regardless of who produced them. After considering all the evidence, if you decide a claim or fact is more likely true than not, then the claim or fact has been proved by a preponderance of the evidence.

[Optional: On certain issues, called "affirmative defenses," [name of defendant] has the burden of proving the elements of a defense by a preponderance of the evidence. I'll instruct you on the facts [name of defendant] must prove for any affirmative defense. After considering all the evidence, if you decide that [name of defendant] has successfully proven that the required facts are more likely true than not, the affirmative defense is proved.]

[Optional: [Name of defendant] has also brought claims for relief against [name of plaintiff] called counterclaims. On these claims, [name of defendant] has the same burden of proof that [name of plaintiff] has for [his/her/its] claims.]

Conduct of the jury:

While serving on the jury, you may not talk with anyone about anything related to the case. You may tell people that you're a juror and give them

information about when you must be in court. But you must not discuss anything about the case itself with anyone.

You shouldn't even talk about the case with each other until you begin your deliberations. You want to make sure you've heard everything — all the evidence, the lawyers' closing arguments, and my instructions on the law —before you begin deliberating. You should keep an open mind until the end of the trial. Premature discussions may lead to a premature decision.

In this age of technology, I want to emphasize that in addition to not talking face-to-face with anyone about the case, you must not communicate with anyone about the case by any other means. This includes e-mails, text messages, and the Internet, including social-networking websites such as Facebook, MySpace, and Twitter.

You also shouldn't Google or search online or offline for any information about the case, the parties, or the law. Don't read or listen to the news about this case, visit any places related to this case, or research any fact, issue, or law related to this case. The law forbids the jurors to talk with anyone else about the case and forbids anyone else to talk to the jurors about it. It's very important that you understand why these rules exist and why they're so important. You must base your decision only on the testimony and other evidence presented in the courtroom. It is not fair to the parties if you base your decision in any way on information you acquire outside the courtroom. For example, the law often uses words and phrases in special ways, so it's important that any definitions you hear come only from me and not from any other source. Only you jurors can decide a verdict in this case. The law sees only you as fair, and only you have promised to be fair — no one else is so qualified.

Taking notes:

If you wish, you may take notes to help you remember what the witnesses said. If you do take notes, please don't share them with anyone until you go to the jury room to decide the case. Don't let note-taking distract you from carefully listening to and observing the witnesses. When you leave

the courtroom, you should leave your notes hidden from view in the jury room.

Whether or not you take notes, you should rely on your own memory of the testimony. Your notes are there only to help your memory. They're not entitled to greater weight than your memory or impression about the testimony.

Course of the trial:

Let's walk through the trial. First, each side may make an opening statement, but they don't have to. Remember, an opening statement isn't evidence, and it's not supposed to be argumentative; it's just an outline of what that party intends to prove.

Next, [name of plaintiff] will present [his/her/its] witnesses and ask them questions. After [name of plaintiff] questions the witness, [name of defendant] may ask the witness questions—this is called "cross-examining" the witness. Then [name of defendant] will present [his/her/its] witnesses, and [name of plaintiff] may cross-examine them. You should base your decision on all the evidence, regardless of which party presented it.

After all the evidence is in, the parties' lawyers will present their closing arguments to summarize and interpret the evidence for you, and then I'll give you instructions on the law.

[Note: Some judges may wish to give some instructions before closing arguments. See Fed. R. Civ. P. 51(b)(3).]

You'll then go to the jury room to deliberate.

1.2 Burden of Proof – Clear and Convincing Evidence

Sometimes a party has the burden of proving a claim or defense by clear and convincing evidence. This is a higher standard of proof than proof by a preponderance of the evidence. It means the evidence must persuade

you that the claim or defense is highly probable or reasonably certain. The court will tell you when to apply this standard.

1.3 Official English Translation/Interpretation

You may hear or see languages other than English during this trial.

You must consider evidence provided through only the official court [interpreters/translators]. It is important that all jurors consider the same evidence. So even if some of you know [language], you must accept the English [interpretation/translation] provided and disregard any different meaning.

1.4 Jury Questions

During this trial, you may submit questions to a witness after the lawyers have finished their own questioning. Here is how the procedure works: After each witness has testified, and the lawyers have asked all of their questions, I'll ask if any of you have questions. If you have a question, write it down and give it to the court staff.

You may submit a question for a witness only to clarify an answer or to help you understand the evidence. Our experience with juror questions indicates that jurors rarely have more than a few questions for any one witness, and there may be no questions at all for some witnesses.

If you submit a question, the court staff will give it to me and I'll share your questions with the lawyers in the case. If the rules of evidence allow your question, one of the lawyers or I will read your question to the witness. I may modify the form or phrasing of a question so that it's allowed under the evidence rules. Sometimes, I may not allow the questions to be read to the witness, either because the law does not allow it or because another witness is in a better position to answer the question. If I can't allow the witness to answer a question, you must not draw any conclusions from that fact or speculate on what the answer might have been.

Here are several important things to keep in mind about your questions for the witnesses:

- First, you must submit all questions in writing. Please don't ask any questions aloud.

- Second, the court can't re-call witnesses to the stand for additional juror questions. If you have a question for a particular witness, you must submit it when I ask.

- Finally, because you should remain neutral and open-minded throughout the trial, you should phrase your questions in a way that doesn't express an opinion about the case or a witness. You must keep an open mind until you've heard all the evidence, the closing arguments, and my final instructions on the law.

1.5 Interim Statements

At times during the trial, the lawyers will address you. You'll soon hear the lawyers' opening statements, and at the trial's conclusion you'll hear their closing arguments. Sometimes the lawyers may choose to make short statements to you, either to preview upcoming evidence or to summarize and highlight evidence they just presented. These statements and arguments are the lawyers' views of the evidence or of what they anticipate the evidence will be. They are not evidence themselves.

1.6 COPYRIGHT -- Preliminary Instructions

Overview of Copyrights

(Read Before Opening at Court's Discretion)

This case involves a dispute relating to copyrights. To help you understand the evidence in this case, I will explain some of the legal concepts and terms you may hear during the trial.

Copyright law reflects a balance between society's interest in encouraging the creation of original works by rewarding authors on the one hand, and society's competing interest in the free flow of ideas and information on the other hand. The goal of copyright law attempts to strike a balance between protecting an author's particular expression, while also protecting the right of others to use the same concepts, ideas or facts.

Copyright protects original works of authorship that are expressed in a form that can be perceived, reproduced, or communicated.

Works of authorship can include literary works, musical works, dramatic works, pantomimes, choreographic works, pictorial works, graphic works, sculptural works, motion pictures, audiovisual works, sound recordings, or architectural works.

Copyright protection, however, does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in the work.

To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. A work may be original even though it closely resembles other works so long as the similarity is not the result of copying. To illustrate, assume that two

poets, each unaware of the other, compose identical poems. Both poems may be considered original.

The owner of a copyright has the exclusive right to reproduce, or copy, distribute copies of, and prepare derivative works based on the copyrighted work for a specific period of time. [The owner of a copyright also has the exclusive right to perform and display the copyrighted work.]

ANNOTATIONS AND COMMENTS

17 U.S.C. § 101, 102, and 106; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-346, 111 S.Ct. 1282, 1287-1288, 113 L.Ed. 358 (1991); *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1248 (11th Cir. 1999).

The last paragraph may be modified when appropriate to include or exclude exclusive rights that correspond to the category of work at issue in the case.

COPYRIGHT

Preliminary Instructions

Overview of Claim

(Read Before Opening at Court's Discretion)

In this case, [name of plaintiff(s)] claims ownership of a copyright in a [literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work] titled [title of Plaintiff's work], and claims [name of defendant(s)] has infringed the asserted copyright by [reproducing or copying, distributing copies of, preparing derivative works based on, performing and displaying] the work without authorization. [Name of defendant(s)] denies infringing the asserted copyright, [claims that [name of plaintiff(s)] does not own a valid copyright], and asserts other defenses which I will describe later.

ANNOTATIONS AND COMMENTS

This paragraph may be modified where appropriate to narrow or expand the charge to fit the case at bar.

2 — Trial Instructions

2.1 Stipulations

Sometimes the parties have agreed that certain facts are true. This agreement is called a stipulation. You must treat these facts as proved for this case.

2.2 Use of Depositions

A deposition is a witness's sworn testimony that is taken before the trial. During a deposition, the witness is under oath and swears to tell the truth, and the lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

The deposition of [name of witness], taken on [date], [is about to be/has been] presented to you [by a video/by reading the transcript]. Deposition testimony is entitled to the same consideration as live testimony, and you must judge it in the same way as if the witness was testifying in court.

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

2.3 Use of Recorded Conversations and Transcripts

Now you're going to hear [a] recorded conversation[s]. This is proper evidence for you to consider. Please listen to it very carefully. I'm going to allow you to have a transcript of the recording [prepared by name of preparer] to help you identify speakers and guide you through the recording. But remember that it is the recording that is evidence — not the transcript. If you believe at any point that the transcript says something different from what you hear on the recording, disregard that portion of the transcript and rely instead on what you hear.

[In this case, there are two transcripts because there is a difference of opinion about what is said on the recording. You may disregard any portion

of one or both transcripts if you believe they reflect something different from what you hear on the recording. It's what you hear on the recording that is evidence — not the transcripts.]

2.4 Interim Statements

At the beginning of the trial, I told you that the lawyers might make short statements previewing upcoming evidence or summarizing and highlighting evidence that they have already presented before. Right now, [Mr./Ms.] [name of attorney] is going to make a short statement. Please remember that the statement you are about to hear — like all statements by the lawyers — is [Mr./Ms.] [name of attorney]'s view of the evidence or of what [he/she] anticipates the evidence will be, but isn't itself evidence.

2.5 Judicial Notice

The rules of evidence allow me to accept facts that no one can reasonably dispute. The law calls this "judicial notice." I've accepted [state the fact that the court has judicially noticed] as proved even though no one introduced evidence to prove it. You must accept it as true for this case.

2.6 Use of Interrogatories

[You'll now hear/You've heard] answers that [name of party] gave in response to written questions the other side submitted. The questions are called "interrogatories." Before the trial, [name of party] gave the answers in writing while under oath.

You must consider [name of party]'s answers to as though [name of party] gave the answers on the witness stand.

2.7 In-Trial Instructions on News Coverage

Reports about this trial [or about this incident] may appear in the media. The reporters may not have heard all the testimony as you have, may be getting information from people who are not under oath and subject to cross examination, may emphasize an unimportant point, or may simply be wrong.

You must not read, listen to, or watch anything about this trial. It would violate your oath as a juror to decide this case on anything other than the evidence presented at trial and on your own common sense. You must decide this case exclusively on the evidence you receive here in court.

2.8 Civil *Allen* Charge

Members of the jury:

I'm going to ask you to continue your deliberations to reach a verdict. Please consider the following comments.

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

Any future jury would be selected in the same manner and from the same source as you. There's no reason to believe that the case could ever be submitted to a jury of people more conscientious, more impartial, or more competent to decide it — or that either side could produce more or clearer evidence.

It's your duty to consult with one another and to deliberate with a view to reaching an agreement — if you can do it without violating your individual

judgment. You must not give up your honest beliefs about the evidence's weight or effect solely because of other jurors' opinions or just to return a verdict. You must each decide the case for yourself — but only after you consider the evidence with your fellow jurors.

You shouldn't hesitate to reexamine your own views and change your opinion if you become convinced it's wrong. To bring your minds to a unanimous result, you must openly and frankly examine the questions submitted to you with proper regard for the opinions of others and with a willingness to reexamine your own views.

If a substantial majority of you is for a verdict for one party, each of you who holds a different position ought to consider whether your position is reasonable. It may not be reasonable since it makes so little impression on the minds of your fellow jurors — who bear the same responsibility, serve under the same oath, and have heard the same evidence.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in light of the court's instructions on the law. You may take all the time that you need.

I remind you that in your deliberations, you are to consider the court's instructions as a whole. You shouldn't single out any part of any instructions, including this one, and ignore others.

You may now return to the jury room and continue your deliberations.

3 — Basic Instructions

3.1 Introduction

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____
_____ DIVISION

CASE NO. _____

_____,

Plaintiff,

vs.

_____,

Defendant.
_____/

COURT'S INSTRUCTIONS
TO THE JURY

Members of the jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case.

When I have finished, you will go to the jury room and begin your discussions, sometimes called deliberations.

3.2 The Duty to Follow Instructions – No Corporate Party Involved

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

3.2.2 The Duty to Follow Instructions – Corporate Party Involved

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

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

3.2.3 The Duty to Follow Instructions – Government Entity or Agency Involved

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

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

3.3 Consideration of Direct and Circumstantial Evidence; Argument of Counsel; Comments by the Court

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about

whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

3.4 Credibility of Witnesses

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?

- Did the witness seem to have a good memory?
- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

3.5.1 Impeachment of Witnesses Because of Inconsistent Statements

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

3.5.2 Impeachment of Witnesses Because of Inconsistent Statements or Felony Conviction

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must

decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

3.6.1 Expert Witness

When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

3.6.2 Expert Witness – When Expert Fees Represent a Significant Portion of the Witness's Income

When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

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

3.7.1 Responsibility for Proof – Plaintiff's Claim[s], Cross Claims, Counterclaims – Preponderance of the Evidence

In this case it is the responsibility of the [Plaintiff] [party bringing any claim] to prove every essential part of [his, her, its] claim[s] by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

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

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

[When more than one claim is involved, you should consider each claim

separately.]

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

If the proof fails to establish any essential part of [the Plaintiff's] [a party's] claim[s] by a preponderance of the evidence, you should find for the [Defendant] [Counter-Defendant, Cross-Claim Defendant] as to that claim.

3.7.2 Responsibility for Proof – Affirmative Defense Preponderance of the Evidence

In this case, the [Defendant, Counter-Defendant, cross-claim Defendant] asserts the affirmative defense[s] of _____. Even if the

[Plaintiff] [Party bringing the claim] proves [his, her, its] claim[s] by a preponderance of the evidence, the [Defendant, Counter-Defendant, cross-claim Defendant] can prevail in this case if [he, she, it] proves an affirmative defense by a preponderance of the evidence.

[When more than one affirmative defense is involved, you should consider each one separately.]

I caution you that the [Defendant, Counter-Defendant, cross-claim Defendant] does not have to disprove the [Plaintiff's][Counter-Plaintiff's] [cross-claimant's] claim[s], but if the [Defendant, Counter-Defendant, cross-claim Defendant] raises an affirmative defense, the only way [he, she, it] can prevail on that specific defense is if [he, she, it] proves that defense by a preponderance of the evidence.

3.8.1 Duty to Deliberate When Only the Plaintiff Claims Damages

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

Your verdict must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and

change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

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

3.8.2 Duty to Deliberate When Both Plaintiff and Defendant Claim Damages or When Damages are not an Issue

Your verdict must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges – judges of the facts.

Your only interest is to seek the truth from the evidence in the case.

3.9 Election of Foreperson Explanation of Verdict Form[s]

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it and date it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the court security officer. The court security officer will bring it to me and I'll respond as promptly as possible –

either in writing or by talking to you in the courtroom. Please understand that I may have to talk to the lawyers and the parties before I respond to your question or message, so you should be patient as you await my response. But I caution you not to tell me how many jurors have voted one way or the other at that time. That type of information should remain in the jury room and not be shared with anyone, including me, in your note or question.

4 – Adverse Employment Action Claims

4.1 Public Employee — First Amendment Claim — Discharge or Failure to Promote — Free Speech on Matter of Public Concern

In this case, [name of plaintiff] claims that [name of defendant], while acting "under color" of state law, intentionally deprived [name of plaintiff] of [his/her] constitutional right to free speech by [discharging [him/her] from employment/ denying [him/her] a promotion] because [he/she] [describe protected speech or conduct].

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

Under the First Amendment to the Constitution of the United States, a public employee has a right to freedom of speech on matters of public concern. It is unlawful for a public employer to take action against a public employee because the employee exercises [his/her] First Amendment rights by speaking on a matter of public concern.

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant]'s actions were "under color" of state law;

Second: [Name of plaintiff] [describe protected speech or conduct];

Third: [Name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion];

Fourth: [Name of plaintiff]'s [describe protected speech or conduct] was a motivating factor in [name of defendant]'s decision [to discharge [name of plaintiff]/not to promote [name of plaintiff]]; and

Fifth: [Name of plaintiff] suffered damages because of [name of defendant]'s actions.

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

[**To be used when the parties stipulate that the defendants acted "under color" of state law:** The parties have agreed that [name of defendant] acted "under color" of state law so you should accept that as a true and proven fact.]

[**To be used when the parties dispute whether the defendants acted "under color" of state law:** For the first element, you must decide whether [name of defendant] acted "under color" of state law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

For the second element, if you find that [name of plaintiff] [describe protected speech or conduct], then you have found that [he/she] engaged in "protected speech."

For the third element, you must decide whether [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion].

For the fourth element, you must decide whether [name of plaintiff]'s protected speech was a "motivating factor" in [name of defendant]'s decision. To prove that [name of plaintiff]'s protected speech was a motivating factor in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [his/her] protected speech was the only reason for [name of defendant]'s actions. It is enough if [name of plaintiff] proves that [his/her] protected speech influenced [name of defendant]'s decision. If [name of plaintiff]'s protected speech made a difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]'s protected speech was not a motivating factor in [name of defendant]'s decision

and that [he/she/it] [discharged/did not promote] [name of plaintiff] for [another reason/other reasons]. A public employer may not take action against a public employee because the employee exercised protected First Amendment rights. But a public employer may [discharge/decline to promote] a public employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision [to discharge/not to promote] [name of plaintiff], and you find that [his/her/its] decision was not motivated by [name of plaintiff]'s protected speech, you must not second guess [his/her/its] decision and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [his/her] protected speech was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]'s protected speech was a motivating factor in [name of defendant]'s decision [to discharge/ not to promote] [name of plaintiff], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true unconstitutional reasons for the decision.]

If you find that [name of plaintiff] [describe protected speech or conduct] and that this protected speech was a "motivating" factor in [name of defendant]'s decision to [discharge [name of plaintiff] from employment/deny [name of plaintiff] a promotion], you must decide whether [name of plaintiff] suffered damages as a result. If the damages would not have existed except for the [discharge/denied promotion], then you may find that [name of plaintiff] suffered those damages because of the [discharge/denied promotion].

[**Including Affirmative Defense (if applicable, see annotations):** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must decide whether [name of defendant] has

shown by a preponderance of the evidence that [he/she/it] would have made the same decision even if [he/she/it] had not taken [name of plaintiff]'s protected activity into account. If you find that [name of plaintiff] would [have been dismissed/not have been promoted] for reasons other than [his/her] protected speech, your verdict should be for [name of defendant].

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must consider [name of plaintiff]'s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must consider [name of plaintiff]'s compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the [discharge/denied promotion], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits from the date of the [discharge] [denied promotion] to the date of your verdict; and

(b) Emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claim. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages. To be used only for individual-capacity claims against individual defendants:** [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive

damages. You will only reach the issue of punitive damages if you find that [name of plaintiff] has proved the elements of [his/her] claim against [name of individual defendant], and you award [name of plaintiff] compensatory damages. You may not assess punitive damages against [public employer].

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

A person acts with malice if the person's conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages. [You also may assess punitive damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant]'s actions were "under color" of state law?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff] [describe protected speech or conduct]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

3. That [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

4. That [name of plaintiff] [describe protected speech or conduct] was a motivating factor in [name of defendant]’s decision [to discharge [name of plaintiff] from employment/not to promote [name of defendant]]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

5. That [name of defendant] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [name of defendant] had not taken [name of plaintiff]’s protected activity into account?

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

6. That [name of plaintiff] suffered damages because of [name of

defendant]'s acts?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

7. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

8. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

If you did not award damages in response to either Question No. 7 or Question No. 8, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question No. 7 or Question No. 8 (or both), go to the next question.

9. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Causes of Action

This pattern charge contemplates cases in which a public employee sues members of a governing body who have the legal authority to take the adverse employment action about which the employee complains (e.g., school boards, city councils, county commissions). If the action is brought against a municipality or other government entity that is capable of being sued, then the pattern charge should be modified to reflect that the employee who took the adverse employment action on behalf of the government entity did so under color of state law and was authorized to do so either as the final decisionmaker or pursuant to the governing body's policy and/or practice.

Pattern Instruction 4.1 provides instructions for discharge and failure to promote claims, but it is also intended to be used for any other case in which the plaintiff alleges a discriminatory adverse employment action, including demotion, pay cut, transfer to a less desirable job, or other adverse employment action.

II. Elements and Defenses

A. "Under Color of State Law"

To prevail on a First Amendment claim, the plaintiff must prove that the defendant or the defendant's representative acted under color of state law. This issue is usually undisputed and need not be charged. For cases in which the "under color of" issue is disputed, Pattern Instruction 4.1 contains an optional "under color of" element and

instruction.

B. Whether Employee's Speech Is Protected

A threshold issue in most public employee freedom of speech cases is whether the employee engaged in protected speech. Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), an employee's speech is not protected unless the plaintiff spoke as a citizen and not as part of his official duties. *Garcetti*, 547 U.S. at 421**.** To date, the Eleventh Circuit cases on this issue have decided the "citizen-employee" issue as a matter of law, and the cases generally say that the issue is a question of law, not a question of fact. *See, e.g., Battle v. Bd. of Regents*, 468 F.3d 755, 757, 761-62 (11th Cir. 2006) (per curiam) (affirming grant of summary judgment where there was no genuine dispute that speech was part of employee's official duties); *accord Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283-84 (11th Cir. 2009) (affirming judgment on the pleadings where there was no genuine fact dispute that employees made statements pursuant to official duties); *Boyce v. Andrew*, 510 F.3d 1333, 1343-47 (11th Cir. 2007) (per curiam) (reversing denial of qualified immunity based on "official duties" issue). Nonetheless, there could be a genuine fact dispute on the question. *See D'Angelo v. Sch. Bd. of Polk Cnty.*, 497 F.3d 1203, 1211 (11th Cir. 2007) (affirming judgment as a matter of law based on "official duties" issue where there was no genuine fact dispute, but noting that such a case may arise). In cases where there is a dispute as to whether the plaintiff was speaking on a matter of public concern and not as part of his official employment duties, the instruction and verdict form should be adapted to cover this issue.

C. Adverse Employment Action

To prevail on a First Amendment retaliation claim, the plaintiff must prove that the employer subjected the plaintiff to an "adverse employment action." Pattern Instruction 4.1 does not define "adverse employment action." In most cases, the question whether an employer's decision amounts to an "adverse employment action" will not be disputed because the decision is clearly an adverse employment action, such as termination, failure to promote, or demotion with pay cut. If there is a fact dispute as to whether an employment action amounts to an "adverse employment action," the instruction and verdict form should be adapted accordingly. Pattern Instruction 4.21, *infra*, contains an adverse employment action charge that may be used. An "adverse employment action" "must involve an important condition of employment" and exists "when the alleged employment action would likely chill the exercise of constitutionally protected speech." *Akins v. Fulton Cnty., Ga.*, 420 F.3d 1293, 1300-01 (11th Cir. 2005) (internal quotation marks omitted) (listing examples of "adverse employment actions," including constructive discharge, transfer to a less desirable position, and actions that negatively impact "an employee's salary, title, position, or job duties").

D. Causation

Pattern Instruction 4.1 charges that the protected speech must be a "motivating factor" in the employer's decision. This instruction is based on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), in which the Supreme Court held that a plaintiff must show that protected First Amendment "conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor'" in the defendant's challenged action. *Id.* at 287; *see also Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007) (requiring that protected speech play "a substantial or motivating role in the adverse employment action"). To eliminate potential confusion that the terms "substantial" and "motivating" have different meanings, Pattern Instruction 4.1 charges that the protected speech must be a "motivating factor" in the defendant's decision.

The model instruction includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *infra*.

III. Individual Liability

An "official decisionmaker" is individually liable under § 1983 for taking an adverse employment action in violation of the plaintiff's First Amendment rights. *See Quinn v. Monroe Cnty.*, 330 F.3d 1320, 1326 (11th Cir. 2003) ("The 'decisionmaker' inquiry addresses who has the power to make official decisions and, thus, be held individually liable." (emphasis omitted)). The model instruction presumes that the defendant's status as an official decisionmaker is undisputed or has been resolved by the court.

In a case where a genuine fact dispute exists as to the defendant's status as an official decisionmaker, the instruction and verdict form should be adapted accordingly. The following principles of law may be helpful in fashioning a jury charge. The official decisionmaker may be identified by a rule, handbook, or organizational chart, or "by examining the statutory authority of the official alleged to have made the decision." *Id.* at 1328. In the termination context, a defendant is an official decisionmaker if he or she has the power to effectuate termination, even if the termination decision is subject to further review. *Id.* On the other hand, a supervisor who merely has the power to recommend a termination is not an official decisionmaker, even if the recommendation is "rubber stamp[ed]" by the actual decisionmaker. *Id.* at 1327; *accord Kamensky v. Dean*, 148 F. App'x 878, 879-80 (11th Cir. 2005) (per curiam) (declining to extend a "rubber stamp" exception to the decisionmaker inquiry for individual liability). Although other circuits have taken a different approach to this issue, *e.g.*, *Tejada-Batista v. Morales*, 424 F.3d 97, 102 (1st Cir. 2005) (holding that where a supervisor's biased adverse recommendation to the official decisionmaker was a but-for cause of the official decisionmaker's decision to take adverse employment action, the biased subordinate may be individually liable even if the official decisionmaker's own motive was pure), at the date of this publication, the Eleventh

Circuit has not reconsidered its holding in *Quinn*.

IV. Governmental Liability

A government entity cannot be held liable for the actions of its employees under 42 U.S.C. § 1983 based on a theory of *respondeat superior*. *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1307 (11th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 n.7 (1978)). "Rather, only deprivations undertaken pursuant to governmental 'custom' or 'policy' may lead to the imposition of governmental liability." *Id.*

Pattern Instruction 4.1 does not contain a "policy or custom" charge. In cases where there is a jury question as to whether the decision was made pursuant to a policy or custom, then the instruction should be adapted accordingly. Pattern Instruction 4.3, *infra*, contains language that is intended to guide the jury through the "policy or custom" issue, and that language may be used. Please refer to Pattern Instruction 4.3, *infra*, and the accompanying annotations.

V. Special Questions

The First Amendment protects independent contractors from being terminated from at-will government contracts in retaliation for the exercise of protected free speech. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 684-85 (1996). Accordingly, the model instruction applies in such cases. The Eleventh Circuit has yet to decide whether to extend this protection to First Amendment claims brought by independent contractors without pre-existing relationships (i.e., "disappointed bidders"). *See Webster v. Fulton Cnty., Ga.*, 283 F.3d 1254, 1257 (11th Cir. 2002).

VI. Remedies

Damages under § 1983 are determined by common law compensation principles. *Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990). "In addition to damages based on monetary loss or physical pain and suffering, . . . a § 1983 plaintiff also may be awarded compensatory damages based on demonstrated mental and emotional distress, impairment of reputation, and personal humiliation." *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000).

The court, in its discretion, may award front pay as an alternative to reinstatement. *E.g., Haskins v. City of Boaz*, 822 F.2d 1014, 1015 (11th Cir. 1987). Front pay is a question for the court and not the jury, so it is not included as a remedy in Pattern Instruction 4.1.

A plaintiff cannot recover punitive damages in a § 1983 action against a government entity. *See Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008) ("In a § 1983 action, punitive damages are only available from government officials

when they are sued in their individual capacities." (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981))). Therefore, if the case involves claims against a government entity only, then the punitive damages instruction should not be given; if the case involves claims against a government entity *and* government officials sued in their individual capacities, then the instruction and verdict form should be adapted to clarify that the jury may only consider the issue of punitive damages with regard to the individual defendants.

Few awards exceeding a single digit ratio between punitive and compensatory damages will "comport with due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

A plaintiff is not automatically entitled to a nominal damages instruction for constitutional violations. *See Oliver v. Falla*, 258 F.3d 1277, 1282 (11th Cir. 2001) (finding that because the plaintiff failed to request a nominal damages instruction, he waived "any entitlement to such damages"). A plaintiff is entitled to nominal damages, however, if a nominal damages instruction is requested and a violation of a fundamental constitutional right is established. *See Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) (citing *Carey v. Piphus*, 435 U.S. 247, 255 (1978)); *see also Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994) ("When constitutional rights are violated, a plaintiff may recover nominal damages even though he suffers no compensable injury." (emphasis omitted)).

4.2 Public Employee — First Amendment Claim — Discharge or Failure to Promote — Political Disloyalty or Key Employee

In this case, [name of plaintiff] claims that [name of defendant], while acting "under color" of state law, intentionally deprived [name of plaintiff] of [his/her] constitutional right to free speech by [discharging [him/her] from employment/ denying [him/her] a promotion] because [he/she] [describe protected speech or conduct].

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendants' defense].

Under the First Amendment to the Constitution of the United States, every citizen has a right to "freedom of speech," which includes the right to engage in "political activity" without governmental interference or penalty. It is unlawful for a public employer to take action against a public employee [— except for certain "key" employees, as I will explain in a moment —] because the employee engaged in political activity, such as holding meetings and hearing the views of political candidates, running for office, or supporting political candidates.

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant] actions were "under color" of state law;

Second: [Name of plaintiff] engaged in constitutionally protected political activity, a form of free speech, by [describe protected activity];

Third: [Name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion];

Fourth: [Name of plaintiff]'s [describe protected activity] was a motivating factor in [name of defendant]'s

decision [to discharge [name of plaintiff]/not to promote [name of plaintiff]]; and

Fifth: [Name of plaintiff] suffered damages because of [name of defendant]'s acts.

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

[**To be used when the parties stipulate that defendants acted "under color" of state law:** The parties have agreed that [name of defendant] acted "under color" of state law so you should accept that as a proven fact.]

[**To be used when the parties dispute whether the defendants acted "under color" of state law:** For the first element, you must decide whether [name of defendant] acted "under color" of state law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

For the second element, if you find that [name of plaintiff] [describe protected activity], then you have found that [he/she] engaged in "protected activity."

For the third element, you must decide whether [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion].

For the fourth element, you must decide whether [name of plaintiff]'s protected activity was a "motivating factor" in [name of defendant]'s decision. To prove that [name of plaintiff]'s protected activity was a motivating factor in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [his/her] protected activity was the only reason for [name of defendant]'s actions. It is enough if [name of plaintiff] proves that [his/her] protected activity influenced [name of

defendant]'s decision. If [name of plaintiff]'s protected activity made a difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]'s protected activity was not a motivating factor in [his/her/its] decision and that [he/she/it] [discharged/did not promote] [name of plaintiff] for [another reason/other reasons]. A public employer may not take action against a public employee because the employee exercised [his/her] protected First Amendment rights. But a public employer may [discharge/decline to promote] a public employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision [to discharge/not to promote] [name of plaintiff], and you find that [his/her/its] decision was not motivated by [name of plaintiff]'s protected activity, you must not second guess [his/her/its] decision and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [his/her] protected activity was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]'s protected activity was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true unconstitutional reasons for the decision.]

If you find that [name of plaintiff] [describe protected activity] and that this protected activity was a "motivating" factor in [name of defendant]'s decision to [discharge [name of plaintiff] from employment/deny [name of plaintiff] a promotion], you must decide whether [name of plaintiff] suffered damages as a result. If the damages would not have existed except for the [discharge/denied promotion],

then you may find that [name of plaintiff] suffered those damages because of the [discharge/denied promotion].

[**Including "Same Decision" Defense (if applicable, see annotations):** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have made the same decision even if [he/she/it] had not taken [name of plaintiff]'s protected activity into account. If you find that [name of plaintiff] would [have been dismissed/not have been promoted] for reasons other than [his/her] protected activity, your verdict should be for [name of defendant].]

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must [consider [name of plaintiff]'s compensatory damages/decide the issue of [name of defendant]'s "key-employee" defense.]]

[**Including "Key Employee" Defense.** If you find by a preponderance of the evidence that [name of plaintiff] suffered damages as a result of [name of defendant]'s acts [and that [name of plaintiff] would not have been [discharged] [denied a promotion] for reasons unrelated to [his][her] protected activity], then you must decide whether [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] was a "key" employee whose job duties and responsibilities were such that [name of defendant] had a right to expect and demand political loyalty from [name of plaintiff] as a condition of employment.

An elected official such as [name of defendant] must stand for election and is politically responsible or accountable for the acts of certain key employees. Therefore, elected officials have a right to expect and demand political loyalty from key employees. If a key employee engages in politically disloyal activity, that employee may be [terminated] [denied a promotion] even though the politically disloyal activity would otherwise be a form of free speech or free association protected by the First Amendment. On the other hand, non-key employees continue to enjoy full First Amendment protection and

cannot be [terminated] [denied a promotion] simply because they engaged in politically disloyal activity.

[Name of defendant] claims that [name of plaintiff] was a "key" employee. [Name of defendant] has the burden to prove by a preponderance of the evidence that [name of plaintiff] was a "key employee." A key employee is one who holds a position that implicates political concerns in its effective functioning, so politically disloyal activity may interfere with the key employee's performance of public duties. To decide whether [name of plaintiff] was a key employee by virtue of [name of plaintiff]'s position as [describe plaintiff's job], you should consider factors such as:

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

(b) Whether the [name of plaintiff] exercised independent judgment in carrying out [his] [her] responsibilities;

(c) Whether [name of plaintiff] had regular contact with or worked closely with [name of defendant];

(d) Whether [name of plaintiff] frequently interacted with the public as [name of defendant]'s representative or alter ego; and

(e) Whether [name of plaintiff] had access to confidential information not generally available to [name of defendant]'s other employees.

No one of these factors is more important than any of the others, and a job can be a "key" position even if one or some of these factors do not apply. You must weigh these factors and then decide whether the [name of plaintiff] was, or was not, a "key" employee.]

If you find that [name of plaintiff] was a key employee, then you

will indicate that on the verdict form, and your foreperson should sign and date the verdict form. If you find that [name of plaintiff] was not a key employee, you must then decide the issue of [name of plaintiff]'s compensatory damages.]

[**Without Any Affirmative Defense:** If you find by a preponderance of the evidence that [name of plaintiff] suffered damages because of [name of defendant]'s acts, you must then decide the issue of [name of plaintiff]'s compensatory damages].

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the [discharge/denied promotion], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits from the date of the [discharge] [denied promotion] to the date of your verdict; and

(b) Emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what

amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages. To be used only for individual-capacity claims against individual defendants:** [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages. You will only reach the issue of punitive damages if you find that [name of plaintiff] has proved the elements of [his/her] claim against [name of individual defendant] and you award [name of plaintiff] compensatory damages. You may not assess punitive damages against [public employer].

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

A person acts with malice if the person's conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages. [You also may assess punitive damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant]'s actions were "under color" state law?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff] engaged in constitutionally protected political activity, a form of free speech, by [describe protected activity]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your

foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

3. That [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

4. That [name of plaintiff]’s [describe protected speech or conduct] was a motivating factor in [name of defendant]’s decision [to discharge [name of plaintiff] from employment/not to promote [name of plaintiff]]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[5. That [name of defendant] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [he/she/it] had not taken [name of plaintiff]’s protected activity into account?

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

[6. That [name of plaintiff] was a “key employee?”

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

7. That [name of plaintiff] suffered damages because of [name of defendant]’s acts?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

8. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

9. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

If you did not award damages in response to either Question No. 8 or Question No. 9, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question No. 8 or Question No. 9 (or both), go to the next question.

10. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Causes of Action

Generally, an employer may not take an adverse employment action against an employee who exercises rights under the First Amendment, including the right to engage in political activity. Pattern Instruction 4.2 provides instructions for discharge and failure to promote claims, but it is also intended to be used for any other case in which the plaintiff alleges a discriminatory adverse employment action, including demotion, pay cut, transfer to a less desirable job, or other adverse employment action.

II. Elements and Defenses

A. Adverse Employment Action

To prevail on a First Amendment retaliation claim, the plaintiff must prove that the employer subjected the plaintiff to an "adverse employment action." Pattern Instruction 4.2 does not define "adverse employment action." In most cases, the question whether an employer's decision amounts to an "adverse employment action" will not be disputed

because the decision is clearly an adverse employment action, such as termination, failure to promote, or demotion with pay cut. If there is a fact dispute as to whether an employment action amounts to an "adverse employment action," the instruction and verdict form should be adapted accordingly. Pattern Instruction 4.21, *infra*, contains an adverse employment action charge that may be used. An "adverse employment action" "must involve an important condition of employment" and exists "when the alleged employment action would likely chill the exercise of constitutionally protected speech." *Akins v. Fulton Cnty., Ga.*, 420 F.3d 1293, 1301-02 (11th Cir. 2005) (internal quotation marks omitted) (listing examples of adverse employment actions, including constructive discharge, transfer to a less desirable position, and actions that negatively impact an employee's salary, title, position, or job duties).

B. Causation

Pattern Instruction 4.2 charges that the protected political activity must be a "motivating factor" in the employer's decision. This instruction is based on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), in which the Supreme Court held that a plaintiff must show that protected First Amendment "conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor'" in the defendant's challenged action. *Id.* at 287; *see also Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007) (requiring that protected speech play "a substantial or motivating role in the adverse employment action"). To eliminate potential confusion that the terms "substantial" and "motivating" have different meanings, Pattern Instruction 4.2 charges that the protected speech must be a "motivating factor" in the defendant's decision.

The model instruction includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *infra*.

C. "Key Employee" Defense

Pattern Instruction 4.2 contains an instruction regarding the "key employee" defense. This instruction is based on *Branti v. Finkel*, 445 U.S. 507 (1980), in which the Supreme Court held that governmental employers cannot condition employment upon an employee's political affiliation, which is protected by the First Amendment, unless the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518; *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73-74 (1990) (holding that employment decisions such as promotions, transfers, and recalls after layoffs, cannot be based upon political affiliation or other protected political activity unless the patronage practice is narrowly tailored to advance vital governmental interests); *Cutcliffe v. Cochran*, 117 F.3d 1353, 1357 (11th Cir. 1997) (explaining that the question whether a particular deputy sheriff is a "key employee" may depend on the deputy's individual job functions).

D. Candidacy Defense

A defense related to the "key employee" defense is the "candidacy defense," which the Eleventh Circuit recognized in *Underwood v. Harkins*, 698 F.3d 1335 (11th Cir. 2012). The "candidacy defense" applies in cases where an elected official dismisses an employee because that employee opposed the elected official in an election. The Eleventh Circuit held that "an elected official may dismiss an immediate subordinate for opposing her in an election without violating the First Amendment if the subordinate, under state or local law, has the same duties and powers as the elected official." *Id.* at 1343. Pattern Instruction 4.2 does not contain a "candidacy defense" instruction but should be modified to include this defense when relevant.

III. Remedies

For annotations and comments regarding remedies, including remedies available against a government entity, please see the Annotations and Comments following Pattern Instruction 4.1, *supra*.

4.3 Public Employee — Equal-Protection Claim — Race/Sex Discrimination — Hostile Work Environment — Supervisor Harassment (Separate Liability for Public Body and Individual Supervisors)

In this case, [name of plaintiff] claims that [name of individual defendant], while acting "under color" of state law, intentionally discriminated against [name of plaintiff] because of [his/her] [race/sex] in violation of [name of plaintiff]'s constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

[Name of individual defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

The Fourteenth Amendment's Equal Protection Clause prohibits discrimination against public employees on the basis of [race/sex]. It also prohibits creating a [racially/sexually] hostile work environment.

[The law that applies to [name of plaintiff]'s claims against [name of individual defendant] is different from the law that applies to [his/her] claim against [name of city], and you must consider each claim separately.]

First, I will explain the law you must apply to decide [name of plaintiff]'s claims against [name of individual defendant].

To succeed on [his/her] claim against [name of individual defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was harassed because of [his/her] [race/sex];

Second: [Name of individual defendant] intentionally committed acts that created a hostile work environment for [name of plaintiff], either personally or by directing others;

Third: [Name of individual defendant] had supervisory authority over [name of plaintiff] in the terms and conditions of [his/her] employment;

Fourth: [Name of individual defendant]'s actions were "under color" of state law; and

Fifth: [Name of plaintiff] suffered damages because of the hostile work environment.

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

For the first element, [name of plaintiff] must show that [he/she] was harassed because of [his/her] [race/sex].

For the second element, [name of plaintiff] must show that [name of individual defendant] intentionally committed acts that created a [racially/sexually] hostile work environment either personally or by directing others.

A [racially/sexually] "hostile work environment" exists if:

(a) [name of plaintiff] was subjected to [racially/sexually] offensive acts or statements — even if they were not specifically directed at [him/her];

(b) [name of plaintiff] did not welcome the offensive acts or statements, which means that [name of plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

(c) the offensive acts or statements were so severe or pervasive that they materially altered the terms and conditions of [name of plaintiff]'s employment;

(d) a reasonable person — not someone who is overly sensitive — would have found that the offensive acts or statements materially altered the terms and conditions of the person's employment; and

(e) [name of plaintiff] personally believed that the offensive acts or statements materially altered the terms and conditions of [his/her] employment.

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms and conditions of [name of plaintiff]'s employment, you should consider all the circumstances, including:

(a) how often the discriminatory conduct occurred;

(b) its severity;

(c) whether it was physically or psychologically threatening or humiliating; and

(d) whether it unreasonably interfered with [name of plaintiff]'s work performance.

A "material alteration" is a significant change in condition. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, [sexual flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/sex]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially changes the employment terms and conditions.

[**To be used when the parties stipulate that defendants acted "under color" of state law:** The parties have agreed that [name of individual defendant] acted "under color" of state law so you should accept that as a proven fact.]

[**To be used when the parties dispute whether the defendants acted "under color" of state law:** For the third and fourth elements, you must also decide whether [name of individual defendant] had supervisory authority over [name of plaintiff] and whether [he/she] acted "under color" of state law.

A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

To find that [name of individual defendant] acted "under color" of state law, you must find that [he/she] had supervisory authority over [name of plaintiff] in the terms and conditions of [his/her] employment and that [name of individual defendant] abused or misused that authority by subjecting [him/her] to a hostile work environment because of [his/her] [race/sex].]

Now I will explain the law you must apply to decide [name of plaintiff]'s claims against [name of city].

To succeed on [his/her] claim against [name of city], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was subjected to a hostile work environment because of [his/her] [race/gender];

Second: The hostile work environment was the result of a "policy or custom" of [name of city]; and

Third: [Name of plaintiff] suffered damages because of the hostile work environment.

[**If there are no individual defendants, insert "hostile work environment" paragraphs here.**]

A "policy or custom" includes a:

(a) rule or regulation enacted, adopted, or ratified by [name of city];

(b) policy statement or decision that [name of city]'s policymakers made; or

(c) practice or course of conduct that is so widespread that it has acquired the force of law — even if the practice has not been formally approved. You may find that a "policy or custom" existed if there was a practice that was so persistent, widespread, or repetitious that [name of city]'s policymaker[s] either knew of it, or should have known of it.

[Name of policymaker] is [name of city]'s "policymaker."

If you find in [name of plaintiff]'s favor on the elements [he/she] must prove, then you must you must decide whether [name of plaintiff] suffered damages because of the hostile work environment. If the damages would not have existed except for the hostile work environment, then you may find that [name of plaintiff] suffered those damages because of the hostile work environment.

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the hostile work environment, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages. To be used only for individual-capacity claims against individual defendants:** [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive

damages. You will only reach the issue of punitive damages if you find that [name of plaintiff] has proved the elements of [his/her] claim against [name of individual defendant] and you award [name of plaintiff] compensatory damages. You may not assess punitive damages against [name of city].

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

A person acts with malice if the person's conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages. [You also may assess punitive damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] was harassed because of [his/her] [race/sex]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of individual defendant] intentionally committed acts that created a hostile work environment for [name of plaintiff], either personally or by directing others?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [individual defendant] had supervisory authority over [name of plaintiff] in the terms and conditions of [name of plaintiff]'s employment?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[4. That [individual defendant]'s actions were "under color" of state law?

Answer Yes or No _____]

[5. That the hostile work environment was the result of a "policy or custom" of [name of city]?

Answer Yes or No _____]

[If you answered "No" to both Questions No. 4 and 5, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you answered "Yes" to either Question No. 4 or 5 (or both), go to the next question.]

6. That [name of plaintiff] suffered damages because of the hostile

work environment?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

7. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

8. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

If you did not award damages in response to either Question No. 7 or Question No. 8, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question No. 7 or Question No. 8 (or both), go to the next question.

9. That punitive damages should be assessed against [individual defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

Under the Equal Protection Clause of the Fourteenth Amendment, public employees have a constitutional right to be free from sex discrimination and race discrimination in public employment. This right to be free from sex and race discrimination includes the right to be free from a hostile work environment based on race or sex. *See, e.g., Bryant v. Jones*, 575 F.3d 1281, 1296 (11th Cir. 2009) (discussing equal protection racial harassment claims); *Cross v. Alabama*, 49 F.3d 1490, 1507-08 (11th Cir. 1995) (discussing equal protection sexual harassment claims).

This pattern instruction focuses on Equal Protection claims based on a hostile work environment. For other types of Equal Protection claims, such as discriminatory discharge based on race or gender, this instruction may be adapted to include the elements and explanations from Pattern Instruction 4.5, *infra*.

II. Elements

The definition of a hostile work environment is adapted from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993). *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808-09 (11th Cir. 2010) (en banc); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc). The language defining "hostile work environment" is the same as the language in Pattern Instruction 4.6, *infra* (Title VII Hostile Work Environment) because the elements of an Equal Protection hostile work environment claim are the same as hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir.

2009). To prevail on an Equal Protection claim, which is brought pursuant to 42 U.S.C. § 1983, the plaintiff must also show that the defendant's actions were under color of state law. *Watkins v. Bowden*, 105 F.3d 1344, 1355 (11th Cir. 1997) (per curiam).

III. Special Liability Questions

Supervisor Liability. Liability in § 1983 cases "cannot be premised solely upon a theory of *respondeat superior*." *Bryant v. Jones*, 575 F.3d 1281, 1299 (11th Cir. 2009). A supervisor may be held liable under § 1983 only "when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation." *Id.* "The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences." *Id.* at 1299-1300 (internal quotation marks omitted). Pattern Instruction 4.3 is to be used in cases where the plaintiff alleges that the supervisor personally participated in creating the hostile work environment. Pattern Instruction 4.4 is to be used in cases where the plaintiff alleges that there is a causal connection between the supervisor's actions and the constitutional deprivation.

Under the law of the Eleventh Circuit at the time of this publication, a "'supervisor' is not merely a person who possesses authority to oversee plaintiff's job performance but a person with the power directly to affect the terms and conditions of the plaintiff's employment." *Bryant*, 575 F.3d at 1300. In defining the term "supervisor," the Eleventh Circuit relied on the Seventh Circuit's decision in *Andonissami v. Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008). The Supreme Court granted certiorari in the Seventh Circuit case of *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011), *cert. granted* 133 S. Ct. 23 (2012), to resolve a circuit split regarding the meaning of the term "supervisor." The Supreme Court did not issue a decision on this point before the date of this publication.

Pattern Instruction 4.3 assumes that there is no genuine fact dispute whether the harasser is a supervisor with the authority to correct the hostile work environment. If there is a fact dispute on this issue, the instruction should be modified accordingly. The Committee recommends that district judges review the Supreme Court's decision in *Vance* before drafting this instruction.

Governmental Liability. A government entity cannot be held liable for the actions of its employees under 42 U.S.C. § 1983 based on a theory of *respondeat superior*. *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1307 (11th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 n.7 (1978)). "Rather, only deprivations undertaken pursuant to governmental 'custom' or 'policy' may lead to the imposition of governmental liability." *Id.* To prove a "custom, a plaintiff must establish a widespread practice that, although not

authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage with the force of law.'" *Id.* at 1308 (11th Cir. 2001) (internal quotation marks omitted); *accord Monell*, 436 U.S. at 690-91 (1978)).

Pattern Instruction 4.3 contains language that is intended to guide the jury through the "policy or custom issue." The instruction does not define the term "policymaker." If there is a dispute whether the decisionmaker was a final policymaker, then the instruction should be adapted accordingly. An official is considered a final policymaker if his decisions are insulated from review but not if his decisions are subject to meaningful administrative review. *E.g., Doe v. Sch. Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1264 (11th Cir. 2010) (citing *Hill v. Clifton*, 74 F.3d 1150, 1152 (11th Cir. 1996) and *Martinez v. City of Opa-Locka, Fla.*, 971 F.2d 708, 714-15 (11th Cir. 1992) (per curiam)); *see also Maschmeier v. Scott*, 269 F. App'x 941, 943-44 (11th Cir. 2008) (per curiam) (defining meaningful review and explaining how to demonstrate that the review was not meaningful).

IV. Remedies

A plaintiff cannot recover punitive damages in a § 1983 action against a government entity. *E.g., Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981)) ("In a § 1983 action, punitive damages are only available from government officials when they are sued in their individual capacities."). Therefore, if the case involves claims against a government entity only, then the punitive damages instruction should not be given; if the case involves claims against a government entity *and* government officials sued in their individual capacities, then the instruction and verdict form should be adapted to clarify that the jury may only consider the issue of punitive damages with regard to the individual defendants.

For additional annotations and comments regarding remedies, please see the Annotations and Comments following Pattern Instruction 4.1, *supra*.

V. When the Case Involves Hostile Work Environment Claims Under More than One Statute

In some cases, a plaintiff will bring a hostile work environment claim under more than one statute based on the same set of facts (Title VII, Equal Protection Clause, and 42 U.S.C. § 1981). The jury instruction on these separate claims can be combined because the elements of an Equal Protection hostile work environment claim are the same as hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). Two issues to consider when combining instructions: (1) statutes of limitations differ, so the instruction and verdict form should take that into account; (2) the availability of punitive damages differs by statute and type of defendant, so the instruction and verdict form should take that

into account.

4.4 Public Employee — Equal-Protection Claim --Race/Sex Discrimination -- Hostile Work Environment— Co-worker Harassment (Separate Liability for Public Body and Individual Supervisors)

In this case, [name of plaintiff] claims that [name of defendant], while acting "under color" of state law, intentionally discriminated against [name of plaintiff] because of [his/her] [race/sex] in violation of [name of plaintiff]'s constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

The Fourteenth Amendment's Equal Protection Clause prohibits discrimination against public employees on the basis of [race/sex]. It also prohibits creating a [racially/sexually] hostile work environment.

[The law that applies to [name of plaintiff]'s claims against [name of individual defendant] is different from the law that applies to [his/her] claim against [name of city], and you must consider each claim separately.]

First, I will explain the law you must apply to decide [name of plaintiff]'s claim against [name of individual defendant].

To succeed on [his/her] claim against [name of individual defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was harassed because of [his/her] [race/sex];

Second: The harassment created a hostile work environment for [name of plaintiff];

Third: [Name of individual defendant] had supervisory authority over [name of plaintiff] in the terms and conditions of [his/her] employment;

Fourth: [Name of individual defendant] knew about the hostile work environment;

Fifth: [Name of individual defendant] acted with deliberate indifference in not taking prompt remedial action to eliminate the hostile work environment;

Sixth: [Name of individual defendant]'s actions were "under color" of state law; and

Seventh: [Name of plaintiff] suffered damages because of the hostile work environment.

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

A [racially/sexually] "hostile work environment" exists if:

(a) [name of plaintiff] was subjected to [racially/sexually] offensive acts or statements — even if they were not specifically directed at [him/her];

(b) [name of plaintiff] did not welcome the offensive acts or statements, which means that [name of plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

(c) the offensive acts or statements were so severe or pervasive that they materially altered the terms and conditions of [name of plaintiff]'s employment;

(d) a reasonable person — not someone who is overly sensitive — would have found that the offensive acts or statements materially altered the terms and conditions of the person's employment; and

(e) [name of plaintiff] personally believed that the offensive acts or statements materially altered the terms and conditions of [his/her] employment.

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms and conditions of [name of plaintiff]'s employment, you should consider all the circumstances, including:

(a) how often the discriminatory conduct occurred;

(b) its severity;

(c) whether it was physically or psychologically threatening or humiliating; and

(d) whether it unreasonably interfered with [name of plaintiff]'s work performance.

A "material alteration" is a significant change in condition. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, [sexual flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/sex]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially changes the employment terms and conditions.

For the first and second elements, you must decide whether [harasser], [name of plaintiff]'s co-worker, created a hostile work environment because of [name of plaintiff]'s [race/sex].

For the fourth and fifth elements, you may hold [name of individual defendant] responsible for the hostile work environment only if [name of plaintiff] proves by a preponderance of the evidence that [name of individual defendant] knew about the hostile work environment but permitted it to continue by failing to take prompt action to eliminate it. If you find that the harassment was so widespread and obvious that [name of individual defendant] should have been on notice of the need to act, then you may find that [name of individual defendant] "knew" about the hostile work environment. And if you find that [name of individual defendant] knew about the hostile work environment but failed to take prompt action to stop it, then you may find that [name of

individual defendant] acted with deliberate indifference in not taking prompt remedial action to eliminate the hostile work environment.

For the seventh element, you must decide whether [name of plaintiff] suffered damages because of the hostile work environment. If the damages would not have existed except for the hostile work environment, then you may find that [name of plaintiff] suffered those damages because of the hostile work environment.

[**To be used when the parties stipulate that defendants acted "under color" of state law:** The parties have agreed that [name of individual defendant] acted "under color" of state law so you should accept that as a proven fact.]

[**To be used when the parties dispute whether the defendants acted "under color" of state law:** For the third and sixth elements, you must also decide whether [name of individual defendant] had supervisory authority over [name of plaintiff] and whether [he/she] acted "under color" of state law.

A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

To find that [name of individual defendant] acted "under color" of state law, you must also find that [name of individual defendant] had supervisory authority over [name of plaintiff] in the terms and conditions of [his/her] employment and that [name of individual defendant] abused or misused that authority by allowing [name of plaintiff] to be subjected to a hostile work environment because of[his/her] [race/sex].]

Now I will explain the law you must apply to decide [name of plaintiff]'s claims against [name of city].

To succeed on [his/her] claim against [name of city], [name of plaintiff] must prove each of the following facts by a preponderance of

the evidence:

First: [Name of plaintiff] was subjected to a hostile work environment because of [his/her] [race/sex];

Second The hostile work environment was the result of a "policy or custom" of [name of city]; and

Third: [Name of plaintiff] suffered damages because of the hostile work environment.

[**If there are no individual defendants, insert "hostile work environment" paragraphs here.**]

A "policy or custom" includes a:

(a) rule or regulation enacted, adopted, or ratified by [name of city];

(b) policy statement or decision that [name of city]'s policymakers made; or

(c) practice or course of conduct that is so widespread that it has acquired the force of law — even if the practice has not been formally approved. You may find that a "policy or custom" existed if there was a practice that was so persistent, widespread, or repetitious that [name of city]'s policymaker[s] either knew about it, or should have known about it.

[Name of policymaker] is [name of city]'s "policymaker."

If you find that [name of plaintiff] has proved each element of [his/her] claim against either [names of individual defendants], [name of city], or both, you must decide the issue of [name of plaintiff]'s damages.

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as

a result of the hostile work environment, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) lost wages and benefits from the date of [discharge/denied promotion] to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make

reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages. To be used only for individual-capacity claims against individual defendants:** [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. These damages are a punishment for [name of defendant] and as a deterrent to others. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages. You will only reach the issue of punitive damages if you find that [name of plaintiff] has proved the elements of [his/her] claim against [name of individual defendant] and you award [name of plaintiff] compensatory damages. You may not assess punitive damages against [name of city].

A person acts with malice if the person's conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages. [You also may assess punitive damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] was harassed because of [his/her] [race/sex]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That the harassment created a hostile work environment for [name of plaintiff]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [individual defendant] had supervisory authority over [name of plaintiff] in the terms and conditions of [name of plaintiff]'s employment?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [individual defendant] knew about the hostile work environment?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

5. That [individual defendant] acted with deliberate indifference in not taking prompt remedial action to eliminate the hostile work environment?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[6. That [individual defendant]’s actions were “under color” of state law?

Answer Yes or No _____]

[7. That the hostile work environment was the result of a “policy or custom” of [name of city]?

Answer Yes or No _____]

[If you answered “No” to both Questions No. 6 and 7, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you answered “Yes” to either Question No. 6 or 7 (or both), go to the next question.]

8. That [name of plaintiff] suffered damages because of the hostile work environment?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your

answer is “Yes,” go to the next question.

9. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

10. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

If you did not award damages in response to either Question No. 9 or Question No. 10, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question No. 9 or Question No. 10 (or both), go to the next question.

11. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

Under the Equal Protection Clause of the Fourteenth Amendment, public employees have a constitutional right to be free from sex discrimination and race discrimination in public employment. This right to be free from sex and race discrimination includes the right to be free from a hostile work environment based on race or sex. *See, e.g., Bryant v. Jones*, 575 F.3d 1281, 1296 (11th Cir. 2009) (discussing equal protection racial harassment claims); *Cross v. Alabama*, 49 F.3d 1490, 1507-08 (11th Cir. 1995) (discussing equal protection sexual harassment claims).

This pattern instruction focuses on Equal Protection claims based on a hostile work environment. For other types of Equal Protection claims, such as discriminatory discharge based on race or gender, this instruction may be adapted to include the elements and explanations from Pattern Instruction 4.5, *infra* (Title VII discrimination).

II. Elements

The definition of a hostile work environment is adapted from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993). *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808-09 (11th Cir. 2010) (en banc); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc). The language defining "hostile work environment" is the same as the language in Pattern Instruction 4.6, *infra* (Title VII Hostile Work Environment) because the elements of an Equal Protection hostile work environment claim are the same as hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). To prevail on an Equal Protection claim, which is brought pursuant to 42 U.S.C. § 1983, the plaintiff must also show that the defendant's actions were under color of state law. *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997) (per curiam).

III. Special Liability Questions

Supervisor Liability. Liability in § 1983 cases "cannot be premised solely upon a theory of *respondeat superior*." *Bryant v. Jones*, 575 F.3d 1281, 1299 (11th Cir. 2009). A supervisor may be held liable under § 1983 only "when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation." *Id.* (internal quotation marks omitted). "The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences." *Id.* at 1299-1300. Pattern Instruction 4.3 is to be used in cases where the plaintiff alleges that the supervisory personally participated in creating the hostile work environment. Pattern Instruction 4.4 is to be used in cases where the plaintiff alleges that there is a causal connection between the supervisor's actions and the constitutional deprivation.

Pattern Instruction 4.4 asks whether the individual defendant is a supervisor with the authority to correct the hostile work environment. Under the law of the Eleventh Circuit at the time of this publication, a "'supervisor' is not merely a person who possesses authority to oversee plaintiff's job performance but a person with the power directly to affect the terms and conditions of the plaintiff's employment." *Bryant*, 575 F.3d at 1300. In defining the term "supervisor," the Eleventh Circuit relied on the Seventh Circuit's decision in *Andonissami v. Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008). The Supreme Court granted certiorari in the Seventh Circuit case of *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011), *cert. granted* 133 S. Ct. 23 (2012), to resolve a circuit split regarding the meaning of the term "supervisor." The Supreme Court did not issue a decision on this point before the date of this publication.

Governmental Liability. A government entity cannot be held liable for the actions of its employees under 42 U.S.C. § 1983 based on a theory of *respondeat superior*. *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1307 (11th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 n.7(1978)). "Rather, only deprivations undertaken pursuant to governmental 'custom' or 'policy' may lead to the imposition of governmental liability." *Id.* To prove a "custom, a plaintiff must establish a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage with the force of law.'" *Id.* at 1308 (11th Cir. 2001) (some internal quotation marks omitted); *accord Monell*, 436 U.S. at 690-91.

This pattern instruction contains language that is intended to guide the jury through the "policy or custom issue." ." If there is a dispute as to whether the decisionmaker was a final policymaker, then the instruction should be adapted accordingly. Please refer to the annotations to Federal Clams Instruction 4.3, *supra*.

IV. Remedies

A plaintiff cannot recover punitive damages in a § 1983 action against a government entity. *E.g., Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981)) ("In a § 1983 action, punitive damages are only available from government officials when they are sued in their individual capacities."). Therefore, if the case involves claims against a government entity only, then the punitive damages instruction should not be given; if the case involves claims against a government entity *and* government officials sued in their individual capacities, then the instruction and verdict form should be adapted to clarify that the jury may only consider the issue of punitive damages with regard to the individual defendants.

For additional annotations and comments regarding remedies, please see the Annotations and Comments following Pattern Instruction 4.1, *supra*.

V. When the Case Involves Hostile Work Environment Claims Under More than One Statute

In some cases, a plaintiff will bring a hostile work environment claim under more than one statute based on the same set of facts (Title VII, Equal Protection Clause, and 42 U.S.C. § 1981). The jury instruction on these separate claims can be combined because the elements of an Equal Protection hostile work environment claim are the same as hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). Two issues to consider when combining instructions: (1) statutes of limitations differ, so the instruction and verdict form should take that into account; (2) the availability of punitive damages differs by statute and type of defendant, so the instruction and verdict form should take that into account.

4.5 Title VII — Civil Rights Act — Discrimination — Discharge or Failure to Promote — Including "Same Decision" Defense

In this case, [name of plaintiff] claims that [name of defendant] violated the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of employment because of their [race/religion/sex/national origin].

Specifically, [name of plaintiff] claims that [name of defendant] [discharged/denied a promotion to] [him/her] because of [his/her] [race/sex/religion/national origin].

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant] [discharged/denied a promotion to] [name of plaintiff]; and

Second: [Name of plaintiff]'s [race/religion/sex/national origin] was a motivating factor that prompted [name of defendant] to [discharge [name of plaintiff]/deny [name of plaintiff] a promotion].

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

If you find that [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion], you must decide whether [name of plaintiff]'s [race/religion/sex/national origin] was a "motivating factor" in the decision.

To prove that [race/religion/sex/national origin] was a motivating factor in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [his/her] [race/religion/sex/national origin] was the

only reason that [name of defendant] [discharged [him/her] from employment/denied [him/her] a promotion]. It is enough if [name of plaintiff] proves that [race/religion/sex/national origin] influenced the decision. If [name of plaintiff]'s [race/religion/sex/national origin] made a difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]'s [race/religion/sex/ national origin] was not a motivating factor in the decision and that [he/she] [discharged/did not promote] [name of plaintiff] for [another reason/other reasons]. An employer may not discriminate against an employee because of the employee's [race/religion/sex/national origin], but the employer may [discharge/decline to promote] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for the decision [to discharge/not to promote] [name of plaintiff], and you find that [name of defendant]'s decision was not motivated by [name of plaintiff]'s [race/religion/sex/national origin], you must not second guess [name of defendant]'s decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you disagree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [his/her] [race/religion/sex/national origin] was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]'s [race/religion/sex/national origin] was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[**Cat's Paw (if applicable, see annotations):** [Name of plaintiff]

claims that [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff] was based on the recommendation of [name of plaintiff]'s supervisor and that [name of plaintiff]'s [race/religion/sex/national origin] was a motivating factor in the supervisor's recommendation. If [name of plaintiff]'s supervisor recommended that [name of defendant] [discharge/decline to promote] [name of plaintiff] and [name of plaintiff]'s [race/religion/sex/national origin] motivated the supervisor's recommendation, the supervisor's recommendation can be a "motivating factor" behind [name of defendant]'s employment decision — even if the supervisor did not make the ultimate decision to [discharge/decline to promote] [name of plaintiff].

But [name of plaintiff]'s [race/religion/sex/national origin] can be a motivating factor in [name of defendant]'s decision only if you find that [name of plaintiff] has proved each of the following by a preponderance of the evidence:

(a) the supervisor acted with the intent to make [name of defendant] [discharge/deny a promotion to] [name of plaintiff] (which means that the supervisor wanted [name of defendant] to [discharge/deny a promotion to] [name of plaintiff]), or the supervisor believed that [his/her] actions would cause [name of defendant] [to discharge/deny a promotion to] [name of plaintiff];

(b) [name of plaintiff]'s [race/religion/sex/national origin] was a motivating factor behind the supervisor's actions; and

(c) there was a direct relationship between the supervisor's actions and [name of plaintiff]'s [discharge/denial of promotion].]

[**Including Affirmative Defense (if applicable, see annotations):** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have

[discharged/not promoted] [name of plaintiff] even if [name of defendant] had not taken [name of plaintiff]'s [race/religion/sex/national origin] into account. If you find that [name of plaintiff] would [have been discharged/not have been promoted] for reasons other than [his/her] [race/religion/sex/national origin], you must make that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must consider [name of plaintiff]'s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must consider [name of plaintiff]'s compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the [discharge/denied promotion], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits from the date of [discharge/denied promotion] to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages.** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its

employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff]'s [race/religion/sex/national origin] was a motivating factor that prompted [name of defendant] to take that action?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[3. That [name of defendant] would have [discharged [name of

plaintiff] from employment/denied [name of plaintiff] a promotion] even if [name of defendant] had not taken [name of plaintiff]'s [race/religion/sex/national origin] into account?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

4. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

5. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

[If you did not award damages in response to either Question Nos. 4 or 5, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question Nos. 4 or 5 (or both), go to the next question.]

[6. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Causes of Action

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Pattern Instruction 4.5 provides instructions for discharge and failure to promote claims, but it is also intended to be used for any other case in which the plaintiff alleges a discriminatory adverse employment action, including wage discrimination, demotion, or other serious and material change to the plaintiff's terms and conditions of employment. Pattern Instruction 4.5 may also be used as the starting point for jury instructions in cases in which the plaintiff alleges the adverse employment action of failure to hire, though slight modifications will be required. Pattern Instruction 4.5 may be used for general claims that a hostile work environment culminated in a "tangible employment action," such as discharge or demotion. Pattern Instruction 4.5 is meant to be used for general disparate treatment claims; for claims where the disparate treatment is allegedly based on the plaintiff's refusal of unwelcome sexual advances, Pattern Instruction 4.8, *infra*, applies. Pattern Instruction 4.5 is *not* intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *infra*, address those claims.

Pattern Instruction 4.5 is intended to be used for all claims under Title VII, including claims of color discrimination. It is rare to have a claim of color discrimination separate from a claim of race discrimination, but the issue does occasionally arise. *See, e.g.*, *Walker v. Sec'y of Treasury*, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (finding that light-skinned black person's Title VII color discrimination claim for termination by dark-skinned black supervisor "stated a claim for relief that cannot be reached by summary judgment").

Pattern Instruction 4.5 is also intended to be used for claims under the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). It further provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

II. Elements and Defenses

A. "Adverse Employment Action"

To prevail on a Title VII disparate treatment claim, the plaintiff must prove that the employer subjected the plaintiff to an "adverse employment action." Pattern Instruction 4.5 does not define "adverse employment action." In most cases, the question whether an employer's decision amounts to an "adverse employment action" will not be disputed because the decision is clearly an adverse employment action, such as termination, failure to promote, or demotion with pay cut. If there is a fact dispute as to whether an employment action amounts to an "adverse employment action," the instruction and verdict form should be adapted accordingly. An "adverse employment action" is a "a *serious and material* change in the terms, conditions, or privileges of employment." *Crawford v. Carroll*, 529 F.3d 961, 970-71 (11th Cir. 2008) (internal quotation marks omitted).

B. Causation

Pattern Instruction 4.5 charges that the protected trait (race, sex, religion, national origin, color) must be a "motivating factor" in the employer's decision. This instruction is based on the statutory language. *See* 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). There is Eleventh Circuit precedent approving jury instructions stating that the protected trait must be a "substantial or motivating factor," *e.g., Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999), and the previous version of the pattern instructions used this language. The Committee believes, however, that the addition of the word "substantial" is potentially confusing, and Pattern Instruction 4.5 charges in accordance with the statutory text, which requires only that the protected trait be a "motivating factor" in the employer's decision.

Pattern Instruction 4.5 applies the "motivating factor" standard to all Title VII disparate treatment claims, not just "mixed motive" claims. The Supreme Court reserved the question of "when, if ever, [42 U.S.C. § 2000e-2(m)] applies outside of the

mixed-motive context." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 n.1 (2003). The Committee believes that, as a practical matter, many cases that are submitted to a jury could be construed as "mixed motive" cases, which is why the Committee recommends "motivating factor" language for Pattern Instruction 4.5.

For the employee's protected trait to be a motivating factor in the employer's decision, the employer must have been aware of the protected trait. *E.g., Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1305 (11th Cir. 2002). In cases where there is a fact question on this issue, the court may consider adding a special interrogatory on this point.

C. Pretext (In General)

When analyzing employment discrimination claims in the context of pretrial motions, the courts typically employ the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under that framework, the plaintiff must establish a prima facie case of discrimination. *E.g., Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010). Once the plaintiff has made a prima facie case, the employer may articulate a legitimate nondiscriminatory reason for its action. *Id.* If the employer articulates a legitimate nondiscriminatory reason, then the plaintiff must produce evidence that the employer's proffered reason is pretext for discrimination. *Id.* "The plaintiff can show pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Kragor v. Takeda Pharms. Am., Inc.*, 702 F.3d 1304, 1308 (11th Cir. 2012) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). If the decisionmaker's statements can be interpreted as an admission that the proffered reason was a cover-up for discrimination, for example, then a jury may consider the statement and decide whether discrimination was the real reason for the employer's decision. *Id.* at 1308-09.

The Eleventh Circuit has concluded that "it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis" because such an instruction has potential to confuse the jury. *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999). Nonetheless, it is not error to instruct a jury that one way a plaintiff may show intentional discrimination is by showing that the employer's stated reasons for its actions were not true and were instead pretext or cover to hide discrimination. *Palmer v. Bd. of Regents of Univ. Sys. of Ga.*, 208 F.3d 969, 974-75 (11th Cir. 2000). It is also not error to refuse to give a pretext instruction. *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1196 (11th Cir. 2004).

Pattern Instruction 4.5 includes an optional pretext charge, which instructs the jury that it may consider the circumstances of the employer's decision—including whether the jury believes the employer's proffered nondiscriminatory reason for its decision—in

deciding whether the decision was motivated by a protected trait.

D. Pretext (Failure to Promote)

In a failure to promote or failure to hire case where the defendant has presented evidence of a legitimate nondiscriminatory reason for its decision but there is a question of fact as to the relative qualifications of plaintiff and the comparator, the court may consider adding a special interrogatory on the issue. The Eleventh Circuit stated that "'a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the [person] who received the position he coveted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by race.'" *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007) (per curiam) (alteration in original) (quoting *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1163 (11th Cir. 2006)). Rather, "a plaintiff must show that the disparities between the successful applicant's and his own qualifications were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." *Id.* (internal quotation marks omitted).

E. Cat's Paw

In *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the Supreme Court approved a "cat's paw" theory of causation in the context of a case under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* ("USERRA"). In *Staub*, the plaintiff sought to hold his employer liable for the anti-military animus of his supervisors, who did not make the ultimate decision to fire the plaintiff but did make unfavorable reports that led to the plaintiff's termination. The Supreme Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Id.* at 1194 (reversing Seventh Circuit's grant of judgment as a matter of law for employer because Seventh Circuit incorrectly required decisionmaker to be wholly dependent on advice of supervisors with discriminatory animus; declining to analyze district court's jury instruction).

At the time of this publication, there have been no Supreme Court or Eleventh Circuit cases that specifically apply *Staub* beyond the USERRA context, but the Committee believes that the reasoning of *Staub* may apply in cases outside the USERRA context—including Title VII cases. USERRA and Title VII discrimination claims turn on whether the discriminatory animus is a "motivating factor" in the employer's decision. 38 U.S.C. § 4311(c)(1); 42 U.S.C. § 2000e-2(m).

Pattern Instruction 4.5 includes an optional cat's paw charge that instructs the jury to consider three elements in determining whether plaintiff's protected trait was a motivating factor in the defendant's decision. The optional cat's paw charge is to be used only in cases where the plaintiff claims that (1) the employer's decision was based on the recommendation of the plaintiff's supervisor and (2) the plaintiff's protected trait was a motivating factor in the supervisor's recommendation.

F. The "Same Decision" Defense

If the Defendant prevails on a "same decision" defense, the jury should award no compensatory or punitive damages, even though Plaintiff has proven that "race, color, religion, sex or national origin was a motivating factor." *See* 42 U.S.C. § 2000e-5(g)(2)(B) (providing that in cases where the employer prevails on the "same decision" defense, the court may grant declaratory relief, *limited* injunctive relief and *limited* attorney's fees and costs; this is an issue for the court, not the jury). Accordingly, Pattern Instruction 4.5 instructs the jury that it need not consider the issue of damages if it finds in favor of the defendant on this defense.

III. Remedies

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

A. Compensatory and Punitive Damages

The award of compensatory and punitive damages in a Title VII employment discrimination action is governed by 42 U.S.C. § 1981a. *See* 42 U.S.C. §§ 1981a(a)(1), (b)(2). Equitable relief is authorized under 42 U.S.C. § 2000e-5(g) and is discussed in more detail below.

42 U.S.C. § 1981a(a)(1) authorizes a prevailing plaintiff to receive compensatory damages, which may be awarded for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *Id.* § 1981a(b)(3). Compensatory damages do not include "backpay, interest on backpay, or any other type of relief authorized under" 42 U.S.C. § 2000e-5(g). Compensatory damages are capped under 42 U.S.C. § 1981a(b)(3), as discussed in more detail below.

42 U.S.C. § 1981a(b)(1) also authorizes a prevailing plaintiff to receive punitive damages if the plaintiff "demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Punitive damages are not available against "a

government, government agency or political subdivision." *Id.* § 1981a(b)(1).

Pattern Instruction 4.5 instructs the jury on the definitions of "malice" and "reckless indifference." *See Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1280 (11th Cir. 2008) ("Malice or reckless indifference is established by a showing that the employer discriminated in the face of the knowledge that its actions would violate federal law.") (internal quotation marks omitted). Examples of conduct that could support a punitive damages award include: "'(1) a pattern of discrimination, (2) spite or malevolence, or (3) a blatant disregard for civil obligations.'" *Id.* (quoting *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322-23 (11th Cir. 1999)). The mere fact that an employer has an anti-discrimination policy will not insulate the employer from punitive damages; if the employer's policy is not enforced, the jury could conclude that the employer did not attempt "good faith compliance with the civil rights laws." *Id.* at 1281-82.

Pattern Instruction 4.5 also instructs the jury on who must have knowledge of the violations for punitive damages to be assessed against the employer. In the Eleventh Circuit, "punitive damages will ordinarily not be assessed against employers with only constructive knowledge" of the violations. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1279-80 (11th Cir. 2002); *accord Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996). To get punitive damages, a Title VII plaintiff must "impute liability for punitive damages to" the employer. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 539 (1999). To do this, the plaintiff may establish that an employee of the defendant acting in a "managerial capacity" acted with malice or reckless indifference to the plaintiff's federally protected rights. *Id.* at 543, 545-46. Though the Supreme Court did not define "managerial capacity," the Court suggested that the employee must be "important, but perhaps need not be the employer's top management, officers, or directors to be acting in a managerial capacity." *Id.* at 543 (internal quotation marks omitted). The Court stated that "determining whether an employee" acts in a "managerial capacity" "requires a fact-intensive inquiry" and listed several factors for the courts to review in making this determination: "the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished." *Id.* Even after *Kolstad*, the Eleventh Circuit has continued to require that the conduct be taken or approved by the employer's "higher management." *Miller* , 277 F.3d at 1280 (citing *Dudley*, 166 F.3d at 1323). The *Miller* court did acknowledge that what constitutes "higher management" can vary widely from company to company—while a Wal-Mart store manager who is separated from higher management by many layers may not be higher management, a manager at a small company who is separated from the president of the company by only one person could be considered higher management. *Id.* at 1279.

The award of damages is limited by 42 U.S.C. § § 1981a(b)(3), which provides for a cap on the "sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section." The damages award shall not exceed, for each plaintiff:

> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a(b)(3).

A major limitation on the recovery of punitive damages is the Supreme Court's announcement that few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *see also Goldsmith*, 513 F.3d at 1283-84 (discussing *Campbell* and upholding punitive damages award under 42 U.S.C. § 1981 where the ratio of punitive damages to compensatory damages was approximately 9.2 to 1).

In some cases, a party may bring parallel claims under Title VII and § 1981 or the Equal Protection Clause. Punitive damages are available under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 and are not capped by Title VII's damages cap. *Goldsmith*, 513 F.3d at 1284-85 (upholding punitive damages award of $500,000 where analogous Title VII cap was $100,000); *Bogle v. McClure*, 332 F.3d 1347, 1355, 1362 (11th Cir. 2003) (rejecting argument that Title VII cap should be applied by analogy in cases under 42 U.S.C. § 1983 and upholding award of approximately $17 million where analogous Title VII cap was $300,000).

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

B. Back Pay

42 U.S.C. § 2000e-5(g)(1) specifically provides for the award of back pay from the date of judgment back to two years prior to the date the plaintiff files a complaint with the Equal Employment Opportunity Commission. This section also provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." *Id.*; *see also Nord v. U.S. Steel Corp.*, 758 F.2d 1462, 1470-73 (11th Cir. 1985) (stating that the purpose behind Title VII is to "make whole" the complainant, therefore back pay is recoverable up to the date judgment is entered and must exclude interim earnings).

Back pay encompasses more than just salary; it also includes fringe benefits such as vacation, sick pay, insurance and retirement benefits. *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir. 1974); *accord Crabtree v. Baptist Hosp. of Gadsden, Inc.*, 749 F.2d 1501, 1502 (11th Cir. 1985).

In an "after-acquired evidence" case, where the employer discovers evidence that would have caused it to terminate the employee *after* it terminates the employee for unlawful reasons, the after-acquired evidence does not bar recovery; it only affects the remedy. *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 380-81 (11th Cir. 1995) (en banc). In such cases, the calculation of back pay is from the date of the unlawful discharge to the date the defendant discovers evidence of employee misconduct. *See id.* (authorizing back pay from date of unlawful discharge to date employer discovered evidence that employee lied in her employment application).

Back pay is recoverable only through 42 U.S.C. § 2000e-5(g)(1); it is specifically exempted from the definition of compensatory damages under 42 U.S.C. § 1981a(b)(2), so it is not limited by the damages cap of § 1981a. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 253-55 (1994) (stating that compensatory damages are in addition to "and do not replace or duplicate the backpay remedy" and that back pay is excluded from compensatory damages "to prevent double recovery").

In the Eleventh Circuit, back pay is considered equitable relief, so it is a question for the court and not the jury. *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1184 (11th Cir. 2010). "Of course, when legal and equitable issues are tried together and overlap factually, the Seventh Amendment requires that 'all findings necessarily made by the jury in awarding [a] verdict to [a party on legal claims] are binding on . . . the trial court' when it sits in equity." *Id.* (quoting *Williams v. City of Valdosta*, 689 F.2d 964, 976 (11th Cir. 1982) (alterations in original)).

Even if the legal and equitable issues do not overlap, the parties may consent to have the issue tried by a jury, or the court may try the issue with an advisory jury. Fed. R. Civ. P. 39 (c). Pattern Instruction 4.5 has been prepared to permit the jury to decide the claim for back pay. If the judge decides not to submit the issue to the jury, the jury should be told that should the jury find in favor of the plaintiff, the court will award pay lost as a result of

defendant's discrimination, and the jury should not make any award for lost pay.

C. Front Pay

The award of "front pay" covers monetary damages for future economic loss, and it is only awarded when reinstatement is not feasible "as a make-whole remedy." *E.E.O.C. v. W & O, Inc.*, 213 F.3d 600, 619 (11th Cir. 2000). Front pay is an equitable remedy to be determined by the court at the conclusion of the jury trial. *Id.*; *accord Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541,1545 (11th Cir. 1988).

D. Attorney's Fees

Title VII explicitly authorizes the court, in its discretion, to award attorney's fees to "the prevailing party." 42 U.S.C. § 2000e-5(k). The attorney's fee award is an issue for the court, not the jury.

IV. When the Case Involves Disparate Treatment Claims Under More than One Statute

In some cases, a plaintiff will bring a disparate treatment claim under more than one statute based on the same set of facts (Title VII, Equal Protection Clause, and 42 U.S.C. § 1981). The jury instruction on these separate claims can be combined because the analysis of disparate treatment claims under Title VII is identical to the analysis under the Equal Protection Clause and § 1981 where the facts on which the claims rely are the same. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008). Three issues to consider when combining instructions: (1) the causation standards may differ, so the instruction and verdict form should take that into account; (2) statutes of limitations differ, so the instruction and verdict form should take that into account; (3) the availability of punitive damages differs by statute and type of defendant, so the instruction and verdict form should take that into account.

Though the Eleventh Circuit has stated that the analysis of claims under Title VII, Equal Protection Clause, and § 1981 is "identical," *Crawford*, 529 F.3d at 970, there are some important distinctions with regard to the causation standards under the different theories. Title VII claims are subject to a "motivating factor" causation standard. 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). Under Title VII, if a plaintiff establishes that a protected trait was a motivating factor that caused the employer's decision and the employer establishes the "same decision" affirmative defense by proving that it would have taken the same action even if it had not considered the protected trait, the plaintiff can still obtain limited relief. 42 U.S.C. § 2000e-5(g)(2)(B). In other words, the "same decision" defense is not a complete bar to

relief under Title VII. In contrast, though the "motivating factor" standard applies in § 1983/Equal Protection cases, the "same decision" defense is a complete bar in § 1983/Equal Protection cases. *Harris v. Shelby Cnty. Bd. of Educ.*, 99 F.3d 1078, 1084 n.5 (11th Cir. 1996). By the date of this publication, neither the Supreme Court nor the Eleventh Circuit had addressed whether the reasoning of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) applies to claims under § 1981 such that a "because of" causation standard applies instead of a "motivating factor" standard. Please see the annotation to Pattern Instruction 4.9, *infra*, for more discussion of this issue. If the "because of" standard applies, then the jury should be instructed on that causation standard, and there is no same decision affirmative defense because the plaintiff must show that the protected trait was *the* reason for the decision. If the "motivating factor" standard applies to § 1981 claims, then the "same decision" defense is a complete bar to recovery, just as it is in § 1983/Equal Protection cases.

4.6 Title VII — Civil Rights Act — Workplace Harassment by Supervisor— No Tangible Employment Action Taken (with Affirmative Defense by Employer)

In this case, [name of plaintiff] claims that [name of defendant] violated Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of employment because of their [race/religion/sex/national origin]. These statutes prohibit the creation of a hostile work environment caused by harassment because of an employee's [race/religion/sex/national origin].

Specifically, [name of plaintiff] claims that [his/her] supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin] and that the harassment created a hostile work environment.

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff]'s supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin];

Second: The harassment created a hostile work environment for [name of plaintiff]; and

Third: [Name of plaintiff] suffered damages because of the hostile work environment.

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

A "hostile work environment" created by harassment because of [race/religion/sex/national origin] exists if:

(a) [name of plaintiff] was subjected to offensive acts or statements about [race/religion/sex/national origin] — even if they were not specifically directed at [him/her];

(b) [name of plaintiff] did not welcome the offensive acts or statements, which means that [name of plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

(c) the offensive acts or statements were so severe or pervasive that they materially altered the terms and conditions of [name of plaintiff]'s employment;

(d) a reasonable person — not someone who is overly sensitive — would have found that the offensive acts or statements materially altered the terms and conditions of the person's employment; and

(e) [name of plaintiff] believed that the offensive acts or statements materially altered the terms and conditions of [his/her] employment.

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms and conditions of [name of plaintiff]'s employment, you should consider all the circumstances, including:

(a) how often the discriminatory conduct occurred;

(b) its severity;

(c) whether it was physically or psychologically threatening or humiliating; and

(d) whether it unreasonably interfered with [name of plaintiff]'s work performance.

A "material alteration" is a significant change in conditions. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will

not result from occasional horseplay, [sexual flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/religion/sex/national origin]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially alters the terms and conditions of employment.

If you find that [name of plaintiff]'s supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin], and that the harassment created a hostile work environment, then you must decide whether [he/she] suffered damages as a result. If the damages would not have existed except for the hostile work environment, then you may find that [name of plaintiff] suffered those damages because of the hostile work environment.

[**Without affirmative defense:** If you find that [name of plaintiff] suffered damages because of the hostile work environment, you must decide the issue of [his/her] compensatory damages.]

[**With affirmative defense:** If you find that [name of plaintiff] suffered damages because of the hostile work environment, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

To succeed on its affirmative defense, [name of defendant] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant] exercised reasonable care to prevent and promptly correct any harassing behavior because of [race/religion/sex/national origin] in the workplace; and

Second: [Name of plaintiff] [unreasonably failed to take advantage of preventive or corrective opportunities [name of defendant] provided to avoid or correct the harm.] [took advantage of [name of defendant]'s preventative or corrective opportunities and [name of defendant] responded by taking reasonable and prompt corrective action.]

To determine whether [name of defendant] exercised reasonable care, you may consider whether:

(a) [name of defendant] created an explicit policy against harassment because of [race/religion/sex/national origin] in the workplace;

(b) [name of defendant] communicated the policy to [his/her/its] employees; and

(c) the policy provided a reasonable process for [name of plaintiff] to complain to higher management.

[To determine whether [name of plaintiff] unreasonably failed to take advantage of a preventive or corrective opportunity [name of defendant] provided, you may consider, for example, whether [name of plaintiff] unreasonably failed to follow a complaint procedure [name of defendant] provided.]

If you find that [name of defendant] established [his/her/its] affirmative defense, you must indicate that on the verdict form, and you will not decide the issue of [name of plaintiff]'s damages. If you find that [name of defendant] did not establish [his/her/its] affirmative defense, you must decide the issue of [name of plaintiff]'s compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the hostile work environment, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent

employment.]

[**Punitive Damages.** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs

designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff]'s supervisor harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That the harassment created a hostile work environment for [name of plaintiff]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[3. That [name of defendant] exercised reasonable care to prevent and promptly correct any harassing behavior in the workplace because of [race/religion/sex/national origin]?

Answer Yes or No _____

If your answer is “Yes,” go to the next question. If your answer is “No,” go to Question No. 5.

4. [That [name of plaintiff] unreasonably failed to take advantage of the preventive or corrective opportunities [name of defendant] provided to avoid or correct the harm.] [That [name of plaintiff] took advantage of the preventive or corrective opportunities provided by [name of defendant] and [name of defendant] responded by taking reasonable and prompt corrective action].

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

5. That [name of plaintiff] suffered damages because of the hostile work environment?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

6. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

7. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

[If you did not award damages in response to either Question Nos. 6 or 7, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 6 or 7 (or both), go to the next question.]

[8. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Such disparate treatment can take the form of a "hostile work environment that changes the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc) (internal quotation marks omitted).

Pattern Instruction 4.6 provides instructions for Title VII workplace harassment by a supervisor. Pattern Instruction 4.7 provides instructions for Title VII workplace harassment by a co-worker and may also be used where the alleged harasser is a third party, such as a customer.

A. Not For Tangible Employment Action Cases

Pattern Instruction 4.6 is intended to be used for any Title VII hostile work environment claim where there is no contention that the hostile work environment culminated in a "tangible employment action." For those claims, Pattern Instruction 4.5, *supra*, or Pattern Instruction 4.8, *infra*, may be used. Pattern Instruction 4.5 is a general disparate treatment charge, and Pattern Instruction 4.8 applies to a subset of "tangible employment action" claims where the disparate treatment is alleged to be based on the refusal of unwelcome sexual advances.

In a case where there is a fact dispute whether the hostile work environment culminated in a tangible employment action, it may be necessary to combine the instructions and to instruct the jury on the definition of "tangible employment action." "'A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th Cir. 2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). In such a case, if the jury finds a tangible employment action, it

will not need to consider the affirmative defense available in hostile work environment cases based on a supervisor's harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.").

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140 (2004), the Supreme Court concluded that constructive discharge due to a "supervisor's official act" is a "tangible employment action," so the affirmative defense established in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) does not apply. In contrast, constructive discharge due to continuing harassment by a supervisor is not a "tangible employment action," so the *Faragher* defense is available. *Suders*, 542 U.S. at 140. Please see "Affirmative Defense" section below for more information on the *Faragher* defense. The elements of a constructive discharge claim are addressed in Pattern Instruction 4.23, *infra*.

B. Retaliatory Hostile Work Environment Cases

The Eleventh Circuit recognized a cause of action for retaliatory hostile work environment under Title VII. *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012). The Eleventh Circuit in *Gowski* applied the "severe or pervasive" requirement for a hostile work environment claim that is described in Pattern Instruction 4.6 (and not the "materially adverse action" standard applied to retaliation claims under *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)), so Pattern Instruction 4.6 may be modified for use in a retaliatory hostile work environment case—the main difference would be that the questions regarding whether protected *status* motivated the hostile work environment would need to ask whether protected *activity* motivated the hostile work environment. If there is a fact dispute regarding whether the plaintiff engaged in protected activity, then instructions and interrogatories from Pattern Instruction 4.21, *infra*, should be inserted into Pattern Instruction 4.6.

II. Elements and Defenses

The definition of a hostile work environment is adapted from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993). *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808-09 (11th Cir. 2010) (en banc); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc).

A. Supervisor

Pattern Instruction 4.6 assumes that there is no genuine fact dispute as to whether the harasser is a "supervisor." If there is a fact dispute on this issue, the instruction should be modified accordingly. Under the law of the Eleventh Circuit at the time of this publication, a "'supervisor' is not merely a person who possesses authority to oversee plaintiff's job

performance but a person with the power directly to affect the terms and conditions of the plaintiff's employment." *Bryant*, 575 F.3d at 1300. In defining the term "supervisor," the Eleventh Circuit relied on the Seventh Circuit's decision in *Andonissami v. Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008). The Supreme Court granted certiorari in the Seventh Circuit case of *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011), *cert. granted* 133 S. Ct. 23 (2012), to resolve a circuit split regarding the meaning of the term "supervisor." The Supreme Court did not issue a decision on this point before the date of this publication. The Committee recommends that district judges review the Supreme Court's decision in *Vance* before drafting an instruction on this issue.

B. "Because of" the Protected Trait

The plaintiff must prove that the hostile work environment was *because of* the protected trait. *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) (en banc) ("Although gender-specific language that imposes a change in the terms or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a general civility code.") (internal quotation marks omitted). "Evidence that co-workers aimed their insults at a protected group may give rise to the inference of an intent to discriminate on the basis of sex, even when those insults are not directed at the individual employee." *Id.* at 811. Pattern Instruction 4.6 does not elaborate on the "because of" requirement.

C. Affirmative Defense

The Supreme Court recognized an affirmative defense to hostile work environment claims in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). Under this defense, an employer may be vicariously liable "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." *Id.* at 807. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* If the employer exercises reasonable care to prevent and correct harassing behavior and the employee takes advantage of the preventive or corrective opportunities, the employer is still entitled to the affirmative defense if it establishes that it responded to the employee's complaint with reasonable and prompt corrective action. *Nurse "BE" v. Columbia Palms W. Hosp. Ltd. P'ship*, 490 F.3d 1302, 1311-12 (11th Cir. 2007). Pattern Instruction 4.6 contains an instruction on the *Faragher* defense.

III. Remedies

Please refer to the annotations and comments for Pattern Instruction 4.5, *supra*.

4.7 Title VII — Civil Rights Act —Workplace Harassment by Co-Worker or Third Party— No Tangible Employment Action Taken

In this case, [name of plaintiff] claims that [name of defendant] violated Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of employment because of their [race/religion/sex/national origin]. These statutes prohibit the creation of a hostile work environment caused by harassment because of an employee's [race/religion/sex/national origin].

Specifically, [name of plaintiff] claims that [name of harasser] harassed [him/her] because of [his/her] [race/religion/sex/national origin], that the harassment created a hostile work environment for [him/her], and that [name of defendant] knew, or in the exercise of reasonable care should have known about, the harassment, but did not take prompt remedial action.

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the Defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of harasser] harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin];

Second: The harassment created a hostile work environment for [name of plaintiff];

Third: [Name of plaintiff]'s supervisor knew, or in the exercise of reasonable care should have known, about the hostile work environment;

Fourth: [Name of plaintiff]'s supervisor failed to take prompt remedial action to eliminate the hostile work environment; and

Fifth: [Name of plaintiff] suffered damages because of the hostile work environment.

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

A "hostile work environment" created by harassment because of [race/religion/sex/national origin] exists if:

(a) [name of plaintiff] was subjected to offensive acts or statements about [race/religion/sex/national origin] — even if they were not specifically directed at [him/her];

(b) [name of plaintiff] did not welcome the offensive acts or statements, which means that [name of plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

(c) the offensive acts or statements were so severe or pervasive that they materially altered the terms and conditions of [name of plaintiff]'s employment;

(d) a reasonable person — not someone who is overly sensitive — would have found that the offensive acts or statements materially altered the terms and conditions of the person's employment; and

(e) [name of plaintiff] believed that the offensive acts or statements materially altered the terms and conditions of [his/her] employment.

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms and conditions of [name of plaintiff]'s employment, you should consider all the circumstances, including:

(a) how often the discriminatory conduct occurred;

(b) its severity;

(c) whether it was physically or psychologically threatening or humiliating; and

(d) whether it unreasonably interfered with [name of plaintiff]'s work performance.

A "material alteration" is a significant change in conditions. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, [sexual flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/religion/sex/national origin]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially alters the terms and conditions of employment.

In this case, [name of plaintiff] claims that [name of harasser], [his/her] co-worker, created and carried on the hostile work environment.

You can hold [name of defendant] responsible for the hostile work environment only if [name of plaintiff] proves by a preponderance of the evidence that [name of plaintiff]'s supervisor [, or a person with the authority to receive, address, or report a complaint of harassment,] knew, or should have known, of the hostile work environment and permitted it to continue by failing to take remedial action.

To show that a supervisor [, or a person with the authority to receive, address, or report a complaint of harassment,] "should have known" of a hostile work environment, [name of plaintiff] must prove that the hostile environment was so pervasive and so open and obvious that any reasonable person in the supervisor's position [, or in the position of a person with the authority to receive, address, or report a complaint of harassment,] would have known that the harassment was occurring.

For the fifth element, if you find that:

(a) [name of harasser] harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin];

(b) the harassment created a hostile work environment;

(c) [name of plaintiff]'s supervisor knew, or in the exercise of reasonable care should have known, about the hostile work environment; and

(d) [name of plaintiff]'s supervisor did not take prompt remedial action to eliminate the hostile work environment,

then you must decide whether [name of plaintiff] suffered damages because of the hostile work environment.

If the damages would not have existed except for the hostile work environment, then you may find that [name of plaintiff] suffered those damages because of the hostile work environment.

If you find that [name of plaintiff] suffered damages because of the hostile work environment, you must decide the issue of [his/her] compensatory damages.

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the hostile work environment, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent

employment.]

[**Punitive Damages.** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs

designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of harasser] harassed [name of plaintiff] because of [his/her] [race/religion/sex/national origin]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That the harassment created a hostile work environment for [name of plaintiff]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

3. That [name of plaintiff]’s supervisor knew, or in the exercise of reasonable care should have known, about the hostile work environment?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

4. That [name of plaintiff]’s supervisor took prompt remedial action to eliminate the hostile work environment?

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.

5. That [name of plaintiff] suffered damages because of the hostile work environment?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

6. That [name of plaintiff] should be awarded damages to

compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

7. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

[If you did not award damages in response to either Question Nos. 6 or 7, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 6 or 7 (or both), go to the next question.]

[8. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Such disparate treatment can take the form of a "hostile work environment that changes the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc) (internal quotation marks omitted).

Pattern Instruction 4.6 provides instructions for Title VII workplace harassment by a supervisor. Pattern Instruction 4.7 provides instructions for Title VII workplace harassment by a co-worker and may also be used where the alleged harasser is a third party, such as a customer. *E.g., Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003).

A. Not For Tangible Employment Action Cases

Pattern Instruction 4.7 is intended to be used for any Title VII hostile work environment claim where there is no contention that the hostile work environment culminated in a "tangible employment action." For those claims, Pattern Instruction 4.5, *supra*, or Pattern Instruction 4.8, *infra*, may be used. Pattern Instruction 4.5 is a general disparate treatment charge, and Pattern Instruction 4.8 applies to a subset of "tangible employment action" claims where the disparate treatment is alleged to be based on the refusal of unwelcome sexual advances.

In a case where there is a factual dispute as to whether the hostile work environment culminated in a tangible employment action, it may be necessary to combine the instructions and to instruct the jury on the definition of "tangible employment action." "'A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th Cir. 2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

B. Retaliatory Hostile Work Environment Cases

The Eleventh Circuit recognized a cause of action for retaliatory hostile work

environment under Title VII. *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012). The Eleventh Circuit in *Gowski* applied the "severe or pervasive" requirement for a hostile work environment claim that is described in Pattern Instruction 4.7 (and not the "materially adverse action" standard applied to retaliation claims under *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)), so Pattern Instruction 4.7 may be modified for use in a retaliatory hostile work environment case—the main difference would be that the questions regarding whether protected status motivated the hostile work environment would need to ask whether protected activity motivated the hostile work environment. If there is a fact dispute regarding whether the plaintiff engaged in protected activity, then instructions and interrogatories from Pattern Instruction 4.21, *infra*, should be inserted into Pattern Instruction 4.7.

II. Elements and Defenses

The definition of a hostile work environment is adapted from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993). *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808-11 (11th Cir. 2010) (en banc); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc).

A. "Because of" the Protected Trait

The plaintiff must prove that the hostile work environment was *because of* the protected trait. *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) (en banc) ("Although gender-specific language that imposes a change in the terms or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a general civility code.") (internal quotation marks omitted). "Evidence that co-workers aimed their insults at a protected group may give rise to the inference of an intent to discriminate on the basis of sex, even when those insults are not directed at the individual employee." *Id.* at 811. Pattern Instruction 4.7 does not elaborate on the "because of" requirement.

B. Prompt Remedial Action

An employer may be held liable under Title VII for the harassing conduct of its non-supervisory employees, customers, or other third parties "if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or reasonably should have known." *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957-58 (11th Cir. 2010) (finding that prison could be held liable for harassing conduct of inmates). Pattern instruction 4.7 does not define "prompt remedial action."

C. Affirmative Defense

The Supreme Court recognized an affirmative defense to hostile work environment claims *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). Under this defense, an employer may be held vicariously liable "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." *Id.* at 807. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

"The *Faragher* defense is available to employers who defend against complaints of 'an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the [plaintiff] employee.'" *Beckford v. Dep't of Corr.*, 605 F.3d 951, 960 (11th Cir. 2010) (alterations in original) (emphasis omitted) (quoting *Faragher*, 524 U.S. at 807). The *Faragher* defense does *not* apply where the employee complains "of harassment by someone other than a supervisor." *Id.* at 961. Accordingly, Pattern Instruction 4.7 does not contain an affirmative defense instruction.

III. Remedies

Please refer to the annotations and comments for Pattern Instruction 4.5, *supra*.

4.8 Title VII — Civil Rights Act — Workplace Harassment — Unwelcome Sexual Advances — Tangible Employment Action Taken

In this case, [name of plaintiff] claims that [name of defendant] violated Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of employment because of the employee's sex. These statutes prohibit sexual harassment that culminates in an adverse tangible employment action.

Specifically, [name of plaintiff] claims that [name of supervisor] discriminated against [him/her] by making unwelcome sexual advances toward [him/her] and that [name of supervisor] took an adverse tangible employment action against [him/her] because [he/she] rejected those unwelcome advances.

[Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of supervisor] made unwelcome sexual advances toward [name of plaintiff];

Second: [Name of supervisor] took an adverse tangible employment action against [name of plaintiff];

Third: [Name of plaintiff]'s rejection of the unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take the adverse tangible employment action; and

Fourth: [Name of plaintiff] suffered damages because of the adverse tangible employment action;

[In the verdict form that I will explain in a moment, you will be

asked to answer questions about these factual issues.]

A tangible employment action is a significant change in employment status. If you find that [name of supervisor] [describe adverse tangible employment action at issue], you have found that [name of supervisor] took an adverse "tangible employment action" against [name of plaintiff], and you must decide whether [name of plaintiff]'s rejection of [name of supervisor]'s unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take the tangible employment action. To prove that [his/her] rejection of [name of supervisor]'s unwelcome sexual advances was a motivating factor in [name of supervisor]'s decision, [name of plaintiff] does not have to prove that [his/her] rejection of the unwelcome sexual advances was the only reason that [name of supervisor] took the adverse tangible employment action. It is enough if [name of plaintiff] proves that [his/her] rejection of the unwelcome sexual advances influenced the decision. If [name of plaintiff]'s rejection of [name of supervisor]'s unwelcome sexual advances made a difference in [name of supervisor]'s decision, you may find that it was a motivating factor in the decision.

Unlawful sexual harassment may take the form of unwelcome sexual advances, and it is unlawful for a supervisor to change — or threaten to change — the terms and conditions of an employee's employment to force or coerce, or to attempt to force or coerce, sexual favors from the employee.

A supervisor's demand or threat for sexual favors must be (1) one that a reasonable person would regard as a real or serious effort by the supervisor to gain a sexual favor, and (2) unwelcome to the employee. That means that the employee did not expressly or implicitly welcome or invite the sexual advances, and the employee regarded the supervisor's conduct as undesirable or offensive. [The fact that an employee may have consented to engaging in sex-related conduct in response to a demand or threat does not, by itself, establish that the employee invited or welcomed the conduct. But it is one of the factors you may consider.]

[**Including Affirmative Defense (if applicable, see**

annotations): If you find that [name of plaintiff]'s rejection of [name of supervisor]'s unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take an adverse tangible employment action, you must decide whether [name of supervisor] has shown by a preponderance of the evidence that [he/she/it] would have [describe adverse tangible employment action] [name of plaintiff] even if [name of supervisor] had not taken [name of plaintiff]'s rejection of the unwelcome sexual advances into account. If you find that [name of plaintiff] would [describe adverse tangible employment action] for reasons other than [his/her] rejection of [name of supervisor]'s unwelcome sexual advances, you must make that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must decide whether [name of plaintiff] suffered damages because of the adverse tangible employment action.]

[**Without Affirmative Defense:** If you find that [name of plaintiff]'s rejection of [name of supervisor]'s unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take an adverse tangible employment action, you must decide whether [name of plaintiff] suffered damages because of the adverse tangible employment action.]

If the damages would not have existed except for the adverse tangible employment action, then you may find that [name of plaintiff] suffered those damages because of the adverse tangible employment action. If you find that [name of plaintiff] suffered damages because of the adverse tangible employment action, you must decide the issue of [name of plaintiff]'s damages.

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the adverse tangible employment action, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant].

Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits from the date of the adverse tangible employment action to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that

comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages.** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle

[name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff]'s supervisor made unwelcome sexual advances toward [name of plaintiff]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

2. That [name of plaintiff]’s supervisor took an adverse tangible employment action against [name of plaintiff]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

3. That [name of plaintiff]’s rejection of [name of supervisor]’s unwelcome sexual advances was a motivating factor that prompted [name of supervisor] to take the adverse tangible employment action?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[4. That [name of supervisor] would have [describe adverse tangible employment action][name of plaintiff] even if [name of supervisor] had not taken [name of plaintiff]’s rejection of the unwelcome sexual advances into account?

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

5. That [name of plaintiff] suffered damages because of the adverse tangible employment action?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

6. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

7. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

[If you did not award damages in response to either Question Nos. 6 or 7, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 6 or 7 (or both), go to the next question.]

[8. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex and other protected traits. 42 U.S.C. § 2000e-2(a). An employer may be held liable under Title VII if a supervisor takes a "tangible employment action" (such as discharge or demotion) against the employee because the employee refused to give in to the supervisor's sexual demands. *E.g., Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1245 (11th Cir. 2004); *accord Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001) ("[W]hen a supervisor engages in harassment which results in an adverse 'tangible employment action' against the employee, the employer is automatically held vicariously liable for the harassment."). Pattern Instruction 4.8 addresses this type of disparate treatment claim, which the courts previously referred to as "quid pro quo" claims but now refer to as "tangible employment action" sexual harassment claims. *Frederick*, 246 F.3d at 1311.

For all other "tangible employment action" disparate treatment claims, Pattern Instruction 4.5, *supra*, may be used. For cases where the plaintiff's claims are based on a hostile work environment but there is no contention that the hostile work environment culminated in a tangible employment action, Pattern Instruction 4.6 (supervisor harassment), *supra*, or Pattern Instruction 4.7 (co-worker or third party harassment), *supra*, may be used.

II. Elements

A. Elements

The elements of a "tangible employment action" sexual harassment claim (also

called "quid pro quo" claim) are derived from cases such as *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231-32 (11th Cir. 2006) and *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1245 (11th Cir. 2004). In "tangible employment action" sexual harassment cases, the employer is strictly liable for the supervisor's unlawful conduct. *See, e.g.*, *Hulsey*, 367 F.3d at 1245 ("An employer is liable under Title VII if it (even unknowingly) permits a supervisor to take a tangible employment action against an employee because she refused to give in to his sexual overtures . . . regardless of whether the employee took advantage of any employer-provided system for reporting harassment."); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001) ("[W]hen a supervisor engages in harassment which results in an adverse 'tangible employment action' against the employee, the employer is automatically held vicariously liable for the harassment.").

B. "Tangible Employment Action"

A "tangible employment action" is required to prevail on a "tangible employment action" theory. Pattern Instruction 4.8 does not define "tangible employment action." If there is a fact dispute as to whether an employment action amounts to a "tangible employment action," the instruction and verdict form should be adapted accordingly. "'A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th Cir. 2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

C. Causation

If the employee establishes that the employee rejected the supervisor's unwelcome sexual advances and that the employee suffered a tangible employment action, the employee must still establish that the employee's refusal of the supervisor's unwelcome sexual advances was a motivating factor that prompted the tangible employment action. *See, e.g.*, *Myers v. Cent. Fla. Invs., Inc.*, 237 F. App'x 452, 455 (11th Cir. 2007) (per curiam) (affirming summary judgment against plaintiff on tangible employment action theory because plaintiff "failed to offer evidence rebutting" the employer's legitimate nondiscriminatory reason for her termination). In cases where the dispute centers on the causation element, the court may wish to include a modified version of the legitimate nondiscriminatory reason instruction (and the optional pretext instruction) from Pattern Instruction 4.5, *supra.*

A "tangible employment action" is an adverse employment action such as a termination or a denied promotion. Therefore, Pattern Instruction 4.8 includes the causation language applicable to Title VII disparate treatment claims: "motivating factor," and Pattern Instruction 4.8 also includes an optional "same decision" defense charge. *See*

Alwine v. Buzas, 89 F. App'x 196, 210-11 (10th Cir. 2004) (finding no error in district court's "mixed motive" defense instruction on plaintiff's "quid pro quo harassment claim"); *cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (concluding that district court did not abuse its discretion in giving a mixed motive instruction—including the same decision defense—because the plaintiff had presented sufficient evidence for a reasonable jury to conclude that sex was a motivating factor for the employer's decision).

III. Remedies

Please refer to the annotations and comments for Pattern Instruction 4.5, *supra*.

4.9 Civil Rights Act — 42 U.S.C. § 1981 — Race Discrimination in Employment — Discharge or Failure to Promote

In this case, [name of plaintiff] claims that [name of defendant] violated the Federal Civil Rights statutes that prohibit employers from discriminating against an employee in the terms and conditions of employment because of the employee's race.

Specifically, [name of plaintiff] claims that [name of defendant] [describe adverse employment action] [him/her] because of [his/her] race.

[Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of defendant] [describe adverse employment action]; and

Second: [Name of plaintiff]'s race was a motivating factor that prompted [name of defendant] to take that action.

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

If you find that [name of defendant] [describe adverse employment action], you must decide whether [name of plaintiff]'s race was a "motivating factor" in the decision.

To prove that race was a motivating factor in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [his/her] race was the only reason that [name of defendant] [describe adverse employment action]. It is enough if [name of plaintiff] proves that race influenced the decision. If [name of plaintiff]'s race made a

difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]'s race was not a motivating factor in the decision and that [he/she] [describe adverse employment action] for [another reason/other reasons]. An employer may not discriminate against an employee because of the employee's race, but the employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for the decision [to discharge/not to promote] [name of plaintiff], and you find that [name of defendant]'s decision was not motivated by [name of plaintiff]'s race, you must not second guess [name of defendant]'s decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you disagree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [his/her] race was a motivating factor in [name of defendant]'s decision to [describe adverse employment action]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]'s race was a motivating factor in [name of defendant]'s decision to [describe adverse employment action], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[**Including Affirmative Defense (if applicable, see annotations):** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have [describe adverse employment action] even if [name of defendant] had not taken [name of plaintiff]'s race into account. If you find that [name of plaintiff] would have been [describe adverse employment action] for reasons other than [his/her] race, you must make that finding in your

verdict.

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must consider [name of plaintiff]'s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must consider [name of plaintiff]'s compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits from the date of [describe adverse employment action] to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what

amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages.** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a

managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to take corrective action concerning discriminatory

acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] [describe adverse employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff]'s race was a motivating factor that prompted [name of defendant] to take that action?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[3. That [name of defendant] would have [describe adverse employment action] even if [name of defendant] had not taken [name of plaintiff]'s race into account.?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your

foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

4. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

5. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

[If you did not award damages in response to either Question Nos. 4 or 5, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question Nos. 4 or 5 (or both), go to the next question.]

[6. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____]

So Say We All.

_____
Foreperson's Signature

Date: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

42 U.S.C. § 1981(a) states that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts." 42 U.S.C. § 1981(a). "The term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). Section 1981 prohibits intentional racial discrimination in the making and enforcement of private contracts, including employment contracts." *Washington v. Kroger Co.*, 218 F. App'x 822, 824 (11th Cir. 2007) (per curiam).

Pattern Instruction 4.9 provides instructions for discharge and failure to promote claims, but it is also intended to be used for any other case in which the plaintiff alleges a racially discriminatory adverse employment action, including discharge, failure to promote, wage discrimination, demotion, or other serious and material changes to the plaintiff's terms and conditions of employment. Pattern Instruction 4.9 may also be used as the starting point for jury instructions in cases in which the plaintiff alleges the adverse employment action of failure to hire, though slight modifications will be required. Finally, Pattern Instruction 4.9 may be used for claims that a race-based hostile work environment culminated in a "tangible employment action," such as discharge or demotion. Pattern Instruction 4.9 is *not* intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *supra*, may be adapted to address § 1981 claims for a race-based hostile work environment. Pattern Instruction 4.9 is also not intended to be used for § 1981 retaliation claims; Pattern Instruction 4.21, *infra*, may be adapted to address such claims. An instruction on § 1981 retaliation should incorporate the damages instructions of Pattern Instruction 4.9.

Section 1981 prohibits race discrimination, and it does not cover purely national origin discrimination. *Bullard v. OMI Ga., Inc.*, 640 F.2d 632, 634 (5th Cir. Unit B Mar. 1981); *accord Tippie v. Spacelabs Med., Inc.*, 180 F. App'x 51, 56 (11th Cir. 2006) (per curiam). However, "[i]n some contexts, national origin discrimination is so closely related to racial discrimination as to be indistinguishable." *Bullard*, 640 F.2d at 634 (internal quotation marks omitted).

II. Elements

A. Causation

Pattern Instruction 4.9 instructs that the jury must find that the plaintiff's race was a "motivating factor" in the defendant's decision. This language tracks the language of Pattern Instruction 4.5, *supra*, but this issue may need to be revisited in the § 1981 context in light of the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). In *Gross*, the Supreme Court held that to prove discrimination under the Age Discrimination in Employment Act ("ADEA"), the plaintiff must establish "but for" causation and may not prevail "by showing that age was simply a motivating factor." *Gross*, 557 U.S. at 174-78. The rationale for this decision is that the ADEA's statutory text makes it unlawful for an employer to discriminate against an individual "because of" the individual's age. *Id.* at 176. Only Title VII was amended to allow for employer liability where discrimination "'was a motivating factor for any employment practice, even though other factors also motivated the practice.'" *Id.* at 177 n.3 (quoting 42 U.S.C. § 2000e-2(m)). Also, "[b]ecause an ADEA plaintiff must establish 'but for' causality, no 'same decision' affirmative defense can exist: the employer either acted 'because of' the plaintiff's age or it did not." *Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010) (per curiam).

At the time of this publication, neither the Supreme Court nor the Eleventh Circuit had addressed whether the reasoning of *Gross* applies to claims under § 1981. Section 1981 does not contain any specific causation language, such as the "motivating factor" language of Title VII or the "because of" language of the ADEA. Rather, § 1981 "prohibits intentional racial discrimination in the making and enforcement of private contracts, including employment contracts." *E.g., Washington v. Kroger Co.*, 218 F. App'x 822, 824 (per curiam) (11th Cir. 2007). It is often said that Title VII and § 1981 "have the same requirements of proof and present the same analytical framework," *e.g., id.*, but the test is still whether there was intent to discriminate because of race. *E.g., Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235 (11th Cir. 2000). The "motivating factor" language of § 2000e-2(m) was not inserted into § 1981.

Because *Gross* does not squarely apply to § 1981 and because the issue had not been decided by the Supreme Court or the Eleventh Circuit prior to this publication, the Committee did not recommend changing the "motivating factor" language of Pattern Instruction 4.9. The Committee does, however, recommend that district courts review this issue prior to instructing a jury on § 1981. The Committee notes that the Supreme Court granted certiorari to determine whether the rationale of *Gross* extends to cases under the anti-retaliation provision of Title VII and similarly worded statutes, but at the date of this publication, the Supreme Court has not issued an opinion. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 978, 979 (2013) (granting certiorari in *Nassar v. Univ. of Tex. Sw. Med.*

Ctr., 674 F.3d 448, 454 n.16 (5th Cir. 2012)). Though *Nassar* may not be precisely on point for claims under § 1981, it may provide some guidance regarding the reach of *Gross.*

B. Pretext (In General)

When analyzing employment discrimination claims in the context of pretrial motions, the courts typically employ the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under that framework, the plaintiff must establish a prima facie case of discrimination. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010). Once the plaintiff has made a prima facie case, the employer may articulate a legitimate nondiscriminatory reason for its action. *Id.* If the employer articulates a legitimate nondiscriminatory reason, then the plaintiff must produce evidence that the employer's proffered reason is pretext for discrimination. *Id.* "The plaintiff can show pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Kragor v. Takeda Pharms. Am., Inc.*, 702 F.3d 1304, 1308 (11th Cir. 2012) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). If the decisionmaker's statements can be interpreted as an admission that the proffered reason was a cover-up for discrimination, then a jury may consider the statement and decide whether discrimination was the real reason for the employer's decision. *Id.* at 1308-09.

The Eleventh Circuit has concluded that "it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis" because such an instruction has potential to confuse the jury. *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999). Nonetheless, it is not error to instruct a jury that one way a plaintiff may show intentional discrimination is by showing that the employer's stated reasons for its actions were not true and were instead pretext or cover to hide discrimination. *Palmer v. Bd. of Regents of Univ. Sys. of Ga.*, 208 F.3d 969, 974-75 (11th Cir. 2000). It is also not necessarily error to refuse to give a pretext instruction. *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1196 (11th Cir. 2004).

Pattern Instruction 4.9 includes an optional pretext charge, which instructs the jury that it may consider the circumstances of the employer's decision—including whether the jury believes the employer's proffered nondiscriminatory reason for its decision—in deciding whether the decision was motivated by a protected trait.

C. Pretext (Failure to Promote)

In a failure to promote or failure to hire case where the defendant has presented evidence of a legitimate nondiscriminatory reason for its decision but there is a question of fact as to the relative qualifications of plaintiff and the comparator, the court may consider

adding a special interrogatory on the issue. The Eleventh Circuit stated that "'a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the [person] who received the position he coveted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by race.'" *Springer v. Convergys Customer Management Group Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007) (per curiam) (alteration in original) (quoting *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1163 (11th Cir. 2006)). Rather "a plaintiff must show that the disparities between the successful applicant's and his own qualifications were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff. *Id.* (internal quotation marks omitted).

D. Cat's Paw

In *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the Supreme Court approved a "cat's paw" theory of causation in the context of a case under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* ("USERRA"). In *Staub*, the plaintiff sought to hold his employer liable for the anti-military animus of his supervisors, who did not make the ultimate decision to fire the plaintiff but did make unfavorable reports that led to the plaintiff's termination. The Supreme Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Staub*, 131 S. Ct. at 1194 (reversing Seventh Circuit's grant of judgment as a matter of law for employer because Seventh Circuit incorrectly required decisionmaker to be wholly dependent on advice of supervisors with discriminatory animus; declining to analyze district court's jury instruction).

At the time of this publication, there have been no Supreme Court or Eleventh Circuit cases that specifically apply *Staub* beyond the USERRA context. Pattern Instruction 4.9 does not contain a cat's paw instruction for claims arising under § 1981, but if the court decides that the appropriate causation standard for a § 1981 claim is "motivating factor" and that a cat's paw charge is warranted based on the facts in the case, the court may refer to Pattern Instruction 4.5, *supra*, which includes an optional cat's paw charge.

E. "Same Decision" Defense

The Eleventh Circuit has held that a complete mixed motive defense is available in actions brought pursuant to 42 U.S.C. § 1981. *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357, 1357-58 (11th Cir. 1999) (citing *Harris v. Shelby Cnty. Bd. of Educ.*, 99 F.3d 1078, 1084-85 & n.5 (11th Cir. 1996). The Eleventh Circuit has not decided whether this issue should be revisited in light of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). The Committee recommends that district

courts review this issue before instructing a jury on § 1981.

III. Remedies

A. Damages (general)

Section 1981, like 42 U.S.C. § 1983, does not contain its own damages provisions. Rather, the remedies available have been judicially determined. Plaintiffs may recover punitive and compensatory damages (including pain and suffering), back pay, reinstatement or future earnings, and attorney's fees. *See generally, e.g., Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1268 (11th Cir. 2008) (affirming award of back pay, mental anguish damages, punitive damages, attorney's fees, and costs).

Damages, including punitive damages, are not capped by Title VII's damages cap. *See, e.g., id.* at 1284-85 (upholding punitive damages award of $500,000 where analogous Title VII cap was $100,000); *Bogle v. McClure*, 332 F.3d 1347, 1330, 1362 (11th Cir. 2003) (rejecting argument that Title VII cap should be applied by analogy in cases under 42 U.S.C. § 1983 and upholding award of approximately $17 million where analogous Title VII cap was $300,000). A punitive damages award still must comport with due process, and the Supreme Court has instructed the courts to consider several guideposts in evaluating punitive damages awards. *E.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). The Supreme Court has noted that "few [punitive damages] awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *Id.* at 424.

B. Punitive Damages

A plaintiff cannot recover punitive damages from a government entity under § 1981. *E.g., Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981)) ("In a § 1983 action, punitive damages are only available from government officials when they are sued in their individual capacities."). Therefore, if the case involves claims against a government entity only, then the punitive damages instruction should not be given; if the case involves claims against a government entity *and* government officials sued in their individual capacities, then the instruction and verdict form should be adapted to clarify that the jury may only consider the issue of punitive damages with regard to the individual defendants. Pattern Instruction 4.3, *supra*, contains a punitive damages instruction that can be used in cases involving individual defendants.

IV. Special Questions

A. Governmental Liability

"[Section] 1983 constitutes the exclusive federal remedy for violation by state actors of the rights guaranteed under § 1981." *Bryant v. Jones*, 575 F.3d 1281, 1288 n.1 (11th Cir. 2009). Therefore, a plaintiff's § 1981 claims against a government entity must be brought through § 1983. *Butts v. Cnty. of Volusia*, 222 F.3d 891, 892 (11th Cir. 2000). This means that plaintiffs pursuing § 1981 claims against a government entity must establish that the deprivation was done pursuant to a policy or custom of the government entity. *E.g., Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1307 (11th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978)).

Pattern Instruction 4.9 does not contain instructions on the "policy or custom" issue. In cases where there is a fact dispute as to whether the actions in question were taken pursuant to a policy or custom, the court should refer to Pattern Instruction 4.3, *supra*, which contains language that is intended to guide the jury through the "policy or custom" issue.

B. Statute of Limitations

The statute of limitations may be different for different types of claims under § 1981. *See, e.g., Palmer v. Stewart Cnty. Sch. Dist.*, 178 F. App'x 999, 1003 (11th Cir. 2006) (per curiam) (noting that four-year catch-all statute of limitations applies to § 1981 actions arising under the 1991 amendments to § 1981 but not to causes of action under § 1981 as originally enacted). The jury instruction and verdict form may need to be adapted to address this issue in some cases.

V. When the Case Involves Disparate Treatment Claims Under More than One Statute

In some cases, a plaintiff will bring a disparate treatment claim under more than one statute based on the same set of facts (Title VII, Equal Protection Clause, and 42 U.S.C. § 1981). The jury instruction on these separate claims can be combined because the analysis of disparate treatment claims under Title VII is similar to the analysis under the Equal Protection Clause and § 1981 where the facts on which the claims rely are the same." *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008). Three issues to consider when combining instructions: (1) the causation standards may differ (especially if the courts decide that *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) applies in the § 1981 context), so the instruction and verdict form should take that into account; (2) statutes of limitations differ, so the instruction and verdict form should take that into account; (3) the availability of punitive damages differs by statute and type of defendant, so the instruction and verdict form should take that into account. For more information on the causation issue, please see Annotation IV to Pattern Instruction 4.5, *supra*.

VI. Additional Information

See Annotations and Comments for Pattern 4.5, *supra*, some of which may be relevant to

a § 1981 claim because the analysis of disparate treatment claims under Title VII is similar to the analysis under § 1981 "where the facts on which the claims rely are the same." *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008).

4.10 Age Discrimination in Employment Act — 29 U.S.C. §§ 621–634

In this case, [name of plaintiff] makes a claim under the federal law that prohibits employers from discriminating against an employee in the terms and conditions of employment because of the employee's age. The federal law applies to employees who are at least 40 years old.

Specifically, [name of plaintiff] claims that [name of defendant] [describe adverse employment action] because of [his/her] age.

[Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

[First: [Name of plaintiff] was [name of defendant]'s employee;]

Second: [Name of plaintiff] was at least 40 years old at the time of [describe adverse employment action];

Third: [Name of defendant] [describe adverse employment action]; and

Fourth: [Name of defendant] took that action because of [name of plaintiff]'s age.

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

If you find that [name of plaintiff] [was [name of defendant]'s employee,] was at least 40 years old, and that [name of defendant] [describe adverse employment action], you must decide whether [name of defendant] took that action because of [name of plaintiff]'s age.

To determine that [name of defendant] [describe adverse employment action] because of [name of plaintiff]'s age, you must

decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had been younger but everything else had been the same.

[Name of defendant] denies that [he/she/it] [describe adverse employment action] because of [name of plaintiff]'s age and claims that it made the decision for [other reasons/another reason].

An employer may not discriminate against an employee because of age, but an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision to [describe adverse employment action], and you find that [name of defendant]'s decision was not because of [name of plaintiff]'s age, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [name of defendant]'s decision to [describe adverse employment action] was because of [name of plaintiff]'s age. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]'s decision [describe adverse employment action] was because of [name of plaintiff]'s age, you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[**Including BFOQ affirmative defense:** If you find by a preponderance of the evidence that [name of defendant] [describe adverse employment action] because of [name of plaintiff]'s age, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

To establish its affirmative defense, [name of defendant] must prove by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because age is a "bona-fide occupational qualification." It is not unlawful for an employer to [describe adverse employment action] an employee based on a bona-fide occupational qualification.

To establish that age is a "bona-fide occupational qualification," [name of defendant] must prove both of the following elements by a preponderance of the evidence:

First: The age qualification is reasonably necessary for [name of plaintiff] to successfully perform [his/her] job; and

Second: [Name of defendant] had reasonable cause to believe that all, or substantially all, persons over the age qualification would be unable to perform the job safely and efficiently.

If you find that [name of defendant] has proved that age is a bona-fide occupational qualification, you must decide whether [name of defendant] has proved by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because of the bona-fide occupational qualification.

If you find that [name of defendant] [describe adverse employment action] because of the bona-fide occupational qualification, you have found that [he/she/it] established [his/her/its] affirmative defense, and you will not decide the issue of [name of plaintiff]'s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Including seniority system affirmative defense:** If you find by a preponderance of the evidence that [name of defendant] [describe adverse employment action] because of [name of plaintiff]'s age, you must decide whether [name of defendant] has established [his/her/its] affirmative defense. An affirmative defense allows a party to limit [his/her/its] liability.

To establish [his/her/its] affirmative defense, [name of defendant] must prove by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because [he/she/it] was applying the terms of a bona-fide seniority system. It is not unlawful for an employer to [describe adverse employment action] based on a bona-fide seniority system.

To establish that [he/she/it] was applying the terms of a bona-fide seniority system, [name of defendant] must prove both of the following elements by a preponderance of the evidence:

First: [Name of defendant]'s seniority system used the employees' length of service — not the employees' age — as the primary basis for giving available job opportunities to [his/her/its] employees; and

Second: [Name of defendant]'s decision to [describe adverse employment action] was consistent with its seniority system.

If you find that [name of defendant] established both these elements by a preponderance of the evidence, you have found that [he/she/it] established [his/her/its] affirmative defense, and you will not decide the issue of [name of plaintiff] compensatory damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]'s favor for each fact [he/she] must prove, you must consider [name of plaintiff]'s compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or

guesswork.

You should consider the following element of damage, to the extent you find that [name of plaintiff] has proved it by a preponderance of the evidence, and no others: net lost wages and benefits from the date of [describe adverse employment action] to the date of your verdict.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Willful Violation:** [Name of plaintiff] also claims that [name of defendant] willfully violated the law. You will only consider this issue if you find for [name of plaintiff] and award [him/her] compensatory damages.

If [name of defendant] knew that [his/her/its] [describe adverse employment action] violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [name of defendant] did

not know, or knew only that the law was potentially applicable, and did not act in reckless disregard about whether the law prohibited its conduct, [his/her/its] conduct was not willful.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

[1. That [name of plaintiff] was [name of defendant]'s employee?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

2. That [name of plaintiff] was at least 40 years old at the time of the [describe adverse employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of defendant] [describe adverse employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [name of defendant] took that action because of [name of plaintiff]'s age?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[5. That [age is a bona-fide occupational qualification] [[name of defendant]’s seniority system used employees’ length of service and not the age of employees as the primary basis for giving available job opportunities to the employees]?

Answer Yes or No _____

If your answer is “No,” go to Question No. 7. If your answer is “Yes,” go to the next question.

6. That [[name of defendant] took the action you found it took because of the bona-fide occupational age qualification/[name of defendant]’s decision to take the action you found it took was consistent with [name of defendant]’s seniority system]?

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

7. That [name of plaintiff] should be awarded damages?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

[8. That [name of defendant] willfully violated the law?

Answer Yes or No _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), prohibits employment discrimination on the basis of age. Pattern Instruction 4.10 is meant to be used for ADEA disparate treatment claims based on any adverse employment action, including but not limited to failure to hire, failure to promote, discharge, reduction in force, and elimination of position.

Pattern Instruction 4.10 is not intended to be used for ADEA retaliation claims. Pattern Instruction 4.22, *infra*, may be adapted to address such claims. An instruction on ADEA retaliation should incorporate the damages instructions of Pattern Instruction 4.10.

The Eleventh Circuit has assumed without deciding that the ADEA provides a cause of action for hostile work environment. *See E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1249 & n.7 (11th Cir. 1997). Pattern Instruction 4.10 is not intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *supra*, may be adapted to address claims for an age-based hostile work environment.

II. Elements and Defenses

A. "Employee"

To prevail on an ADEA claim (other than a failure-to-hire claim), the plaintiff must prove that he was an employee of the defendant. In a failure-to-hire case, the pattern charge and interrogatories should be modified so that the jury does not have to find that the plaintiff

was an employee of the defendant. If there is a dispute about whether the plaintiff was an employee of the defendant, this issue should be determined as a threshold matter and should be inserted as the first fact to be considered by the jury. For example, the ADEA does not provide a cause of action for discrimination against an independent contractor. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495 n.13 (11th Cir. 1993). If there is a genuine fact dispute regarding the plaintiff's status as an employee or independent contractor, that issue should be determined by the jury. *See Garcia v. Copenhaver, Bell & Assocs., M.D.'s*, 104 F.3d 1256, 1266-67 (11th Cir. 1997). Please refer to Pattern Instruction 4.24, *infra*, for a pattern instruction regarding the independent contractor-employee distinction. Pattern Instruction 4.25, *infra*, addresses the "joint employer" issue, and Pattern Instructions 4.26 and 4.27, *infra*, address situations where one company may be considered the alter ego of an individual or corporation.

B. Causation

The ADEA prohibits discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1), and the prohibition is "limited to individuals who are at least 40 years of age," *id.* § 631(a).

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that a plaintiff asserting an ADEA disparate treatment claim must prove that his or her age was the but-for cause, not simply a motivating factor, of the adverse employment action and that the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of the plaintiff's age. *Id.* at 174-78. As a result, the "same decision" defense (also known as the "mixed motive" defense) is no longer viable in ADEA cases. *See Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1203-04 (11th Cir. 2010) (per curiam). Pattern Instruction 4.10 incorporates this causation standard and does not contain a mixed motive instruction.

Pattern Instruction 4.10 includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*. *See also Mitchell v. City of Lafayette*, No. 12-12556, 2013 WL 310063, at *1 (11th Cir. Jan. 28, 2013) (per curiam) (explaining that, even after *Gross*, ADEA claims are analyzed under the *McDonnell Douglas* framework); *Sims v. MVM, Inc.*, 704 F.3d 1327, 1333-34 (11th Cir. 2013) (evaluating pretext in ADEA context).

Pattern Instruction 4.10 does not contain an optional cat's paw charge based on *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011). The Supreme Court in *Staub* applied the cat's paw theory to a claim under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq.*, which requires proof that protected military status "is a motivating factor in the employer's action." *Staub*, 131 S. Ct. at 1190-91 (quoting 38 U.S.C. § 4311(a)). A cat's paw charge may be given in an appropriate

case, and the cat's paw instruction in Pattern Instruction 4.5, *supra*, may be used as a starting point, though the court should modify it because of the differences in causation standards between Title VII/USERRA ("motivating factor") and the ADEA ("but for"). A stricter causation standard applies to cat's paw claims under a "but for" statute like the ADEA. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335-37 (11th Cir. 2013) (evaluating cat's paw argument in ADEA context and finding that a different standard applies to claims under the ADEA).

III. Remedies

Pattern Instruction 4.10 contains an instruction on willful violations, which is to be used in cases where the plaintiff alleges a willful violation of the ADEA. The willful damages instruction is adapted from *Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990) (per curiam). If the jury finds that the defendant acted willfully, then the court should award as damages the amount calculated by the jury plus an equal amount as liquidated damages. 29 U.S.C. § 626(b); *accord Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340 (11th Cir. 1999).

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

A court may award both prejudgment interest and liquidated damages in an ADEA case because the legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature. *See Lindsey v. Am. Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985)). "ADEA liquidated damages awards punish and deter violators, while FLSA liquidated damages merely compensate for damages that would be difficult to calculate." *Id.*

"[N]either punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA." *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985).

IV. Disparate Impact Claims

The ADEA provides a right to jury trial for all claims covered by the Act, including disparate impact claims. 29 U.S.C. § 626(c)(2). In *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005), the Supreme Court held that the ADEA authorizes recovery on disparate impact claims in accordance with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971),

which announced a disparate impact theory of recovery in Title VII cases. Pattern Instruction 4.10 does not include a disparate impact charge.

Should the court need to craft a disparate impact instruction, the following points may be useful. The disparate impact ground of recovery is narrower in the ADEA context than in the Title VII context. First, the ADEA permits a disparate impact claim "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Second, the 1991 amendment to Title VII modified the Supreme Court's holding in *Ward's Cove Packing v. Atonio*, 490 U.S. 642 (1989), in which the Court narrowly construed the employer's exposure to disparate-impact liability under Title VII. Because the 1991 amendment to Title VII did not affect the ADEA, it follows that the standards of *Ward's Cove* remain applicable to disparate impact actions under the ADEA. *Smith*, 544 U.S. at 240. Under *Ward's Cove*, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Smith*, 544 U.S. at 241 (emphasis omitted) (internal quotation marks omitted).

In an ADEA disparate-impact case, the employer may assert the affirmative defense that its employment decision was made on the basis of reasonable factors other than age, and the employer bears the burdens of production and persuasion on this defense. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93-95 (2008).

V. Miscellaneous Issues

Trial by jury is available in ADEA disparate treatment cases. *Lorilard v. Pons*, 434 U.S. 575, 585 (1978).

The ADEA does not abrogate the states' sovereign immunity. *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 92 (2000).

A court may award attorney's fees to a prevailing ADEA defendant only upon finding that the plaintiff litigated in bad faith. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir. 1998).

4.11 Americans with Disabilities Act—Disparate-Treatment Claim —42 U.S.C. §§ 12101 12117

In this case, [name of plaintiff] claims that [name of defendant] discriminated against [name of plaintiff] by [refusing to hire [him/her]/terminating [his/her] employment/failing to promote [him/her]] because [he/she] had a "disability" within the meaning of the Americans with Disabilities Act (the ADA).

[Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the defendant's defense].

Under the ADA, if a person is qualified to do the job, it is unlawful for an employer to [refuse to employ/discharge/fail to promote] the person because of that person's disability.

To succeed on [his/her] claim, [name of plaintiff] must prove all the following facts by a preponderance of the evidence:

First: [Name of plaintiff] had a disability;

Second: [Name of plaintiff] was a qualified individual;

Third: [Name of defendant] [refused to employ/ discharged/failed to promote] [name of plaintiff]; and

Fourth: [Name of defendant] took that action because of [name of plaintiff]'s disability.

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

Definition of "Disability"

The first element requires that [name of plaintiff] prove by a preponderance of the evidence that [he/she] had a disability. A "disability" is a physical or mental impairment that substantially limits one or more major life activities.

A “physical impairment” is a condition that prevents the body from functioning normally. A “mental impairment” is a condition that prevents the mind from functioning normally.

A “major life activity” is an activity that is centrally important to everyday life, including the operation of major bodily functions.

[[Activity at issue] is a major life activity.]

[[Name of plaintiff] claims that [activity at issue] is a major life activity, and you must decide whether it is. Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.]

An impairment “substantially limits” a major life activity if it prevents or significantly restricts a person from performing the activity, compared to an average person in the general population. An impairment that substantially limits one major life activity is a disability even if it does not limit any other major life activity.

To decide whether [name of plaintiff]’s [describe impairment] substantially limits [his/her] ability to [activity at issue], you should consider, as compared to most people in the general population:

(a) the condition under which [name of plaintiff] performs [activity at issue];

(b) the manner in which [name of plaintiff] performs [activity at issue]; and

(c) how long [it takes [name of plaintiff] to/[name of plaintiff] can] perform [activity at issue].

[**Mitigating measures:** To decide whether [name of plaintiff]’s [describe impairment] substantially limits [his/her] ability to [activity at

issue], it does not matter that [his/her] [describe impairment] can be corrected by the use of [medication/hearing aids/prosthetics/assistive technology/describe other mitigating measure]. [But you can consider whether [name of plaintiff]'s eyesight could be corrected by the use of ordinary eyeglasses or contact lenses.]

[**Episodic impairment:** If [name of plaintiff]'s impairment is not always a problem but flares up from time to time, that can be a disability if it would substantially limit a major life activity when active.]

[**When there is a jury question on "record of" disability:** [Name of plaintiff] also can establish that [he/she] had a disability by proving that [he/she] had a record of a disability. [Name of plaintiff] had a record of a disability if [he/she] had a history of, or had been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. Put another way, if [name of plaintiff] had a disability but [has now recovered/the disability is in remission], [he/she] is still considered to have a disability within the meaning of the ADA.]

[**When there is a jury question on "regarded as":** [Name of plaintiff] can also establish that [he/she] had a disability by proving that [name of defendant] regarded [him/her] as having a disability. [Name of plaintiff] is "regarded as" having a disability if [he/she] proves that [name of defendant] [describe adverse employment action] [him/her] because of an actual or perceived impairment — even if the actual or perceived impairment did not limit a major life activity and even if [name of defendant] did not think that the actual or perceived impairment limited a major life activity. [But [name of plaintiff] cannot be "regarded as" disabled if [his/her] impairment is transitory and minor. A "transitory" impairment is one that's expected to last six months or less.]]

Definition of "Qualified Individual"

The second element requires that [name of plaintiff] prove by a preponderance of the evidence that [he/she] was "qualified" for the job at the time of the challenged employment decision. This means that [name of plaintiff] must show that [he/she] had the skill, experience,

education, and other job-related requirements for [describe job], and could do the essential functions of the job — with or without reasonable accommodation.

In this case, [name of plaintiff] claims that [he/she] was able to perform the essential functions of [describe job] [with [describe accommodation provided]]. [Name of defendant] claims that [name of plaintiff] was unable to perform [describe functions] [— even with [describe accommodation provided] —] and that [this function/these functions] [was/were] essential to [describe job]. To the extent that [name of plaintiff] claims that a particular function is not essential to the job, [he/she] must prove that the function is not essential.

The essential functions of a position are the fundamental duties of that position. The term "essential functions" does not include the position's marginal functions. To decide whether a function is essential to a particular position, you may consider the following factors:

(a) whether the function's performance is the reason the position exists;

(b) whether there are a limited number of employees available to perform the function;

(c) whether the function is highly specialized so that an employee in the position is hired for the ability to perform the function;

(d) [name of defendant]'s judgment about which functions are essential to the position;

(e) written job descriptions for the position;

(f) the amount of time an employee in the position spends performing the function;

(g) the consequences of not requiring an employee in the position to perform the function;

(h) [the terms of a collective-bargaining agreement]; or

(i) whether others who held the position were required to perform the function.

No single factor controls your decision. You should consider all the evidence to decide whether a function is essential to the job. [To decide whether [name of plaintiff] was qualified to perform the essential job functions, you should consider [his/her] abilities as they existed when [name of defendant] [describe adverse employment action].

[**Direct Threat.** [Name of Defendant] contends that [name of plaintiff] is not a "qualified individual" because [name of plaintiff]'s [employment/continued employment] [posed/would have posed] a direct threat to [name of plaintiff] [and/or] to [name of defendant]'s other employees. A "direct threat" is a significant risk to the health or safety of [name of plaintiff] or others that cannot be eliminated by a reasonable accommodation. Therefore, you must decide whether [name of plaintiff] could safely perform the essential functions of [his/her] job with or without a reasonable accommodation. In determining whether [name of plaintiff] [posed/would have posed] a direct threat, you may consider:

(a) the nature of the risk of [plaintiff's condition];

(b) the severity of the risk of [plaintiff's condition];

(c) the duration of the risk of [plaintiff's condition];

(d) how likely it is that harm will occur due to [plaintiff's condition]; and

(e) whether the potential harm due to [plaintiff's condition]is likely to occur in the near future.

[Name of plaintiff] has the burden to prove that [he/she] [did not pose/would not have posed] a direct threat to [himself/herself] [and/or] to [name of defendant]'s other employees. If you find that [name of plaintiff] could not safely perform the essential functions of [his/her] job with or without a reasonable accommodation, then [name of plaintiff] is not a "qualified individual."]

Definition of "Because of Plaintiff's Disability"

Finally, if you find that [name of plaintiff] had a "disability," was a "qualified individual," and that [name of defendant] [describe adverse employment action], you must decide whether [name of defendant] took that action "because of" [name of plaintiff]'s disability. Put another way, you must decide whether [name of plaintiff]'s disability was the main reason for [name of defendant]'s decision.

To determine that [name of defendant] [describe adverse employment action] because of [name of plaintiff]'s disability, you must decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had not had a disability but everything else had been the same.

[Name of defendant] denies that [he/she/it] [describe adverse employment action] because of [name of plaintiff]'s disability and claims that [he/she/it] made the decision for [another reason, other reasons].

An employer may not discriminate against an employee because of the employee's disability, but an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision and find that [his/her/its] decision was not because of [name of plaintiff]'s disability, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [name of defendant]'s decision to [describe adverse employment action] was because of [name of plaintiff]'s disability. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]'s decision [describe adverse employment action] was because of [name of plaintiff]'s disability, you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s][he/she/it] gave for

the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reason for the decision.]

If you find that [name of plaintiff] has proved each of the elements [he/she] must prove, you must decide the issue of [his/her] compensatory damages.

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits from the date of the [describe adverse employment action] to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the

evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages.** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied

promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1.That [name of plaintiff] had a "disability?"

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff] was a "qualified individual?"

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of defendant] [describe adverse employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [name of defendant] took that action because of [name of plaintiff]'s disability?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

5. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

6. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

[If you did not award damages in response to either Question Nos. 5 or 6, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 5 or 6 (or both), go to the next question.]

[7. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), prohibits employment discrimination on the basis of a disability. Pattern Instruction 4.11 is meant to be used for an ADA discrimination claim based on any adverse employment action, such as failure to hire, failure to promote, discharge, reduction in force, and elimination of position. This Pattern Instruction is to be used for claims arising under the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553 (2008), which became effective on January 1, 2009. At the time of this publication, the Eleventh Circuit had not squarely addressed the question whether the ADAAA applies retroactively, but it has suggested that it does not. *Tarmas v. Sec'y of Navy*, 433 F. App'x 754, 762 n.9 (11th Cir. 2011) (per curiam) (noting that Eleventh Circuit has never held that the ADAAA is retroactively applicable and that other circuits have concluded that the ADAAA is not retroactively applicable). Accordingly, in the absence of an Eleventh Circuit decision holding that the ADAAA *is* retroactively applicable, the ADA as it existed prior to the ADAAA applies to claims based on conduct that occurred before January 1, 2009, and the court should use 2005 Pattern Instruction 4.11 for such claims.

Pattern Instruction 4.11 is not intended to be used for ADA retaliation claims. Pattern Instruction 4.22, *infra*, may be adapted to address such claims. An instruction on ADA retaliation should incorporate the damages instructions of Pattern Instruction 4.11.

At the time of this publication, the Eleventh Circuit had not decided whether the ADA provides a cause of action for hostile work environment, though other circuits have recognized such a claim. *E.g.*, *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 234-35 (5th Cir. 2001). Pattern Instruction 4.11 is not intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *infra*, may be adapted to address claims for a disability-based hostile work environment.

II. Disability Element

To state a claim under the ADA, a plaintiff must prove that the plaintiff has a disability, which is a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 12102(1). Pattern Instruction 4.11 is intended to guide the jury through the elements of a "disability."

A. "Major Life Activity"

A non-exhaustive list of "major life activities" is codified at 42 U.S.C. § 12102(2). In some cases, it is undisputed that the activity at issue is a "major life activity," and in such cases the jury should be instructed accordingly. Where the jury is to decide whether a major life activity is limited by a physical or mental impairment, the bracketed charge defining "major life activity" should be used.

B. Mitigating Measures

The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures except for "ordinary eyeglasses or contact lenses." 42 U.S.C. § 12102(4)(E)(i)-(ii). Examples of mitigating measures which may not be considered are set forth in 42 U.S.C. § 12102(4)(E)(i) and 29 C.F.R. § 1630.2(j)(5). In most cases, this issue will be decided as a matter of law and will not need to be submitted to the jury. Therefore, the pattern instruction does not include a "mitigating measures" charge. In the rare cases where there is a fact question on this issue, the court should include a mitigating measures instruction that is tailored to the alleged disability and mitigating measures at issue.

C. Episodic Impairment

Under the ADAAA, "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D). The bracketed instruction defining episodic impairment should be provided to the jury where the parties dispute the existence of an episodic impairment.

D. "Record of" Disability and "Regarded As" Disabled

Pattern Instruction 4.11 contains bracketed instructions to be used when there is a jury question on whether the plaintiff had a "record of" a disability or was "regarded as" disabled. These charges are based on the statutory language of the ADAAA, including the new rule that a plaintiff cannot be "regarded as" disabled based on a "transitory and minor"

impairment, meaning a minor impairment "with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B).

III. "Qualified Individual" – Direct Threat

An individual is not a "qualified individual" if, by performing the duties of a given position, he would pose a "direct threat" to himself or others. *Pinckney v. Potter*, 186 F. App'x 919, 925 (11th Cir. 2006) (per curiam). A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). "The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (per curiam). The "Definition of 'Qualified Individual'" section contains an optional "direct threat" instruction that should be used if there is a fact question on this issue. If there is a fact question as to whether the risk could have been eliminated by a reasonable accommodation, the court should tailor the "reasonable accommodation" portion Pattern Instruction 4.12, *infra*, to address this issue.

A "direct threat" may include an infectious disease. In *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001), the Eleventh Circuit held that where a person poses a significant risk of communicating an infectious disease to others in the workplace and where a reasonable accommodation will not eliminate that risk, the person will not be otherwise qualified for his or her job and thus is not a "qualified individual" under the ADA. *Id.* at 1280. To determine whether a person who carries an infectious disease poses a significant risk to others, the Eleventh Circuit noted that the following evidence should be considered:

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

Id. (alteration in original) (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 (1987)).

There is a circuit split on the issue of who has the burden on the "direct threat" issue. In some circuits, "direct threat" is an affirmative defense, so the employer has the burden to establish that the plaintiff was a direct threat. *Wurzel v. Whirlpool Corp.*, 482 F. App'x 1, 9 n.14 (6th Cir. 2012) (discussing different approaches to burden of proof in direct threat cases). In the Eleventh Circuit, however, "[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations

were available." *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (per curiam).

IV. Causation Element

The ADA prohibits discrimination "on the basis of" or "because of" disability. 42 U.S.C. § 12112. It also prohibits retaliation "because" an employee has opposed a practice made unlawful by the ADA. 42 U.S.C. § 12203. The causation language is the same as the causation language in the Age Discrimination in Employment Act, which prohibits discrimination "because of" age, 29 U.S.C. § 623(a), and retaliation "because" an employee has opposed an employment practice made unlawful by the ADEA, 29 U.S.C. § 623(d).

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that, based on the statutory language of the ADEA, a plaintiff must prove that "age was the 'but-for' cause of the employer's adverse decision," not merely a motivating factor in the decision. *Gross*, 557 U.S. at 176-77. The Court also rejected the mixed motive defense (also known as the same decision defense) in the context of the ADEA, noting that unlike under Title VII, a mixed motive defense was not incorporated into the ADEA. *Id.* at 173-75. Although the Eleventh Circuit has not yet issued an opinion on this matter, the Committee believes that the rationale of *Gross* may extend to the ADA because the statutory causation language is the same in the ADA and the ADEA. Accordingly, Pattern Instruction 4.11 instructs that the adverse employment action must be "because of" the plaintiff's disability.

The Supreme Court granted certiorari to determine whether the rationale of *Gross* extends to cases under the anti-retaliation provision of Title VII and similarly worded statutes, but by the date of this publication, the Supreme Court has not issued an opinion. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 978, 979 (2013) (granting certiorari in *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir. 2012)). Though *Nassar* may not be precisely on point for ADA *discrimination* claims, it may provide some guidance regarding the reach of *Gross*. Therefore, the Committee recommends reviewing this issue before instructing a jury on causation.

The model instruction includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*.

V. Remedies

A plaintiff prevailing on an ADA discrimination claim may recover back pay, other past and future pecuniary losses, damages for pain and suffering, punitive damages, and reinstatement or front pay. 42 U.S.C. § 12117(a) (stating that the remedies and enforcement procedures available in Title VII of the Civil Rights Act of 1964—including 42

U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9—apply to actions for disability discrimination under the ADA). For annotations and comments regarding Title VII remedies, please see the annotations and comments following Pattern Instruction 4.5, *supra*.

A prevailing ADA plaintiff may also recover compensatory (emotional pain and suffering) and punitive damages (exclusive of back pay and interest on back pay) pursuant to 42 U.S.C. § 1981a(a)(2). The statutory caps on total damages provided in 42 U.S.C. § 1981a(b)(3) apply to ADA employment discrimination actions. A further limitation on the recovery of punitive damages is that few awards exceeding a single-digit ratio between punitive and compensatory damages satisfy due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

Either party may demand trial by jury when the complainant seeks compensatory or punitive damages. 42 U.S.C. § 1981a(c).

The court may award a reasonable attorney's fee, litigation expenses, and costs to the prevailing party. 42 U.S.C. § 12205. This is a question for the court, not a jury.

4.12 Americans with Disabilities Act: -- Reasonable -- Accommodation Claim — 42 U.S.C. §§ 12101–12117

In this case, [name of plaintiff] claims that [name of defendant] discriminated against [name of plaintiff] because of [his/her] disability by failing to provide a reasonable accommodation for [his/her] disability within the meaning of the Americans with Disabilities Act (the ADA).

[Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the defendant's defense].

Under the ADA, if an employer knows that an employee has a disability and needs [a] reasonable accommodation[s] to perform the essential functions of [his/her] job, the employer must provide [a] reasonable accommodation[s].

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] had a disability;

Second: [Name of plaintiff] was a qualified individual;

Third: [Name of defendant] knew of [name of plaintiff]'s disability;

Fourth: [Name of plaintiff] requested an accommodation;

Fifth: A reasonable accommodation existed that would have allowed [name of plaintiff] to perform the essential functions of the job; and

Sixth: [Name of defendant] failed to provide a reasonable accommodation.

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

Definition of "Disability"

The first element requires that [name of plaintiff] prove by a preponderance of the evidence that [he/she] had a disability. A "disability" is a physical or mental impairment that substantially limits one or more major life activities.

A "physical impairment" is a condition that prevents the body from functioning normally. A "mental impairment" is a condition that prevents the mind from functioning normally.

A "major life activity" is an activity that is centrally important to everyday life, including the operation of major bodily functions.

[[Activity at issue] is a major life activity.]

[[Name of plaintiff] claims that [activity at issue] is a major life activity, and you must decide whether it is. Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.]

An impairment "substantially limits" a major life activity if it prevents or significantly restricts a person from performing the activity, compared to an average person in the general population. An impairment that substantially limits one major life activity is a disability even if it does not limit any other major life activity.

To decide whether [name of plaintiff]'s [describe impairment] substantially limits [his/her] ability to [activity at issue], you should consider, as compared to most people in the general population:

(a) the condition under which [name of plaintiff] performs [activity at issue];

(b) the manner in which [name of plaintiff] performs [activity at issue]; and

(c) how long [it takes [name of plaintiff] to/[name of plaintiff] can] perform [activity at issue].

[**Mitigating measures:** To decide whether [name of plaintiff]'s [describe impairment] substantially limits [his/her] ability to [activity at issue], it does not matter that [his/her] [describe impairment] can be corrected by the use of [medication/hearing aids/prosthetics/assistive technology/describe other mitigating measure]. [But you can consider whether [name of plaintiff]'s eyesight could be corrected by the use of ordinary eyeglasses or contact lenses.]

[**Episodic impairment:** If [name of plaintiff]'s impairment is not always a problem but flares up from time to time, that can be a disability if it would substantially limit a major life activity when active.]

[**When there is a jury question on "record of" disability:** [Name of plaintiff] also can establish that [he/she] had a disability by proving that [he/she] had a record of a disability. [Name of plaintiff] had a "record of" a disability if [he/she] had a history of, or had been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. Put another way, if [name of plaintiff] had a disability but [has now recovered/the disability is in remission], [he/she] is still considered to have a disability within the meaning of the ADA.]

Definition of "Qualified Individual"

The second element requires that [name of plaintiff] prove by a preponderance of the evidence that [he/she] was "qualified" for the job when [name of defendant] [describe adverse employment action]. This means that [name of plaintiff] must show that [he/she] had the skill, experience, education, and other job-related requirements for [describe job], and could do the essential functions of the job — with or without reasonable accommodation.

The essential functions of a position are the fundamental duties of

that position. The term "essential functions" does not include the position's marginal functions. To decide whether a function is essential to a particular position, you may consider the following factors:

(a) whether the function's performance is the reason the position exists;

(b) whether there are a limited number of employees available to perform the function;

(c) whether the function is highly specialized so that an employee in the position is hired for the ability to perform the function;

(d) [name of defendant]'s judgment about which functions are essential to the position;

(e) written job descriptions for the position;

(f) the amount of time an employee in the position spends performing the function;

(g) the consequences of not requiring an employee in the position to perform the function;

(h) [the terms of a collective-bargaining agreement;] or

(i) whether others who held the position were required to perform the function.

No single factor controls your decision. You should consider all the evidence to decide whether a function is essential to the job. [To decide whether [name of plaintiff] was qualified to perform the essential job functions, you should consider [his/her] abilities as they existed when [name of defendant] [describe adverse employment action].

[**Direct Threat.** [Name of Defendant] contends that [name of plaintiff] is not a "qualified individual" because [name of plaintiff]'s [employment/continued employment] [posed/would have posed] a direct threat to [name of plaintiff] [and/or] to [name of defendant]'s other

employees. A "direct threat" is a significant risk to the health or safety of [name of plaintiff] or others that cannot be eliminated by a reasonable accommodation. Therefore, you must decide whether [name of plaintiff] could safely perform the essential functions of [his/her] job with or without a reasonable accommodation. In determining whether [name of plaintiff] [posed/would have posed] a direct threat, you may consider:

(a) the nature of the risk of [plaintiff's condition];

(b) the severity of the risk of [plaintiff's condition];

(c) the duration of the risk of [plaintiff's condition];

(d) how likely it is that harm will occur due to [plaintiff's condition]; and

(e) whether the potential harm due to [plaintiff's condition]is likely to occur in the near future.

[Name of plaintiff] has the burden to prove that [he/she] [did not pose/would not have posed] a direct threat to [himself/herself] [and/or] to [name of defendant]'s other employees. If you find that [name of plaintiff] could not safely perform the essential functions of [his/her] job with or without a reasonable accommodation, then [name of plaintiff] is not a "qualified individual."]

For the third element, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] knew about [his/her] disability.

For the fourth element, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] requested an accommodation.

Put another way, the third and fourth elements require [name of plaintiff] to prove that [he/she] informed [name of defendant] of both the substantial limitations [his/her] disability created and the need for an accommodation.

For the fifth element, [name of plaintiff] must prove by a preponderance of the evidence that a reasonable accommodation existed that would have allowed [him/her] to perform the essential functions of the job.

For the sixth element, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] failed to provide a reasonable accommodation.

In this case, [name of plaintiff] claims that [he/she] would have been able to perform the essential functions of [describe job] with a reasonable accommodation. [Name of defendant] claims that [[name of plaintiff] was unable to perform the essential job functions — even with a reasonable accommodation/[name of defendant] offered [name of plaintiff] a reasonable accommodation, and [he/she] refused it/the accommodation [name of plaintiff] requested would have imposed an undue hardship on [name of defendant]].

A "reasonable accommodation" is a modification or adjustment of the employer's ordinary work rules, facilities, or terms and conditions of employment that the employer can make without causing an undue hardship.

A reasonable accommodation may include:

(a) making existing facilities readily accessible to, and usable for, [name of plaintiff];

(b) job restructuring;

(c) part-time or modified work schedules;

(d) reassignment to a vacant position;

(e) acquiring or modifying equipment or devices;

(f) adjusting or modifying examinations, training materials, or policies;

(g) providing qualified readers or interpreters; or

(h) other similar accommodations for individuals with disabilities.

[In this case, [name of plaintiff] claims that [name of defendant] should have accommodated [name of plaintiff] by reassigning [him/her] to another position. Reassignment may be a reasonable accommodation under certain circumstances — but an employer is not required to create or reestablish a job where one would not otherwise exist. Also, an employer is not required to promote an employee with a disability as an accommodation. To show that reassignment to another job would have been a reasonable accommodation, [name of plaintiff] must prove that the job was vacant or available and that [he/she] was qualified for it.]

[In this case, [name of plaintiff] claims that [name of defendant] should have accommodated [name of plaintiff] by requiring another employee to perform certain duties of [his/her] job that [name of plaintiff] could not perform because of [his/her] disability. Reallocation of marginal job duties can be a reasonable accommodation — but an employer does not have to transfer any essential job duties to another employee. If the duties [name of plaintiff] wanted [name of defendant] to reallocate were essential functions of [name of plaintiff]'s job, then that is not a reasonable accommodation. If [name of plaintiff] wanted [name of defendant] to reallocate only marginal job duties to another employee, then that reallocation may be a reasonable accommodation — but only if the reallocation would not impose an excessive burden on the employer or the other employee.]

[In this case, [name of plaintiff] claims that [name of defendant] should have accommodated [name of plaintiff] by modifying [his/her] work schedule. Modification of a work schedule can be a reasonable accommodation — but only if [name of plaintiff] shows that the modified work schedule would have enabled [him/her] to perform the essential job functions and shows that it would have been reasonable under the circumstances. An employer's duty to provide a reasonable accommodation to a disabled employee does not require the employer to burden other employees excessively.]

[In this case, [name of plaintiff] claims that [name of defendant] should have [explain suggested reasonable accommodation].]

To decide whether [name of defendant] denied [name of plaintiff] a reasonable accommodation, you should keep in mind that while an employer is required to provide [a] reasonable accommodation[s] that would allow [name of plaintiff] to perform the essential job functions, the employer is not required to provide the particular accommodation that [name of plaintiff] prefers or requests. There may be more than one reasonable accommodation available under the circumstances, and if [name of plaintiff] refused to accept an accommodation offered by [name of defendant] that would have allowed [him/her] to perform the essential job functions, [name of plaintiff] has not proved that [name of defendant] failed to provide a reasonable accommodation.

[Also, just because [name of defendant] may have offered a certain accommodation to [name of plaintiff] or another employee in the past does not mean that [name of defendant] must forever extend the same accommodation to [name of plaintiff] or that the accommodation is necessarily reasonable under the ADA. Otherwise, an employer would be reluctant to offer benefits or concessions to disabled employees for fear that by providing the benefit or concession one time, the employer would be required to provide that accommodation in the future. Because [name of plaintiff] has requested an accommodation that [name of defendant] has provided to [name of plaintiff] or another employee in the past does not necessarily mean that the particular accommodation is a reasonable one. Instead, you must determine its reasonableness under all the evidence.]

[**Good Faith Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

[Name of defendant] claims that after [name of plaintiff] informed [name of defendant] of [his/her] disability and requested an accommodation, [name of defendant] made good faith efforts to consult with [name of plaintiff] in order to identify and make a reasonable accommodation [that would not cause an undue hardship on the

operation of [name of defendant]'s business].

[Name of defendant] must prove by a preponderance of the evidence that [he/she/it] made good faith efforts to identify and make a reasonable accommodation for [name of plaintiff].

If you find by a preponderance of the evidence that [name of defendant] made good faith efforts to identify and make a reasonable accommodation for [name of plaintiff], then you have found that [name of defendant] established its affirmative defense, and you will not decide the issue of [name of plaintiff]'s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Undue-Hardship Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

[Name of defendant] claims that the accommodation that [name of plaintiff] requested would have imposed an undue hardship on the operation of [his/her/its] business. Under the ADA, [name of defendant] is not required to accommodate [name of plaintiff] if the accommodation would cause an undue hardship to its business. An accommodation would cause an "undue hardship" if it would cause [name of defendant] significant difficulty or expense.

[Name of defendant] must prove by a preponderance of the evidence that the accommodation [name of plaintiff] requested would be an undue hardship.

To decide this issue, you should consider the following factors:

(a) the nature and cost of the accommodation;

(b) [name of defendant]'s overall financial resources, including the size of [name of defendant]'s business, the number of employees, and the type of facilities [name of defendant] operates;

(c) the financial resources of the facility where the accommodation would be made, including the number of employees at that facility and the accommodation's impact on the facility's operations and costs; and

(d) the way that [name of defendant] conducts the business's operations, including [name of defendant]'s workforce structure, the location of the facility where the accommodation would be made compared to [name of defendant]'s other facilities, and the relationship between or among those facilities.

If you find by a preponderance of the evidence that the accommodation [name of plaintiff] requested would have imposed an undue hardship on the operation of [name of defendant]'s business, then you have found that [name of defendant] established its affirmative defense, and you will not decide the issue of [name of plaintiff]'s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Without Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide the issue of [his/her] compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of [name of defendant]'s failure to provide [name of plaintiff] with a reasonable accommodation, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent

employment.]

[**Punitive Damages.** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]'s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]'s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs

designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [name of defendant] acted spitefully or malevolently]; [(3) whether [name of defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [name of defendant] failed to investigate reports of discrimination]; [(5) whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [name of plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] had a "disability?"

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff] was a "qualified individual?"

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

3. That [name of defendant] knew of [name of plaintiff]’s disability?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

4. That [name of plaintiff] requested an accommodation?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

5. That a reasonable accommodation existed that would have allowed [name of plaintiff] to perform the essential functions of the job?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

6. That [name of defendant] failed to provide a reasonable accommodation?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your

foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[7. That [name of defendant] made good faith efforts to identify and make a reasonable accommodation for [name of plaintiff]?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

[8. That [name of plaintiff]'s requested accommodation would have imposed an undue hardship on the operation of [name of defendant]'s business?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

9. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

10. That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

[If you did not award damages in response to either Question Nos. 9 or 10, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 9 or 10 (or both), go to the next question.]

[11. That punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), prohibits employment discrimination on the basis of a disability. Under the ADA, prohibited discrimination includes failure to provide a reasonable accommodation. 42 U.S.C. § 12112(b)(5). Pattern Instruction 4.12 is meant to be used for an ADA discrimination claim based on a failure to accommodate a disability. This Pattern Instruction is to be used for claims arising under the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553 (2008), which became effective on January 1, 2009. At the time of this publication, the Eleventh Circuit had not squarely addressed the question whether the

ADAAA applies retroactively, but it has suggested that it does not. *Tarmas v. Sec'y of Navy*, 433 F. App'x 754, 762 n.9 (11th Cir. 2011) (per curiam) (noting that Eleventh Circuit has never held that the ADAAA is retroactively applicable and that other circuits have concluded that the ADAAA is not retroactively applicable). Accordingly, in the absence of an Eleventh Circuit decision holding that the ADAAA *is* retroactively applicable, the ADA as it existed prior to the ADAAA applies to claims based on conduct that occurred before January 1, 2009, and the court should use 2005 Pattern Instruction 4.12 for such claims.

II. Elements and Defenses

A. "Regarded As" Disabled

Pattern Instruction 4.12 is not to be used in cases where the plaintiff is proceeding only under a "regarded as" theory of disability. The ADAAA provides that an employer must provide a reasonable accommodation to employees who have an actual disability or a record of disability but not to employees who are merely "regarded as" being disabled. 42 U.S.C. § 12201(h); *see also* 29 C.F.R. § 1630.2(o)(4). This provision abrogates the Eleventh Circuit case law obligating employers to provide reasonable accommodations to employees "regarded as" being disabled. *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005).

B. Essential Function

The portion of Pattern Instruction 4.12 defining "essential function" tracks the language explaining that term in 29 C.F.R. § 1630.2(n)(2).

C. "Qualified Individual" – Direct Threat

An individual is not a "qualified individual" if, by performing the duties of a given position, he would pose a "direct threat" to himself or others. *Pinckney v. Potter*, 186 F. App'x 919, 925 (11th Cir. 2006) (per curiam). A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). "The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (per curiam). The "Definition of 'Qualified Individual'" section contains an optional "direct threat" instruction that should be used if there is a fact question on this issue.

A "direct threat" may include an infectious disease. In *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001), the Eleventh Circuit held that where a person poses a significant risk of communicating an infectious disease to others in the workplace and where a reasonable accommodation will not eliminate that risk, the person will not be otherwise qualified for his or her job and thus is not a "qualified individual"

under the ADA. *Id.* at 1280. To determine whether a person who carries an infectious disease poses a significant risk to others, the Eleventh Circuit noted that the following evidence should be considered:

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

Id. (alteration in original) (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 (1987)). Where there is a factual dispute on this issue, the jury should be given the "direct threat" instruction, and the court should tailor the "reasonable accommodation" portion of the instruction to address this issue.

There is a circuit split on the issue of who has the burden on the "direct threat" issue. In some circuits, "direct threat" is an affirmative defense, so the employer has the burden to establish that the plaintiff was a direct threat. *Wurzel v. Whirlpool Corp.*, 482 F. App'x 1, 9 n.14 (6th Cir. 2012) (discussing different approaches to burden of proof in direct threat cases). In the Eleventh Circuit, however, "[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (per curiam).

D. Reasonable Accommodation

Pattern Instruction 4.12 contains three bracketed sample reasonable accommodation instructions that are intended to instruct on three common accommodation requests: (1) reassignment to another position, (2) reassignment of marginal job duties, and (3) modification of work schedule. The jury should be instructed with the language that best fits the facts of the case. If one of the three samples does not apply, then the court should fashion its own reasonable accommodation instruction.

III. Remedies

Pattern Instruction 4.12 instructs that a plaintiff cannot prevail if the plaintiff refused to accept a reasonable accommodation offered by the employer. *See Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286-87 (11th Cir. 1997) (finding that ADA liability did not arise where the employee rejected five proposed accommodations but did not provide employer with substantive reasons why the proffered reasons were unreasonable).

In a similar vein, 42 U.S.C. § 1981a provides a defense to employers: compensatory and punitive damages may not be awarded on an ADA reasonable accommodation claim "where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." 42 U.S.C. § 1981a(a)(3). Therefore, where an employee shows that he requested an accommodation, the employer may avoid damages by demonstrating that it in good faith engaged in the interactive process required by the ADA and tried to find a reasonable accommodation for the employee. The employer has the burden of proof on this defense. Pattern Instruction 4.12 provides an instruction on this defense that should be included if there is a fact dispute on this issue. In some cases, this instruction may need to be combined with the "undue burden" affirmative defense instruction.

For additional discussion of the damages that may be awarded in ADA reasonable accommodation cases, see the Annotations and Comments following Pattern Instruction 4.11, *supra.*

4.13 Equal Pay Act — 29 U.S.C. §§ 206(d)(1) and (3)

In this case, [name of plaintiff] claims that [name of defendant] violated a federal law called the Equal Pay Act. This law is designed to prevent sex-based wage discrimination by employers.

To succeed on [his/her] claim, [name of plaintiff] must prove the following four facts by a preponderance of the evidence:

First: [Name of defendant] is an employer;

Second: [Name of defendant] has employed [name of plaintiff] and a [male/female] employee in jobs requiring substantially equal skill, effort, and responsibility;

Third: The two jobs are performed under similar working conditions.

Fourth: [Name of defendant] paid [name of plaintiff] a lower wage than the similarly situated [male/female] employee.

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

[The parties have agreed that [name of defendant] is an employer subject to the Equal Pay Act's provisions. You should consider that a proven fact.]

For the second element, you must consider whether [name of plaintiff]'s job required substantially equal skill, effort, and responsibility as the [male/female] employee's job. You should compare the jobs — not the individual employees holding those jobs. The two jobs do not have to be identical. Rather, the law requires proof that the two jobs be "substantially equal" in skill, effort, and responsibility. Insignificant or trivial differences can be disregarded. The important comparison is the two jobs' actual work or performance requirements — not the job titles, classifications, or descriptions.

To decide whether the jobs require substantially equal "skill," you should consider factors such as the level of education, experience, training, and ability required to perform the two jobs.

Remember—you are comparing jobs, not employees, so the fact that the [male/female] employee has a qualification that [name of plaintiff] does not have is only relevant if that qualification is necessary for the [male/female] employee's job.

To decide whether the jobs require substantially equal "effort," you should compare the amount of physical and mental exertion needed to perform each job. You should weigh duties that result in mental or physical fatigue and emotional stress, or factors that alleviate fatigue and stress, to assess the relative effort involved. Equal effort does not mean that employees must use effort in the same way. If there is no real difference in the amount or degree of effort it takes to perform each job, the jobs require equal effort. But if one job requires additional tasks that take more time and effort, the two jobs do not require substantially equal effort.

To decide whether the jobs involve substantially equal "responsibility," you should consider the degree of accountability that each job requires. You may consider factors such as:

(a) whether the employees are expected to direct or supervise the work of others;

(b) whether the employees are authorized to represent [name of defendant] in dealing with customers, suppliers, or other third parties; and

(c) the potential consequences to [name of defendant] of inadequate or improper performance of the jobs [, which may include possible damage to valuable equipment, possible loss of business or productivity, and the possibility of incurring legal liability to third parties].

For the third element, [name of plaintiff] must prove that the jobs

are performed under similar working conditions. Note that the test here is whether the working conditions are "similar" — they do not need to be substantially equal. To decide whether relative working conditions are similar, you should consider the physical surroundings or the environment in which the work is performed, including the elements to which employees may be exposed. You should also consider travel requirements as well as any work hazards, including the frequency and severity of any risks of injury.

For the fourth element, [name of plaintiff] must prove that [name of defendant] paid [him/her] a lower wage than [his/her] [male/female] counterpart. To determine this, you should consider all forms of compensation including wages, salary, profit sharing, expense accounts, monthly minimums, bonuses, uniform-cleaning allowances, hotel accommodations, use of a company car, gasoline allowances, and fringe benefits.

[**Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

To establish [his/her/its] affirmative defense, [name of defendant] must prove by a preponderance of the evidence that the difference in the amount of pay between the jobs was not because of [name of plaintiff]'s sex but was the result of a [seniority system/merit system/system measuring earnings by quantity or quality of production/describe factor other than sex upon which [name of defendant] relies].

[Name of plaintiff] claims that the difference in pay was not the result of a [seniority system/merit system/system measuring earnings by quantity or quality of production/describe factor other than sex upon which [name of defendant] relies] and that [name of defendant]'s reason for the difference is only an excuse for paying higher wages to [men/women] for equal work.

If you find that [name of defendant] has established its affirmative defense, your verdict must be in favor of [name of defendant], and you

will not decide the issue of [name of plaintiff]'s damages. But if you find that [name of defendant] has not established its affirmative defense, you must decide the damages issue.]

[**No Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide the issue of [his/her] compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following element of damage, to the extent you find that [name of plaintiff] has proved it by a preponderance of the evidence, and no others: the amount of [name of plaintiff]'s lost compensation. [Name of plaintiff]'s lost compensation is the difference between the amount [name of defendant] should have paid [name of plaintiff] and the amount [name of defendant] actually paid [name of plaintiff]. Put another way, [name of plaintiff]'s lost compensation is the difference between [name of plaintiff]'s compensation and the [average] compensation of the [male/female] employee[s] in [a] substantially equal job[s].

[Name of plaintiff] is entitled to recover lost compensation from the date of your verdict back to no more than two years before [he/she] filed this lawsuit on [date of complaint] [, unless you find that [name of defendant] "willfully violated" the Equal Pay Act].

[If [name of defendant] knew that [his/her/its] conduct violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [name of defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard about whether the law prohibited [his/her/its] conduct, [his/her/its]

conduct was not willful. If you find that [name of defendant] wilfully violated the Equal Pay Act, then [name of plaintiff] is entitled to recover lost compensation from the date of your verdict back to no more than three years before [he/she] filed this lawsuit.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] and a member, or members, of the opposite sex have been employed by [name of defendant] in jobs requiring substantially equal skill, effort, and responsibility?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

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

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of plaintiff] was paid a lower wage than a member of the opposite sex doing equal work?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

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

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

[5. That [name of defendant] either knew or showed reckless disregard for whether [his/her/its] conduct was prohibited by the Equal Pay Act?

Answer Yes or No _____]

6. That [name of plaintiff] should be awarded damages for lost compensation?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Elements and Defenses

A. "Employer"

Pattern Instruction 4.13 does not define the term "employer," and the instruction presumes that the issue will not be disputed in most cases. In cases where there is a fact dispute that must be resolved to answer the question whether the defendant is an "employer" within the meaning of the Equal Pay Act (which is part of the Fair Labor Standards Act), the instructions and verdict form should be adapted. Under the FLSA, an "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). "Whether an individual falls within this definition does not depend on technical or 'isolated factors but rather on the circumstances of the whole activity." *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1160 (11th Cir. 2008) (internal quotation marks omitted). Pattern Instructions 4.26 and 4.27, *infra*, provide guidance on this issue.

B. The Burden-Shifting Framework

In an Equal Pay Act ("EPA") case, the plaintiff demonstrates a prima facie case by showing that an employer pays different wages to employees of opposite sexes for equal work on jobs requiring substantially equal skill, effort, and responsibility under similar conditions. *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1077-78 (11th Cir. 2003). If the employee presents a prima facie case, "the employer may avoid liability by proving by a preponderance of the evidence that the pay differences are based on '(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . any other factor other than sex.'" *Id.* at 1078 (quoting 29 U.S.C. § 206(d)(1)). "The burden to prove these affirmative defenses is heavy and must demonstrate that 'the factor of sex provided no basis for the wage differential.'" *Id.* (quoting *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995)).

"Once the employer's burden is met, the employee must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential." *Steger*, 318 F.3d at 1078 (quoting *Irby*, 44 F.3d at 954). "To rebut an employer's legitimate nondiscriminatory reasons for its adverse action, the employee must produce evidence which directly establishes discrimination or which permits the jury to reasonably disbelieve the employer's proffered reason." *Id.* at 1079. "Any believable evidence which demonstrates a genuine issue of fact regarding the truth of the employer's explanation may sustain the employee's burden of proof." *Id.* In other words, the plaintiff has a burden of *production* after the employer meets its burden, but the burden of *persuasion* does not shift back to the plaintiff.

This framework is workable for a summary judgment order, but it is not jury-friendly. Accordingly, Pattern Instruction 4.13 instructs that the plaintiff must prove the elements of the prima facie case. The instruction then instructs on the employer's burden (and calls it an affirmative defense) and provides a place for the jury to be instructed on the plaintiff's contention that the employer's reason for the difference was "only an excuse for paying higher wages to a member of the opposite sex for equal work."

C. Establishment

"Comparison" employees must work in the same "establishment" as the plaintiff. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994). "The term 'establishment' is defined by the Secretary of Labor as 'a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business.'" *Id.* at 591 (quoting 29 C.F.R. § 1620.9(a) (1993)). A single establishment can include operations at more than one physical location. *Id.* (citing *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53, 56 (5th Cir. 1975) (central control and administration of disparate job sites can support finding of single establishment)). However, courts presume that multiple offices are not a single establishment unless unusual circumstances are demonstrated. *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1017 (11th Cir. 1994); *see also* 29 C.F.R. § 1620.9(b) (2009) ("[U]nusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment. For example, a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions.").

Pattern Instruction 4.13 does not instruct on the "establishment" issue. If there is a jury question on this point, the instruction and verdict form should be modified accordingly.

D. Substantially Equal Skill, Effort and Responsibility

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

Pattern Instruction 4.13 breaks this inquiry into three parts: skill, effort, and responsibility.

E. Factors Other than Sex

Although an employer may not rely on a "general practice" as a factor other than sex, it may consider factors such as the "'unique characteristics of the same job; . . . an individual's *experience*, training or ability; or . . . special exigent circumstances connected with the business.'" *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (quoting *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988)); *accord Leatherwood v. Anna's Linen's Co.*, 384 F. App'x 853, 860 (11th Cir. 2010) (per curiam) (explaining that exigent circumstances include understaffing and the need to lure a new employee from a competitor).

II. Remedies

"For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of [the Equal Pay Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the Fair Labor Standards Act]." 29 U.S.C. § 206(d)(3).

A. Amount of Damages

The measure of damages is the difference between the plaintiff's compensation and the compensation of the employees of the opposite sex who worked in substantially equal jobs. Where there is more than one employee of the opposite sex who worked in substantially equal jobs, the damages can be calculated by calculating the difference between the plaintiff's salary and the average salary paid to the workers of the opposite sex. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992).

B. Willful Violations

The statute of limitations for Equal Pay Act suits is two years but is increased to three years for "willful" violations. 29 U.S.C. § 255(a); *accord Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1162 (11th Cir. 2008). To prove willfulness, "the employee must prove by a preponderance of the evidence that his employer either knew that its conduct was prohibited by the [EPA] or showed reckless disregard about whether it was." *Id.* at 1162-63 (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). The question whether an employer willfully violated the EPA is a jury question. *Id.* at 1163.

Pattern Instruction 4.13 includes a willfulness instruction, which is to be used in cases where there is a dispute as to whether the employer willfully violated the EPA.

C. Liquidated Damages

When the jury assesses compensatory damages for a violation of the EPA, the court must generally add an award of liquidated damages in the same amount. 29 U.S.C. § 216(b); *accord Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1163 (11th Cir. 2008). There is a good faith defense: if the employer shows "to the satisfaction of the court" that the acts or omissions giving rise to the violation were in good faith and that the employer had reasonable grounds for believing that its act or omission was not a violation of the EPA, then "the court may, in its sound discretion," reduce or eliminate liquidated damages. 29 U.S.C. § 260. "The employer bears the burden of establishing both the subjective and objective components of that good faith defense against liquidated damages." *Alvarez Perez*, 515 F.3d at 1163. The good faith defense must be decided by the judge *unless* the jury finds that the employer acted willfully. *Id.* If the jury finds that the employer acted willfully, then the court cannot find that the employer acted in good faith, and the court must award liquidated damages. *Id.* at 1166.

D. Attorney's Fees and Costs

Section 216(b) of the Fair Labor Standards Act is incorporated into the Equal Pay Act, and therefore "the court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b).

E. Prejudgment Interest

The court cannot award both liquidated damages and prejudgment interest because such an award would constitute double compensation. *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715 (1945)).

4.14 Fair Labor Standards Act — 29 U.S.C. §§ 201 *et seq.*

In this case, [name of plaintiff] claims that [name of defendant] did not pay [name of plaintiff] the [minimum wage/overtime pay] required by the federal Fair Labor Standards Act, also known as the FLSA.

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was an employee of [name of defendant] and was [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or in the production of goods for commerce]; and

Second: [Name of defendant] failed to pay [name of plaintiff] the [minimum wage/overtime pay] required by law.

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

For the first element, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] was an employee [engaged in commerce or in the production of goods for commerce/employed by an enterprise engaged in commerce or in the production of goods for commerce].

The term "commerce" has a very broad meaning and includes any trade, transportation, transmission, or communication between any place within a state and any place outside that state. [Name of plaintiff] was engaged in the "production of goods" if [he/she] was employed in producing, manufacturing, mining, handling, or transporting goods, or in any other manner worked on goods or any closely related process or occupation directly essential to the production of goods. [An "enterprise engaged in commerce or the production of goods for commerce" means a business that has employees engaged in commerce or the production of commercial goods for commerce and has annual gross sales of at least $500,000.]

[**Minimum wage claim:** The minimum wage required by the FLSA during the period involved in this case was $ [minimum wage] per hour. [To determine whether an employer has paid the minimum wage, it is entitled to a credit for the reasonable costs of furnishing certain non-cash items to [name of plaintiff] [unless those costs are excluded from [name of plaintiff]'s wages under the terms of a union contract that applies to [name of plaintiff]], such as meals and lodging for the employee's benefit, and the employee voluntarily accepts them.]

[**Overtime claim:** The FLSA requires an employer to pay an employee at least one-and-one-half times the employee's "regular rate" for time worked over 40 hours in a workweek. Put another way, if an employee works more than 40 hours in one workweek, the employer must pay the employee the overtime rate of 1.5 times the regular rate for all time worked after the first 40 hours. This is commonly known as time-and-a-half pay for overtime work.]

[The employee's regular rate for one week is the basis for calculating any overtime pay due to the employee. The "regular rate" for a week is determined by dividing the total wages paid for the week by [40/the total number of hours [name of plaintiff]'s weekly salary was intended to compensate]. To calculate how much overtime pay was owed to [name of plaintiff] for a certain week, subtract 40 from the total number of hours [he/she] worked and multiply the difference by the overtime rate. [Name of defendant] failed to pay [name of plaintiff] the required overtime pay if [he/she/it] paid [him/her] less than that amount.]

[**Exemption:** In this case, [name of defendant] claims that [he/she/it] is exempt from the FSLA's overtime provisions. To establish that [he/she/it] is exempt, [name of defendant] must prove each of the following facts by a preponderance of the evidence: [List essential elements of the claimed exemption].

If you find that [name of defendant] is exempt, you will not decide the issue of [name of plaintiff]'s damages. But if you find that [name of defendant] is not exempt, you must decide the issue of [name of plaintiff]'s damages.]

The amount of damages is the difference between the amount [name of plaintiff] should have been paid and the amount [he/she] was actually paid. [Name of plaintiff] is entitled to recover lost wages from the date of your verdict back to no more than two years before [he/she] filed this lawsuit [date of complaint] — unless you find that the employer either knew or showed reckless disregard for whether the FSLA prohibited its conduct. If you find that the employer knew or showed reckless disregard for whether the FSLA prohibited its conduct, then [name of plaintiff] is entitled to recover lost wages from date of your verdict back to no more than three years before [he/she] filed this lawsuit.

[**Inadequate Records:** The law requires an employer to keep records of how many hours [his/her/its] employees work and the amount they are paid. In this case, [name of plaintiff] claims that [name of defendant] failed to keep and maintain adequate records of [his/her] hours and pay. [Name of plaintiff] also claims that [name of defendant]'s failure to keep and maintain adequate records has made it difficult for [name of plaintiff] to prove the exact amount of [his/her] claim.

If you find that [name of defendant] failed to keep adequate time and pay records for [name of plaintiff] and that [name of plaintiff] performed work for which [he/she] should have been paid, [name of plaintiff] may recover a reasonable estimation of the amount of [his/her] damages. But to recover this amount, [name of plaintiff] must prove by a preponderance of the evidence a reasonable estimation of the amount and extent of the work for which [he/she] seeks pay.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] was an employee of [name of defendant] and was [engaged in commerce or in the production of goods for commerce/employed by an enterprise engaged in commerce or in the production of commercial goods]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

2. That [name of defendant] failed to pay [name of plaintiff] the [minimum wage/overtime pay] required by law?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[3. That [name of plaintiff] was exempt from the Fair Labor Standards Act as an [describe pertinent exemption, e.g., “administrative,” “executive”] employee?

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

[4. That [name of defendant] knew or showed reckless disregard for whether the FSLA prohibited its conduct?

Answer Yes or No _____]

5. That [name of plaintiff] should be awarded damages?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

The Fair Labor Standards Act ("FLSA") is found at 29 U.S.C. § 201 *et seq*. Pattern Instruction 4.14 is intended to be used in cases where the plaintiff alleges that the defendant employer failed to pay the minimum wage or overtime pay required by the FLSA. Pattern Instruction 4.14 contains bracketed instructions for each type of FLSA claim.

I. Elements and Defenses

A. "Employee"

Pattern Instruction 4.14 instructs that the plaintiff must have been an employee of the defendant. For cases in which this issue is disputed, the instruction and verdict form should be adapted accordingly. For pattern instructions concerning issues of joint employers or independent contractors, please see Pattern Instructions 4.24 and 4.25, *infra*.

The employee must also be "engaged in commerce" within the meaning of the FLSA or "employed by an enterprise engaged in commerce." For a discussion of the "engaged in commerce" requirement, please see *Martinez v. Palace*, 414 F. App'x 243 (11th Cir. 2011) (per curiam) (finding that a cook at a local restaurant in Alabama was not "engaged in commerce" within the meaning of the FLSA).

B. Amount of Work Performed: Inaccurate or Inadequate Employer Records

When an employer's records are "inaccurate or inadequate and the employee cannot offer convincing substitutes," then an employee has carried his burden of proving that he has performed work for which he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded by statute on other grounds as stated in Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293-94 (D.C. Cir. 1972). "The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from

the employee's evidence." *Id*. at 687-88.

C. Regular Rate of Pay

When an employee is compensated solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours the salary is intended to compensate. *Rodriguez v. Farm Stores Grocery, Inc*., 518 F.3d 1259, 1268 (11th Cir. 2008). For overtime claims involving an employee who is paid a constant weekly salary for fluctuating hours, it may be necessary to modify the instruction so that the jury is instructed on the "fluctuating workweek method" for calculating damages. *See generally Lamonica v. Safe Hurricane Shutters, Inc.*, No. 11-15743, 2013 WL 811906 (Mar. 6, 2013); *see also* 29 C.F.R. § 778.114 (explaining how to use the fluctuating workweek method).

D. Exemptions

Pattern Instruction 4.14 leaves it to the court to fashion an instruction regarding the elements of a claimed exemption. The most common exemptions from the overtime pay requirement exist for employees in a "bona fide executive, administrative, or professional capacity" as defined by regulations of the Secretary. 29 U.S.C. § 213(a)(1). The elements of the exemptions may be found at 29 C.F.R. § 541.1 *et seq*.

In a suit under the FLSA, the employer carries the burden of proving an overtime pay exemption. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004) (per curiam).

II. Remedies

A. Public Employees

Pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., a public employee working overtime has the choice to be reimbursed either in the form of wages or compensatory time. 29 U.S.C. § 207(a), (o). A public employer may only substitute compensatory compensation for overtime pay pursuant to a collective bargaining agreement or agreement between the employer and employee if there is no applicable collective bargaining agreement. 29 U.S.C. § 207(o)(2)(A); *Chesser v. Sparks* 248 F.3d 1117, 1120 n.1 (11th Cir. 2001).

B. Liquidated Damages, Good Faith and Willful Violations

The FLSA provides for liquidated damages and states that such damages shall be paid unless the "employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act," in which case

"the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216" of the FLSA. 29 U.S.C. § 260. Under the plain language of the statute, this is a question for the court to determine not the jury. Thus, the court and the jury answer what is essentially the same question for two different purposes. The willfulness or good faith question is answered first by the jury to determine the period of limitations and then, if there is a verdict for the employee, again by the judge to determine whether to award liquidated damages. *Morgan v. Family Dollar Stores, Inc*. 551 F.3d 1233, 1282 (11th Cir. 2008).

When the jury finds an employer has violated the FLSA and assesses compensatory damages, the district court generally must add an award of liquidated damages in an equal amount. 29 U.S.C. § 216(b) ("Any employer who violates the provisions of ... section 207 of this title shall be liable to the employee or employees affected in the amount of ... their unpaid overtime compensation ... and in an additional equal amount as liquidated damages."); *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc*., 515 F.3d 1150, 1163 (11th Cir. 2008). However, the district court has discretion to reduce or deny liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." *Morgan*, 551 F.3d at 1282(alteration in original) (internal quotation marks omitted); *see also* 29 U.S.C. § 260. A district court must find that an employer acted in good faith in violating the FLSA before it may award less than the full amount of liquidated damages. *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987). If the jury finds that the employer acted willfully, however, then the court cannot find that the employer acted in good faith, and the court must award liquidated damages. A jury's finding that the employer acted willfully precludes the court from finding that the employer acted in good faith when it decides the liquidated damages question. *Alvarez Perez*, 515 F.3d at 1166.

The statute of limitations for a claim seeking unpaid overtime wages under the FLSA is generally two years. "But if the claim is one 'arising out of a willful violation,' the statute of limitations is extended to three years." *Morgan*, 551 F.3d at 1280 (quoting 29 U.S.C. § 255(a)).

To prove willfulness and therefore obtain the benefit of the three year statute of limitations, an employee must establish that the employer "knew, or showed reckless disregard for, the fact that its conduct was forbidden by the FLSA." *Morgan*, 551 F.3d at 1283.

4.15 Family and Medical Leave Act —Retaliation Claims — 29 U.S.C. §§ 2601 – 2654

In this case, [name of plaintiff] claims that [name of defendant] violated a federal law called the Family and Medical Leave Act, also known as the FMLA, by [describe challenged employment action] because [describe protected activity]. [Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

Under the FMLA, an eligible employee may take up to 12 weeks of leave during any 12-month period for [the employee's own serious health condition/the birth, placement or adoption of a child/the care of a spouse, child, or parent who has a serious health condition/active-duty orders/the care of a covered service member]. This leave is called FMLA leave. It is unlawful for an employer to take action against an employee because the employee exercises [his/her] FMLA rights. The FMLA does not require an employer to pay an employee while on FMLA leave.

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was employed by [name of defendant];

Second: [Name of plaintiff] was eligible for FMLA leave;

Third: [Name of plaintiff] was entitled to FMLA leave;

Fourth: [Name of plaintiff] [describe protected activity];

Fifth: [Name of defendant] [describe challenged employment action];

Sixth: [Describe challenged employment action] was an "adverse employment action;" and

Seventh: [Describe protected activity] was a motivating factor that prompted [name of defendant] to take that action.

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

[The parties have agreed that [name of plaintiff] was employed by [name of defendant]. You should consider that a proven fact.]

For the second element, [name of plaintiff] was "eligible" for FMLA leave if:

(a) [name of plaintiff] worked for [name of defendant] for at least 12 months before the date any FMLA leave was to begin, and

(b) [name of plaintiff] worked for [name of defendant] for at least 1,250 hours during the 12-month period before the date any FMLA leave was to begin.

For the third element, [name of plaintiff] was "entitled" to FMLA leave if:

(a) [Name of plaintiff] had an FMLA-qualifying reason, and

(b) [Name of plaintiff] gave [name of defendant] proper notice of [his/her] need for leave.

[A serious health condition that prevented [name of plaintiff] from performing the functions of [his/her] job/The birth, placement or adoption of a child/The care of a spouse, child, or parent who has a serious health condition/Following active-duty orders/The care of a covered service member] is an "FMLA-qualifying reason."

[A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical facility, or continuing treatment by a healthcare provider. Ordinarily, unless complications arise, the

common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, and other similar conditions do not meet the definition of a "serious health condition" and do not qualify for FMLA leave.]

[Name of plaintiff] "gave proper notice" to [name of defendant] of [his/her] need for FMLA leave if [he/she] notified [name of defendant] of the need to take FMLA leave in a timely manner and in a way that alerted [name of defendant] that [his/her] absence might qualify as FMLA leave— even if [name of plaintiff] did not expressly mention the FMLA.

If [name of plaintiff] knew of the need for leave more than 30 days before the leave was to begin, [he/she] was required to give [name of defendant] notice at least 30 days before the leave was to begin. If [name of plaintiff] knew of the need for leave less than 30 days before the leave was to begin, [he/she] was required to give Defendant notice as soon as was reasonably possible.

For the fourth element, you must decide whether [name of plaintiff] [describe protected activity]. If you find that [name of plaintiff] [describe protected activity], then you have found that [he/she] engaged in "FMLA-protected activity."

For the fifth element, you must decide whether [name of defendant] [describe challenged employment action].

For the sixth element, you must decide whether [describe challenged employment action] is an "adverse employment action." An "adverse employment action" is any type of action that would have made a reasonable employee reluctant to exercise FMLA rights. Put another way, if a reasonable employee would be less likely to exercise [his/her] FMLA rights because [he/she] knew that [name of defendant] would [describe adverse employment action], then that action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to exercise FMLA rights, it is not an adverse employment action.

For the seventh element, you must decide whether [name of plaintiff]'s FMLA-protected activity was a "motivating factor" in [name of defendant]'s decision. To prove that [name of plaintiff]'s FMLA-protected activity was a motivating factor in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [his/her] FMLA-protected activity was the only reason for [name of defendant]'s actions. It is enough if [name of plaintiff] proves that [his/her] FMLA-protected activity influenced [name of defendant]'s decision. If [name of plaintiff]'s FMLA-protected activity made a difference in [name of defendant]'s decision, you can find that it was a motivating factor in the decision.

To determine that [name of defendant] [describe adverse employment action] because of [name of plaintiff]'s FMLA-protected activity, you must decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had not engaged in FMLA-protected activity but everything else had been the same.

[Name of defendant] claims that [he/she/it] did not [describe adverse employment action] because of [name of plaintiff]'s [describe protected activity] and that [he/she/it] took the action for [another reason/other reasons]. An employer may not take an adverse action against an employee because of the employee's FMLA-protected activity. But an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision, and you find that [name of defendant] did not make [his/her/its] decision because of [name of plaintiff]'s FMLA-protected activity, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [his/her] FMLA-protected activity was a motivating factor in [name of defendant]'s decision to [describe adverse employment action]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]'s FMLA-protected activity was a motivating factor in [name of

defendant]'s decision to [describe adverse employment action], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[**Cat's Paw (if applicable, see annotations):** [Name of plaintiff] claims that [name of defendant]'s decision to [describe adverse employment action] [name of plaintiff] was based on the recommendation of [name of plaintiff]'s supervisor and that [name of plaintiff]'s [describe protected activity] was a motivating factor in the supervisor's recommendation. If [name of plaintiff]'s supervisor recommended that [name of defendant] [describe challenged employment action] and [name of plaintiff]'s FMLA-protected activity motivated the supervisor's recommendation, the supervisor's recommendation can be a "motivating factor" behind [name of defendant]'s employment decision — even if the supervisor did not make the ultimate decision to [describe challenged employment action].

But [name of plaintiff]'s FMLA-protected activity can be a motivating factor in [name of defendant]'s decision only if you find that [name of plaintiff] has proved each of the following by a preponderance of the evidence:

(a) the supervisor acted with the intent to make [name of defendant] [describe challenged employment action], which means that the supervisor wanted [name of defendant] to [describe challenged employment action], or the supervisor believed that [his/her] actions would cause [name of defendant] to [describe challenged employment action];

(b) [name of plaintiff]'s FMLA-protected activity was a motivating factor behind the supervisor's actions; and

(c) there was a direct relationship between the supervisor's actions and [describe challenged employment action].]

[**Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

It is lawful for an employer to [describe challenged employment action] for reasons unrelated to an employee's FMLA-protected activity. To establish its affirmative defense, [name of defendant] must prove by a preponderance of the evidence that [he/she/it] [describe challenged employment action] for reasons that were unrelated to [name of plaintiff]'s [describe protected activity]. Put another way, [name of defendant] must prove that [he/she/it] would have [describe challenged employment action] even without the FMLA-protected activity.

If you find that [name of defendant] established [his/her/its] affirmative defense, you will not decide the issue of [name of plaintiff]'s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Without Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide the issue of [name of plaintiff]'s damages.]

If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide the issue of [name of plaintiff]'s damages.

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of [describe challenged employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

If [name of plaintiff] proved that [he/she] lost wages or benefits because of [name of defendant]'s FMLA violation, then [name of plaintiff] may recover net lost wages and benefits from the date of [describe challenged employment action] to the date of your verdict.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of [name of plaintiff]'s claim for lost pay, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] was employed by [name of defendant]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your

answer is “Yes,” go to the next question.

2. That [name of plaintiff] was eligible for FMLA leave?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

3. That [name of plaintiff] was entitled to FMLA leave?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

4. That [name of plaintiff] [describe protected activity]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

5. That [name of defendant] [describe challenged employment action]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

6. That [challenged employment action] was an “adverse employment action?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

7. That [describe protected activity] was a motivating factor that prompted [name of defendant] to [describe challenged employment action]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[8. That [name of defendant] [describe challenged employment action] for reasons that were unrelated to [name of plaintiff]’s [describe protected activity]?

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

9. That [name of plaintiff] should be awarded damages?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

So Say We All.

_____
Foreperson's Signature

Date: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

The Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, provides for several causes of action, including an interference claim, in which an employee asserts that his employer denied or otherwise interfered with his rights under the FMLA, and a retaliation claim, in which an employee asserts that his employer took an adverse employment action against him because he took an action protected by the FMLA. Pattern Instruction 4.15 is intended to be used for FMLA retaliation claims where the alleged retaliation is based on the exercise of FMLA rights. *See* 29 C.F.R. § 825.220(c) ("The Act's prohibition against 'interference' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights."). Pattern Instruction 4.15 may be modified for cases in which a plaintiff alleges that his former employer refused to rehire him based on his past use of FMLA leave. *See Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1307 (11th Cir. 2001) (allowing FMLA retaliation claim based on failure to rehire).

Pattern Instruction 4.15 is not intended to be used for FMLA interference cases; for such claims, please refer to Pattern Instruction 4.16., *infra.* If a plaintiff brings alternative claims for FMLA interference and FMLA retaliation based on the same adverse employment action, Pattern Instructions 4.15 and 4.16 may be merged, though the court should be careful to explain the different causation standards and should be aware of the differences in the availability of a causation affirmative defense. For a discussion of the causation standards and affirmative defense availability, please see annotation § II(H) to Pattern Instruction 4.15, *infra* and annotation § III(B) to Pattern Instruction 4.16, *infra*.

Pattern Instruction 4.15 is also not intended to be used for FMLA retaliation cases where the alleged retaliation is based on an employee's complaints about or opposition to practices made unlawful under the FMLA, *see* 29 U.S.C. § 2615(a)(2), or an employee's participation in an inquiry or proceeding under the FMLA, *see* 29 U.S.C. § 2615(b). For such claims, Pattern Instruction 4.15 may be used as a starting point, but the court should carefully consider whether to charge the "eligible for" and "entitled to" elements. The

court should also carefully consider whether "motivating factor" or "but for" causation is required to prove such claims.

II. Elements and Defenses

The definitions of the various terms given in this instruction were derived primarily from 29 U.S.C. § 2611 and 29 C.F.R. § 825.800.

A. "Employed By"

If there is a dispute as to whether the plaintiff was employed by the defendant, please refer to miscellaneous charges 4.24, 4.25, 4.26, and 4.27 for guidance on instructions related to this issue.

B. "Eligible for" FMLA Leave

To establish a claim of retaliation based on the exercise or attempted exercise of FMLA rights, the plaintiff must establish that he was eligible for FMLA leave at the time the requested leave was to be taken. *See Walker v. Elmore Cnty. Bd. of Educ.*, 379 F.3d 1249, 1253 (11th Cir. 2004) ("[T]he statute does not protect an attempt to exercise a right that is not provided by FMLA, i.e., the right to leave before one becomes eligible therefor."). Accordingly, 4.15 charges that the plaintiff must be "eligible for" FMLA leave.

A "pre-eligible" employee may state a retaliation claim based on retaliation for a request for "post-eligibility" FMLA leave. *Pereda v. Brookdale Senior Living Cmtys, Inc.*, 666 F.3d 1269, 1275 (11th Cir. 2012) (holding that "pre-eligible request for post-eligible leave is protected activity" under the FMLA).

C. "Entitled to" FMLA Leave

To establish a claim of retaliation based on the exercise or attempted exercise of FMLA rights, the plaintiff must establish that the plaintiff was entitled to FMLA leave. *See Russell v. N. Broward Hosp.*, 346 F.3d 1335, 1340 (11th Cir. 2003) ("Interference and retaliation claims both require the employee to establish a 'serious health condition' . . . ."). Therefore, Pattern Instruction 4.15 charges that a plaintiff must be "entitled to" FMLA leave.

D. "Minor Child"

The FMLA provides leave for an employee to care for a spouse, minor child, disabled child, or parent suffering from a serious health condition. 29 U.S.C. §§ 2611(12), 2612(a)(1)(C). Pattern Instruction 4.15 does not define "minor child." If there is a dispute on this issue, the charge should be adapted accordingly. The definition of son or daughter

includes a biological child, an adopted child, a foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis. 29 U.S.C. § 2611(12).

E. Covered Service Member/Active Duty Orders

On October 28, 2009, the FMLA was amended to afford leave to care for family of a "covered servicemember" or "[b]ecause of any qualifying exigency . . . arising out of the fact that [a] spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces." 29 U.S.C. § 2612(a)(1)(E), (3) (amended by Pub. L. 111-84, § 565 (Oct. 28, 2009)). Pattern Instruction 4.15 instructs that that "following active duty orders" and "the care of a covered service member" is an "FMLA-qualifying reason" for leave, but the instruction does not define the phrases "following active duty orders" and "covered service members." In cases where there is a dispute about these issues, the charge should be adapted accordingly.

F. Notice of Need for FMLA Leave

An employee is generally required to give proper notice of the employee's need for FMLA leave. The amount of time an employee must give for notice to be proper depends on the reason for the leave. Where leave is based on an expected birth, planned medical treatment, or any other reason listed in 29 C.F.R. § 825.302(a), notice must be provided at least 30 days in advance, unless 30 days' notice is not practicable or the reason for the leave is not foreseeable, in which case notice must be given as soon as practicable. 29 U.S.C. § 2612(e)(1); 29 C.F.R. §§ 825.302(a), 825.303(a). Where leave is requested due to a foreseeable, qualifying exigency arising out of a family member's active duty status or notification of an impending call or order to covered active duty, "the employee shall provide such notice to the employer as is reasonable and practicable." 29 U.S.C. § 2612(e)(3). Pattern Instruction 4.15 provides bracketed charges regarding the sufficiency of notice corresponding to these grounds for requesting FMLA leave.

G. Adverse Employment Action

Pattern Instruction 4.15 includes an optional "adverse employment action" charge to be used when there is a dispute as to whether the employment action is actionable. The charge incorporates the Supreme Court's definition of adverse employment action in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 (2006), which provides that an adverse employment action is action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks omitted); *see also Breneisen v. Motorola, Inc.*, 512 F.3d 972, 979 (7th Cir. 2008) (applying *Burlington Northern* to an FMLA retaliation claim).

H. Causation

The FMLA makes it unlawful for an employer to discriminate against an individual "for opposing any practice made unlawful" by the FMLA, 29 U.S.C. § 2615(a)(2), and it also makes it unlawful for any person to discriminate against an individual "because" the individual participated in an inquiry or hearing under the FMLA, 29 U.S.C. § 2615(b).

Pattern Instruction 4.15 instructs that the jury must find that the plaintiff's protected activity was a "motivating factor" in the defendant's decision. This language tracks the language of Pattern Instruction 4.5, *supra*, but this issue may need to be revisited in the FMLA context light of the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). In *Gross*, the Supreme Court held that to prove discrimination under the Age Discrimination in Employment Act ("ADEA"), the plaintiff must establish "but for" causation and may not prevail "by showing that age was simply a motivating factor." *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349-51 (2009). The rationale for this decision: the ADEA's statutory text makes it unlawful for an employer to discriminate against an individual "because of" the individual's age. *Id.* at 2350. Only Title VII was amended to allow for employer liability where discrimination was a "'was a motivating factor for any employment practice, even though other factors also motivated the practice'" *Id.* n.3 (quoting 42 U.S.C. § 2000e-2(m)). Also, "[b]ecause an ADEA plaintiff must establish 'but for' causality, no 'same decision' affirmative defense can exist: the employer either acted 'because of' the plaintiff's age or it did not." *Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010). The FMLA makes it unlawful for an employer to discriminate against an individual "for opposing any practice made unlawful" by the FMLA, 29 U.S.C. § 2615(a)(2), and it also makes it unlawful for any person to discriminate against an individual "because" the individual participated in an inquiry or hearing under the FMLA, 29 U.S.C. § 2615(b). The "motivating factor" language of Title VII § 2000e-2(m) was not inserted into the FMLA.

At the time of this publication, neither the Supreme Court nor the Eleventh Circuit had addressed the question whether the reasoning of *Gross* applies to claims under the FMLA. The Sixth Circuit has addressed the issue and concluded that the "motivating factor" causation standard and mixed motive defense continue to apply in a FMLA retaliation case. *Hunter v. Valley View Schs.*, 579 F.3d 688, 691-92 (6th Cir. 2009). After *Gross*, the Eleventh Circuit did state that a plaintiff must show that the adverse employment action was "motivated by" impermissible animus to prevail on an FMLA retaliation claim, but the court did not explain whether it was applying a "motivating factor" or "but for" causation standard. *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1243 (11th Cir. 2010).

Because *Gross* does not squarely apply to the FMLA and because the issue had not been decided by the Supreme Court or the Eleventh Circuit prior to this publication, the Committee did not recommend changing the "motivating factor" language of Pattern

Instruction 4.15. The Committee does, however, recommend that district courts review this issue prior to instructing a jury on an FMLA retaliation claim. If the district court concludes that a "because of" standard applies, then the following charge should be used:

In this case, [name of plaintiff] claims that [name of defendant] violated a federal law called the Family and Medical Leave Act, also known as the FMLA, by [describe challenged employment action] because [describe protected activity]. [Name of defendant] denies [name of plaintiff]'s claims and asserts that [describe the defendant's defense].

Under the FMLA, an eligible employee may take up to 12 weeks of leave during any 12-month period for [a serious health condition/the birth or adoption of a child/the care of a spouse, child, or parent who has a serious health condition/active-duty orders/the care of a covered service member]. This leave is called FMLA leave. It is unlawful for an employer to take action against an employee because the employee exercises [his/her] FMLA rights. The FMLA does not require an employer to pay an employee while on FMLA leave.

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was employed by [name of defendant];
Second: [Name of plaintiff] was eligible for FMLA leave;
Third: [Name of plaintiff] was entitled to FMLA leave;
Fourth: [Name of plaintiff] [describe protected activity];
Fifth: [Name of defendant] [described challenged employment action];
Sixth: [Describe challenged employment action] was an "adverse employment action;" and
Seventh: [Name of defendant] took that action because of [name of plaintiff's] [describe protected activity].

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

[The parties have agreed that [name of plaintiff] was employed by [name of defendant]. You should consider that a proven fact.]

For the second element, [name of plaintiff] was "eligible" for FMLA leave if:

(a) [name of plaintiff] worked for [name of defendant] for at least 12 months before the date any FMLA leave was to begin, and
(b) [name of plaintiff] worked for [name of defendant] for at least 1,250 hours during the 12-month period before the date any FMLA leave was to begin.

For the third element, [name of plaintiff] was "entitled" to FMLA leave if:

(a) [Name of plaintiff] had an FMLA-qualifying reason, and

(b) [Name of plaintiff] gave [name of defendant] proper notice of [his/her] need for leave.

[A serious health condition that prevented [name of plaintiff] from performing the functions of [his/her] job/The birth or adoption of a child/The care of a spouse, child, or parent who has a serious health condition/Following active-duty orders/The care of a covered service member] is an "FMLA-qualifying reason."

[A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical facility, or continuing treatment by a healthcare provider. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, and other similar conditions do not meet the definition of a "serious health condition" and do not qualify for FMLA leave.]

[Name of plaintiff] "gave proper notice" to [name of defendant] of [his/her] need for FMLA leave if [he/she] notified [name of defendant] of the need to take FMLA leave in a timely manner and in a way that alerted [name of defendant] that [his/her] absence might qualify as an FMLA leave— even if [name of plaintiff] did not expressly mention the FMLA.

If [name of plaintiff] knew of the need for leave more than 30 days before the leave was to begin, [he/she] was required to give [name of defendant] notice at least 30 days before the leave was to begin. If [name of plaintiff] knew of the need for leave less than 30 days before the leave was to begin, [he/she] was required to give Defendant notice as soon as was reasonably possible.

For the fourth element, you must decide whether [name of plaintiff] [describe protected activity]. If you find that [name of plaintiff] [describe protected activity], then you have found that [he/she] engaged in "FMLA-protected activity."

For the fifth element, you must decide whether [name of defendant] [describe challenged employment action].

For the sixth element, you must decide whether [describe challenged employment action] is an "adverse employment action." An "adverse employment action" is any type of action that would have made a reasonable employee reluctant to exercise FMLA rights. Put another way, if a reasonable employee would be less likely to exercise [his/her] FMLA rights because [he/she] knew that [name of defendant] would [describe adverse employment action], then that action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to exercise FMLA rights, it is not an adverse employment action.

For the seventh element, you must decide whether [name of defendant] [describe

adverse employment action] because of [name of plaintiff]'s FMLA-protected activity. Put another way, you must decide whether [name of plaintiff]'s FMLA-protected activity was the main reason for [name of defendant]'s decision.

To determine that [name of defendant] [describe adverse employment action] because of [name of plaintiff]'s FMLA-protected activity, you must decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had not engaged in FMLA-protected activity but everything else had been the same.

[Name of defendant] claims that [he/she/it] did not [describe adverse employment action] because of [name of plaintiff]'s [describe protected activity] and that [he/she/it] took the action for [another reason/other reasons]. An employer may not take an adverse action against an employee because of the employee's FMLA-protected activity. But an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision, and you find that [name of defendant] did not make [his/her/its] decision because of [name of plaintiff]'s FMLA-protected activity, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

*[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [name of defendant]'s decision to [describe adverse employment action] was because of [name of plaintiff]'s FMLA-protected activity. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]'s [describe adverse employment action] was because of [name of plaintiff]'s FMLA-protected activity, you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] that [name of defendant] gave for the decision. If you do not believe the reason[s] that [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true retaliatory reasons for the decision.]*

If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide the issue of [name of plaintiff]'s damages.

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of [describe challenged employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

If [name of plaintiff] proved that [he/she] lost wages or benefits because of [name of

defendant]'s FMLA violation, then [name of plaintiff] may recover net lost wages and benefits from the date of [describe challenged employment action] to the date of your verdict.

*[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of [name of plaintiff]'s claim for lost pay, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.*

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

I. Pretext

The model instruction includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*.

J. Cat's Paw

The model instruction contains an optional cat's paw charge based on *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011). The Supreme Court in *Staub* applied the cat's paw theory to a claim under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq.*, which requires proof that protected military status "is a motivating factor in the employer's action." *Staub*, 131 S. Ct. at 1190-91 (quoting 38 U.S.C. § 4311(a)). Similarly, an FMLA retaliation claim requires proof that FMLA-protected conduct was a motivating factor for an adverse employment action. *Hunter*, 579 F.3d at 691-92. It follows that the cat's paw theory in *Staub* applies to FMLA retaliation claims under 29 U.S.C. § 2615(a)(2). See the annotations and comments following Pattern Instruction 4.5, *supra*, for more information

K. Health Plan Premiums

During an employee's FMLA leave, an employer must maintain any existing health

insurance coverage under a group health plan if the insurance would have been available had the employee not taken leave. 29 U.S.C. § 2614(c)(1); *see also* 29 C.F.R. § 825.800 (defining "group health plan"). The employer can recover the premium paid during the leave if the employee fails to return to work based on a voluntary choice rather than continued health problems or other circumstances beyond the employee's control. 29 U.S.C. § 2614(c)(2); 29 C.F.R. § 825.100(b). Should an employer seek to recover health plan premiums from an employee, additional instructions and special interrogatories may be appropriate.

L. Key Employee Defense

If an employee is salaried and among the highest paid ten percent of all of the employer's employees within a 75 mile radius, then the employer may refuse to restore a plaintiff to an equivalent position if it "is necessary to prevent substantial and grievous economic injury to the operations of the employer," notice is given to the employee, and if leave has commenced "the employee elects not to return to employment after receiving such notice." 29 U.S.C. § 2614(b). This is sometimes called the "key employee" defense. Pattern Instruction 4.15 does not include an instruction on this defense. If there is a fact dispute on this issue, the charge should be adapted. *See* 29 C.F.R. § 825.218.

III. Remedies

A prevailing plaintiff under FMLA is entitled to damages as set forth in 29 U.S.C. § 2617(a). The prevailing plaintiff can recover actual damages equal to the amount of "any wages, salary, employment benefits, or other compensation denied or lost" by reason of the employer's violation of FMLA. *Id.* § 2617(a)(1)(A)(i)(I). If the prevailing plaintiff incurred no such damages, the plaintiff can recover any actual monetary losses sustained as a direct result of the employer's violation of FMLA, such as the cost of providing care to an injured family member. *Id.* § 2617(a)(1)(A)(i)(II). That alternative measure of damages is limited to a sum equal to twelve weeks of the plaintiff's pay, or in a case involving leave to care for a servicemember under § 2612(a)(3), twenty-six weeks of the plaintiff's pay. *Id.* § 2617(a)(1)(A)(i)(II). Pattern Instruction 4.15 has bracketed alternative charges regarding the proper measure of damages.

"[T]he FMLA does not allow recovery for mental distress or the loss of job security." *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (per curiam). In addition, punitive damages are unavailable under FMLA. *See, e.g.*, *Farrell v. Tri-Cnty. Metro. Transp. Dist. of Or.*, 530 F.3d 1023, 1025 (9th Cir. 2008). Therefore, Pattern Instruction 4.15 does not include this category of damages.

An award of liquidated damages equal to the amount of actual damages and interest must be awarded unless the employer "proves to the satisfaction of the court" that the acts or omissions giving rise to the violation were in good faith and that the employer had

reasonable grounds for believing that such acts or omissions did not violate FMLA, in which case the court may, in its sound discretion, award no liquidated damages or award an amount not to exceed the amount allowable under the statute. 29 U.S.C. § 2617(a)(1)(A)(iii). The issue of whether to reduce an award of liquidated damages is a question for the judge, not the jury. *See, e.g.*, *Cooper v. Fulton Cnty., Ga.*, 458 F.3d 1282, 1287-88 (11th Cir. 2006) (affirming district court's award of liquidated damages).

While the FMLA does not expressly authorize a jury trial, the availability of a jury trial may be inferred from its legislative history referencing the Fair Labor Standards Act, which has been consistently interpreted to authorize jury trials. *See Frizzell v. Sw. Motor Freight*, 154 F.3d 641, 644 (6th Cir. 1998) (holding that a request for damages under FMLA triggers a statutory right to a jury trial). A jury trial is appropriate to decide the issues of back pay, whereas equitable issues such as reinstatement and front pay should be decided by the court. *See* 29 U.S.C. § 2617(a)(1)(B) (permitting a prevailing employee to recover "such equitable relief as may be appropriate, including employment, reinstatement, and promotion"); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 300 (4th Cir. 2009) ("Determinations of front pay are made by the trial court sitting in equity.").

4.16 Family and Medical Leave Act — Interference Claims (NEW) — 29 U.S.C. §§ 2601 – 2654

In this case, [name of plaintiff] claims that [he/she] was entitled to a leave of absence from work under a federal law called the Family and Medical Leave Act, also known as the FMLA, and that [name of defendant] interfered with, restrained, or denied [his/her] entitlement to a leave of absence.

Under the FMLA, an eligible employee may take up to 12 weeks of leave during any 12-month period for [the employee's own serious health condition/the birth, placement or adoption of a child/the care of a spouse, child, or parent who has a serious health condition/active-duty orders/the care of a covered service member]. This leave is called FMLA leave.

The FMLA also gives the employee, after [his/her] leave, the right to be restored by the employer to the position held when the leave began, or to be given an equivalent position. It is unlawful for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise any of these rights.

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was eligible for FMLA leave;

Second: [Name of plaintiff] was entitled to FMLA leave;

Third: [Name of plaintiff] gave [name of defendant] proper notice of [his/her] need for leave; and

Fourth: [Name of defendant] [describe interference, e.g., refused to allow leave, refused [name of plaintiff] reinstatement, discharged [name of plaintiff], failed to maintain benefits].

[In the verdict form that I will explain in a moment, you will be

asked to answer questions about these factual issues.]

For the first element, [name of plaintiff] was "eligible" for FMLA leave if:

(a) [name of plaintiff] worked for [name of defendant] for at least 12 months before the date any FMLA leave was to begin, and

(b) [name of plaintiff] worked for [name of defendant] for at least 1,250 hours during the 12-month period before the date any FMLA leave was to begin.

For the second element, [name of plaintiff] was "entitled" to FMLA leave if [he/she] had an FMLA-qualifying reason. [A serious health condition that prevented [name of plaintiff] from performing the functions of [his/her] job/The birth, placement or adoption of a child/The care of a spouse, child, or parent who has a serious health condition/Following active-duty orders/The care of a covered service member] is an "FMLA-qualifying reason."

[A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical facility, or continuing treatment by a healthcare provider. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, and other similar conditions do not meet the definition of a "serious health condition" and do not qualify for FMLA leave.]

For the third element, [name of plaintiff] "gave proper notice" to [name of defendant] of [his/her] need for FMLA leave if [he/she] notified [name of defendant] of the need to take FMLA leave in a timely manner and in a way that alerted [name of defendant] that [his/her] absence might qualify as FMLA leave— even if [name of plaintiff] did not expressly mention the FMLA.

If [name of plaintiff] knew of the need for leave more than 30 days

before the leave was to begin, [he/she] was required to give [name of defendant] notice at least 30 days before the leave was to begin. If [name of plaintiff] knew of the need for leave less than 30 days before the leave was to begin, [he/she] was required to give Defendant notice as soon as was reasonably possible.

For the fourth element, you must determine whether [name of defendant] [describe interference].

[**Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

It is lawful for an employer to [describe interference] for reasons unrelated to an employee's [FMLA leave/attempt to take FMLA leave]. To establish its affirmative defense, [name of defendant] must prove by a preponderance of the evidence that [he/she/it] [describe interference] for reasons that were unrelated to [name of plaintiff]'s [FMLA leave/attempt to take FMLA leave]. Put another way, [name of defendant] must prove that [he/she/it] would have [describe interference] even without the [FMLA leave/attempt to take FMLA leave].

If you find that [name of defendant] established [his/her/its] affirmative defense, you will not decide the issue of [name of plaintiff]'s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Without Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide the issue of [name of plaintiff]'s damages.]

The measure of damages for [name of plaintiff] is either lost wages and benefits or other expenses incurred because of [name of defendant]'s FMLA violation. [Name of plaintiff] can recover lost wages and benefits, or [he/she] can recover other expenses incurred because of [name of defendant]'s actions — but not both.]

If [name of plaintiff] proved that [he/she] lost wages or benefits

because of [name of defendant]'s FMLA violation, then [name of plaintiff] may recover net lost wages and benefits from the date of [describe interference] to the date of your verdict.

If you find that [name of plaintiff] did not directly lose pay or benefits because of [name of defendant]'s FMLA violation, then you may award [name of plaintiff] the actual monetary loss that directly resulted from [name of defendant]'s FMLA violation. This amount of damages cannot exceed [12/26] weeks of [name of plaintiff]'s wages or salary.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of [name of plaintiff's] claim for lost pay, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] was eligible for FMLA leave?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff] was entitled to FMLA leave?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of plaintiff] gave [name of defendant] proper notice of [his] [her] need for leave?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [name of defendant] [describe interference]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[5. That [name of defendant] [describe interference] for reasons that were unrelated to [name of plaintiff]'s [FMLA leave/attempt to take FMLA leave]?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

6. That [name of plaintiff] should be awarded damages?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Cause of Action

The Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, provides for several causes of action, including an interference claim, in which an employee asserts that his employer denied or otherwise interfered with his rights under the FMLA, and a retaliation claim, in which an employee asserts that his employer took an adverse employment action against him because he took an action protected by the FMLA.

Pattern Instruction 4.16 is intended to be used for FMLA interference claims. Pattern Instruction 4.16 is not intended to be used for FMLA retaliation cases; for such claims, please refer to Pattern Instruction 4.15., *supra*. If a plaintiff brings alternative claims for FMLA interference and FMLA retaliation based on the same adverse employment action, Pattern Instructions 4.15 and 4.16 may be merged, though the court

should be careful to explain the different causation standards and should be aware of the differences in the availability of a causation affirmative defense. For a discussion of the causation standards and affirmative defense availability, please see annotation § II(H) to Pattern Instruction 4.15, *supra*, and annotation § III(B) to Pattern Instruction 4.16, *infra*.

II. Distinction Between FMLA Interference and FMLA Retaliation Claims

To state an interference claim, the employee must show that his employer interfered with or denied him an FMLA benefit to which he was entitled. *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353-54 (11th Cir. 2000). The employee "does not have to allege that his employer intended to deny the right; the employer's motives are irrelevant." *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1208 (11th Cir. 2001). In contrast, an FMLA retaliation plaintiff must prove that his employer retaliated against him because he engaged in activity protected by the FMLA. *See Spakes v. Broward Cnty. Sheriff's Office*, 631 F.3d 1307, 1309-10 (11th Cir. 2011) (per curiam) (noting that an FMLA retaliation plaintiff has an increased burden of proving causal nexus that an interference plaintiff does not have).

III. Elements and Defenses

A. Elements Common to Interference and Retaliation Claims

To prevail on an FMLA interference claim or an FMLA retaliation claim, the plaintiff must be eligible for FMLA leave, be entitled for FMLA leave, and give the employer proper notice of the need for FMLA leave. For a discussion of these elements, please see the annotations and comments following Pattern Instruction 4.15, *supra*.

A "pre-eligible" employee may state an interference claim based on interference with "post-eligibility" FMLA leave. *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1275 (11th Cir. 2012) (holding that "a pre-eligible employee has a cause of action if an employer terminates her in order to avoid having to accommodate that employee with rightful FMLA leave rights once that employee becomes eligible").

B. "Lack of Causation" Affirmative Defense

To prove an FMLA interference claim, a plaintiff does not have to prove a "causal nexus" between the FMLA leave and the employer's action. *Spakes v. Broward Cnty. Sheriff's Office*, 631 F.3d 1307, 1309-10 (11th Cir. 2011). Rather, the plaintiff must prove "that he was denied a benefit to which he was entitled under the FMLA." *Id.* at 1309. "[T]he causal nexus element is the "increased burden" that a retaliation plaintiff faces that an interference plaintiff does not." *Id.* at 1310. Eleventh Circuit "cases make clear that a causal nexus is not an element of an interference claim, but that the employer can raise the lack of causation as an affirmative defense." *Id.* at 1310. Therefore, if the employee

alleges that the employer interfered with the employee's FMLA rights, the employer may prevail if it shows that the employer would have taken the same action—such as refusing to reinstate the employee following FMLA leave—even if the employee had not taken FMLA leave. *Id.; accord Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1241 (11th Cir. 2010); *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1208 (11th Cir. 2001) ("[I]f an employer can show that it refused to reinstate the employee for a reason wholly unrelated to the FMLA leave, the employer is not liable.").

IV. Remedies

For a discussion of the remedies available to a plaintiff who prevails on an FMLA claim, please see the annotations and comments following Pattern Instruction 4.15, *supra*.

4.17 Employee Claim against Employer and Union (*Vaca v. Sipes*)

In this case, [name of plaintiff] makes two claims. The first claim is that [name of plaintiff]'s employer discharged [name of plaintiff] without just cause in violation of the collective-bargaining agreement governing the terms and conditions of [his/her] employment.

The second claim is that [name of plaintiff]'s union breached its duty to fairly represent [name of plaintiff] as one of its members by failing to investigate or otherwise process [his/her] grievance against [his/her] employer under the collective-bargaining agreement's grievance procedure.

The law prohibits an employer from discharging an employee governed by a collective-bargaining agreement unless there is just cause to dismiss the employee.

"Just cause" means a real cause or basis for dismissal — not an arbitrary whim. "Just cause" is something that a reasonable employer, acting in good faith in similar circumstances, would regard as a good reason for dismissing an employee.

For the first claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of employer] discharged [name of plaintiff] from employment; and

Second: [Name of employer] discharged [name of plaintiff] without just cause.

If you find for [name of plaintiff] on the first claim, you must consider the second claim: that [name of union] breached its duty of fair representation —that [name of union] did not fairly represent [name of plaintiff] as one of its members.

To succeed on this second claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of employer] discharged [name of plaintiff] from employment, and that the discharge was without just cause;

Second: [Name of plaintiff] was a member of a collective-bargaining unit represented by [name of union];

Third: [Name of plaintiff] filed a grievance with [name of union];

Fourth: [Name of union] breached its duty of fair representation by handling the grievance proceedings arbitrarily, discriminatorily, or in bad faith; and

Fifth: [Name of union]'s breach materially affected the outcome of [name of plaintiff]'s grievance hearing.

A union has a legal duty to fairly represent the interests of its members in protecting their rights under a collective-bargaining agreement. But an employee does not have an absolute right to require the union to pursue a grievance against an employer. The test is basic fairness. As long as the union acts in good faith, the law allows it to exercise broad discretion to determine whether it should pursue the employee's grievance against an employer under a collective-bargaining agreement.

For example, the union may weigh the cost of pursuing a grievance against the likelihood of success. So even if an employee's grievance has merit, mere negligence or the union's exercise of poor judgment does not establish a breach of its duty of fair representation.

But when a union acts arbitrarily or carelessly, or dishonestly and in bad faith, by refusing to pursue a union member's meritorious grievance, it violates its duty to represent fairly the member who lodged the grievance.

[In the verdict form that I will explain in a moment, you will be

asked to answer questions about these factual issues.]

If you find for [name of plaintiff] on [his/her] first claim or on both claims, you must consider [his/her] damages. The damage award should be an amount that justly compensates [him/her] for the damages [he/she] incurred.

The measure of these damages, if any, is the amount [name of plaintiff] would have earned from [his/her] employment with [name of employer] if [name of employer] had not discharged [him/her]. But you must reduce this amount by any earnings [name of plaintiff] received, or reasonably could have received, from other employment. [Name of plaintiff] has a duty to mitigate or minimize the damages. [Name of defendant] is not responsible for lost earnings to the extent that [name of plaintiff] could have avoided those lost earnings by using reasonable care in seeking other employment.

After you have determined an amount for damages, if you have found for [name of plaintiff] and against both the employer and the union, you must then divide the damages between the employer and the union. The employer is only responsible for lost wages caused by discharging [name of plaintiff] in breach of the collective-bargaining agreement. But any increase in lost wages that the union caused by failing to pursue [name of plaintiff]'s grievance should be charged to the union — not to the employer.

So if you decide that [name of plaintiff] would have been reimbursed for lost wages or reinstated to [his/her] job if the union had fairly represented [him/her], then you must divide those lost wages between the employer and the union. In that case, you should allot damages to the union to the extent its breach of duty to fairly represent [name of plaintiff] increased the amount of wages [he/she] lost.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] discharged [name of plaintiff] from employment?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That the discharge was without "just cause"?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of union] breached its duty of fair representation owed to [name of plaintiff] as one of its members?

Answer Yes or No _____

4. That [name of plaintiff] should be awarded damages?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

5. That [name of plaintiff]'s damages should be divided between the defendants?

Answer Yes or No _____

If your answer is "Yes,"

how should they be divided?

_____ % against [name of defendant]

_____ % against [name of union]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

This jury instruction applies when an employee or former employee files a hybrid breach of contract - breach of duty of fair representation suit against the employer and union, such as in *Vaca v. Sipes*, 386 U.S. 171 (1967). *See also* Labor Management Relations Act § 301, 29 U.S.C. § 185. A plaintiff may decide to sue one defendant and not the other. *See generally Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371, 1375-76 (11th Cir. 1983) (per curiam); *see also Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) ("Because most collective-bargaining agreements accord finality to grievance or arbitration procedures . . . an employee normally cannot bring a § 301 action against an employer unless he can show that the union breached its duty of fair representation in its handling of his grievance.").

Unions have broad discretion in deciding whether to prosecute a grievance, subject only to the duty of fair representation. *Turner v. Air Transp. Dispatchers' Ass'n*, 468 F.2d 297, 300 (5th Cir. 1972). In deciding whether to prosecute a grievance, the union may consider tactical and strategic factors such as its limited resources and consequent need to establish priorities, as well as its desire to maintain harmonious relations among the workers and between the workers and the employer. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997).

In *Air Line Pilots Association International v. O'Neill*, 499 U.S. 65 (1991), the Court extended a union's duty of fair representation to include "all union activity, including contract negotiation." *Id.* at 67. The Court further defined breach of the duty of fair representation to include union actions which are either "arbitrary, discriminatory, or in bad faith," and ruled that "a union's actions are arbitrary only if, in light of the factual and legal

landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Id.* (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

Bad faith on the part of the union "requires a showing of fraud, deceitful action or dishonest action." *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 531 (10th Cir. 1992) (citing *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 299 (1971)). Personal hostility is not enough to establish unfair representation if the representation was adequate and there is no evidence that the personal hostility tainted the union's actions. *Freeman v. O'Neal Steel, Inc.*, 609 F.2d 1123, 1127-28 (5th Cir. 1980); *accord VanDerVeer v. United Parcel Serv., Inc.*, 25 F.3d 403, 405 (6th Cir. 1994). Mere negligence is never sufficient to sustain a claim for breach of the duty of fair representation. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988).

A union owes the duty of fair representation to all members of its collective bargaining unit, whether or not the employee in question is a union member. *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 109-10 (5th Cir. 1973).

The limitations period for bringing a hybrid breach of contract—breach of the duty of fair representation claim is six months from the date of the employer or union's final action, whichever is later. *Coppage v. U. S. Postal Serv.*, 281 F.3d 1200, 1204 (11th Cir. 2002) (citing *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169-71 (1983)).

Generally, damages are apportioned between the employer and union according to the damage caused by each. *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967). However, joint and several liability may be appropriate where the employer and union actively participated in each other's breach. *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1145-46 (2d Cir. 1994) (citing *Vaca*, 386 U.S. at 197 n.18).

4.18 USERRA — 38 U.S.C. § 4311(a) — USERRA Discrimination — Including "Same Decision" Defense

In this case, [name of plaintiff] makes a claim under the Uniformed Services Employment and Reemployment Rights Act, also called USERRA. USERRA prohibits an employer from discriminating against an employee in the terms and conditions of the employee's employment because the employee [is a member of/applies to be a member of/performs service in/has performed service in/applies to perform service in/has an obligation to perform service in] a uniformed service.

[Name of plaintiff] claims that [name of defendant] discriminated against [name of plaintiff] by [discharging [him/her] from employment/denying [him/her] a promotion] because [he/she] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service.

[Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the defendant's defense].

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service;

Second: [Name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]; and

Third: [Name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a motivating factor that prompted [name of defendant] to take that action.

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

[Name of Armed Forces Branch/Army National Guard/Air National Guard] is a "uniformed service."

If you find that [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion], you must decide whether plaintiff's [membership/application for membership/service/application for service/obligation for service] was a motivating factor in [name of defendant]'s decision.

To prove that [name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a "motivating factor" in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service was the only reason that [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]. It is enough if [name of plaintiff] proves that [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service influenced [name of defendant]'s decision. If [name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service made a difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was not a motivating factor in [his/her/its] decision and that [he/she/it] [discharged/did not promote] [name of plaintiff] for [another reason/other reasons]. An employer may not discriminate against an employee because of the employee's [membership/application for membership/service/application for service/obligation for service] in a uniformed service. But an employer may [discharge/decline to promote] an employee for any other reason, good or bad, fair or unfair. If you

believe [name of defendant]'s reason[s] for [his/her/its] decision [to discharge/not to promote] [name of plaintiff] and find that [his/her/its] decision was not motivated by [name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service, you must not second guess [name of defendant]'s decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [his/her] [membership/application for membership/service/application for service/obligation for service] was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] was a motivating factor in [name of defendant]'s decision [to discharge/not to promote] [name of plaintiff], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] that [name of defendant] gave for the decision. If you do not believe the reason[s] that [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reason[s] for the decision.]

[**Including Affirmative Defense:** If you find in [name of plaintiff]'s favor for each element that [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [name of defendant] had not taken [name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service into account. If you find that [name of plaintiff] [would have been dismissed/would not have been promoted] for [a] reason[s] other than [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service, you must make

that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must consider [name of plaintiff]'s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]'s favor for each element that [he/she] must prove, you must decide the issue of [his/her] compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the [discharge/denied promotion], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

To the extent you find that [name of plaintiff] proved damages by a preponderance of the evidence, you must consider only net lost wages and benefits from the date of the [discharge/denial of promotion] to the date of your verdict.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make

reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Willful Violation:** If you find in [name of plaintiff]'s favor and award [him/her] compensatory damages, you must decide whether [name of defendant] willfully violated the law. If [name of defendant] knew that [his/her/its] employment decision violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [name of defendant] did not know, or knew only that the law was potentially applicable and did not act in reckless disregard as to whether [his/her/its] conduct was prohibited by the law, then [name of defendant]'s conduct was not willful.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of defendant] [discharged [name of plaintiff] from

employment/denied [name of plaintiff] a promotion]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a motivating factor that prompted [name of defendant] to take that action?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[4. That [name of defendant] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [name of defendant] had not taken [name of plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service into account?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

5. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

If you did not award damages in response to Question No. 5, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question No. 5, go to the next question.

6. That [name of defendant] willfully violated the law?

Answer Yes or No _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

38 U.S.C. § 4311 states:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation. . . .
>
> (c) An employer shall be considered to have engaged in actions prohibited—
>
> > (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service

. . .

38 U.S.C. § 4311.

> The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

38 U.S.C. 4303(16).

The term "benefit of employment" is defined as "any advantage, profit, privilege, gain, status, [or] account . . . that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes . . . vacations, and the opportunity to select work hours or location of employment." 38 U.S.C. § 4303(2).

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by [10 U.S.C. § 12503 or 32 U.S.C. § 115].

38 U.S.C. § 4303(13).

The Eleventh Circuit has stated that § 4311 clearly mandates proof of discriminatory motive. A motivating factor does not mean that it had to be the sole cause of the employment action. Instead, "it is one of the factors that a truthful employer would list if asked for the reasons for its decision." *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005) (internal quotation marks omitted). "Indeed, [m]ilitary status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration." *Id.* (alteration in original) (internal quotation marks omitted).

USERRA provides that a court may award three kinds of relief: (1) an injunction requiring an employer to comply with USERRA's provisions; (2) compensation for lost wages or benefits suffered by reason of the employer's failure to comply with USERRA, and (3) liquidated damages in an amount equal to lost wages or benefits if the employer's failure to comply with USERRA was willful. 38 U.S.C. § 4323(d)(1)(A)-(C).

USERRA does not allow damages for mental anguish or emotional distress, nor does it allow recovery of punitive damages. *Dees v. Hyundai Motor Mfg. Ala., LLC* 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009), *aff'd* 368 F. App'x 49 (11th Cir. 2010) (per curiam).

Section 4324 of USERRA applies where the employer is a "Federal executive agency." Section 4324 does not authorize a private USERRA action against the Federal Government, as an employer, in federal district court; rather, it confers jurisdiction upon the Merit Systems Protection Board ("MSPB"). *See* 38 U.S.C. § 4324(b). For the definition of "Federal executive agency," see 38 U.S.C. § 4303(5).

Where relevant, apply the Cat's Paw instruction for employment cases. *See* Pattern Instruction 4.5, *supra*.

4.19 USERRA — 38 U.S.C. § 4311(b) — USERRA Retaliation

In this case, [name of plaintiff] claims that [name of defendant] retaliated against [name of plaintiff] because [he/she] took steps to enforce [his/her] lawful rights under the Uniformed Services Employment and Reemployment Rights Act, also called USERRA.

USERRA prohibits an employer from retaliating against an employee because the employee has asserted rights or made complaints under that law. [This prohibition applies regardless of whether the employee has ever served in the uniformed services.]

Specifically, USERRA prohibits an employer from retaliating against an employee who [took action to enforce a protection afforded any person under USERRA/testified or otherwise made a statement in, or in connection with, any proceeding under USERRA/assisted, or otherwise participated in, an investigation under USERRA/exercised a right USERRA provides].

[Name of plaintiff] claims that [name of defendant] [describe adverse employment action] because [he/she] [describe protected activity]. [Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the Defendant's defense].

To succeed on [his/her] claim, [name of plaintiff] must prove all the following facts by a preponderance of the evidence:

First: [Name of plaintiff] engaged, in good faith, in an activity protected by USERRA;

Second: [Name of defendant] took an adverse employment action against [name of plaintiff];

Third: [Name of plaintiff]'s protected activity was a motivating factor that prompted [name of

defendant] to take the adverse employment action; and

Fourth: [Name of plaintiff] suffered damages because of the adverse employment action.

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

For the first element, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] engaged, in good faith, in a protected activity. If you find that [name of plaintiff] made the complaint to enforce what [he/she] believed in good faith to be [his/her] lawful rights, [he/she] may not be penalized — even if the [describe protected activity] is later found to be invalid or without merit. To establish "good faith," it is not enough for [name of plaintiff] to allege that [his/her] belief was honest and bona fide. The allegations and the record must also establish that the belief was objectively reasonable even though it might have been wrong.

For the second element, [name of plaintiff] claims that [name of defendant] took an adverse employment action against [him/her] when [name of defendant] [describe adverse employment action]. An "adverse employment action" is any type of action that might reasonably deter [name of plaintiff] or another employee from engaging in an activity protected by law. Put another way, if [name of defendant]'s challenged action would make a reasonable employee less likely to exercise [his/her] rights under USERRA, that action is an adverse employment action.

For the third element, you must decide whether [his/her] protected activity was a motivating factor in [name of defendant]'s decision. To prove that [name of plaintiff]'s protected activity was a "motivating factor" in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [his/her] protected activity was the only reason that [name of defendant] [describe adverse employment action]. It is enough if [name of plaintiff] proves that [his/her] protected activity influenced [name of defendant]'s decision. If [name of plaintiff]'s protected activity

made a difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]'s protected activity was not a motivating factor behind [describe adverse employment action]. [Name of defendant] argues that [he/she/it] [describe adverse employment action] [name of plaintiff] for [another reason/other reasons]. An employer may not take an adverse employment action against an employee because of the employee's protected activity. But an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision and find that [his/her/its] decision was not motivated by [name of plaintiff]'s protected activity, you must not second guess [name of defendant]'s decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [his/her] protected activity was a motivating factor in [name of defendant]'s decision to [describe adverse employment action]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]'s decision to [describe adverse employment action] was because of [name of plaintiff]'s protected activity, you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] that [name of defendant] gave for the decision. If you do not believe the reason[s] that [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true retaliatory reasons for the decision.]

For the fourth element, if you find that [name of plaintiff] engaged in protected activity and that [name of defendant] took an adverse employment action against [him/her] because of that protected activity, you must decide whether [name of defendant]'s acts were the proximate cause of damages that [name of plaintiff] sustained. Put another way, you must decide whether these damages would have occurred if [name of defendant] had not [describe adverse employment action].

If you find that [name of defendant]'s acts were the proximate cause of damages [name of plaintiff] sustained, you must determine the amount of damages.

[**Including Affirmative Defense:** If you find in [name of plaintiff]'s favor for each element [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have taken the same action even if [name of defendant] had not taken [name of plaintiff]'s protected activity into account. If you find that the [name of defendant] would have made the same decision for reasons other than [name of plaintiff]'s protected activity, you must make that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on [his/her/its] defense, you must decide the issue of [name of plaintiff]'s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]'s favor for each element [he/she] must prove, you must decide the issue of [his/her] compensatory damages.]

When considering the issue of [name of plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]'s damages as a result of the adverse employment action, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

To the extent you find that [name of plaintiff] proved damages by a preponderance of the evidence, you must consider only net lost wages and benefits from the date of the adverse employment action to the date of your verdict.

To determine the amount of [name of plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [name of plaintiff] lost and the monetary value of any benefits lost.

[**Mitigation of Damages.** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]'s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Willful Violation:** [Name of plaintiff] also claims that [name of defendant] willfully violated the law. You will only consider this issue if you find for [name of plaintiff] and award [him/her] compensatory damages.

If the employer knew that [his/her/its] [describe adverse employment action] violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [name of defendant] did not know, or knew only that the law was potentially applicable and did not act in reckless disregard as to whether [his/her/its] conduct was prohibited by the law, then [name of defendant]'s conduct was not willful.]

Do you find from a preponderance of the evidence:

1. That [name of plaintiff], in good faith, engaged in an activity protected by USERRA?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of defendant] took an adverse employment action against [name of plaintiff]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of plaintiff]'s protected activity was a motivating factor that prompted [name of defendant] to take that action?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[4. That [name of defendant] would have taken the same action even if [name of defendant] had not taken [name of plaintiff]'s protected activity into account?

Answer Yes or No _____

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

5. That [name of plaintiff] suffered damages because of the adverse employment action?

Answer Yes or No _____

6. That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits from the date of [describe adverse employment action] to the date of your verdict?

Answer Yes or No _____

If your answer is “Yes,”

in what amount? $ _____

[If you did not award damages in response to Question No. 6, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question No. 6, go to the next question.]

[7. That [name of defendant] willfully violated the law?

Answer Yes or No _____]

SO SAY WE ALL.

_____
Foreperson’s Signature

DATE: _____

ANNOTATIONS AND COMMENTS

38 U.S.C. § 4311 states, in part:

> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
>
> (c) An employer shall be considered to have engaged in actions prohibited–
>
> > * * *
> >
> > (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

Under the plain language of the statute, the plaintiff does not have to establish application to serve or service in a uniformed service to be entitled to the protections of this law.

> The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

38 U.S.C. § 4303(16).

USERRA provides that a court may award three kinds of relief: (1) an injunction requiring an employer to comply with USERRA's provisions; (2) compensation for lost wages or benefits suffered by reason of the employer's failure to comply with USERRA, and (3) liquidated damages in an amount equal to lost wages or benefits if the employer's failure to comply with USERRA was willful. 38 U.S.C. § 4323(d)(1)(A)-(C).

USERRA does not allow damages for mental anguish or emotional distress, nor does it allow recovery of punitive damages. *Dees v. Hyundai Motor Mfg. Ala., LLC*, 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009), *aff'd* 368 F. App'x 49 (11th Cir. 2010) (per curiam).

4.20 USERRA — 38 U.S.C. § 4312 — Reemployment

In this case, [name of plaintiff] makes a claim under the Uniformed Services Employment and Reemployment Rights Act, also called USERRA.

Under USERRA, employees who leave civilian jobs to serve in the military are entitled to reemployment rights and benefits upon their return from service. [Name of plaintiff] claims [he/she] was entitled to be reemployed by [name of defendant]. [Name of defendant] denies [name of plaintiff] was entitled to such a right.

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] left employment with [name of defendant] to perform service in a uniformed service;

Second: [Name of plaintiff] gave [name of defendant] advance notice of the service — unless it was impossible or unreasonable to give notice;

[Third: The cumulative length of [name of plaintiff]'s absences from employment with [name of defendant] due to periods of military service was not more than five years;]

Fourth: After completing the service, [name of plaintiff] timely returned to [name of defendant] or applied for reemployment with [name of defendant]; and

Fifth: [Name of plaintiff] was separated from the service under honorable conditions.

[Name of Armed Forces Branch/Army National Guard/Air National Guard] is a "uniformed service."

For the first element, "service in a uniformed service" means the

voluntary or involuntary performance of duty. It includes:

(a) active duty;

(b) active duty for training;

(c) initial active duty for training;

(d) inactive duty training;

(e) full-time National-Guard duty;

(f) a person's absence from a position of employment for an examination to determine the person's fitness to perform any of these duties; and

(g) a person's absence from employment for performing funeral-honors duty.

For the second element, if you find that [name of plaintiff] left employment with [name of defendant] to perform service in a uniformed service, you must decide whether [name of plaintiff] gave [name of defendant] advance notice of [his/her] obligation [or was excused from giving notice because it was impossible or unreasonable]. The advance notice to [name of defendant] of [name of plaintiff]'s obligation or intention to perform military service can be written or oral, and it may be informal.

[For the third element, add up the number of days or months that [name of plaintiff] was absent from his employment with [name of defendant].]

For the [third/fourth] element, a "timely return" depends on how long [name of plaintiff]'s period of service was.

[**Period of service less than 31 days or for a period of any length for the purpose of a fitness examination:** To establish a timely return for purposes of reemployment, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] reported to [name of defendant] no later than the start of the first full regularly

scheduled work period on the first full calendar day after [he/she] completed service — except that [he/she] is not required to report before eight hours past the time needed for safe transportation from the place of service to [his/her] home. For example, if [name of plaintiff] completes [his/her] service, travels home, and arrives at ten o'clock in the evening, [he/she] cannot be required to report to [name of defendant] earlier than six o'clock the next morning — eight hours after arriving home.

If it is impossible or unreasonable for [name of plaintiff] to report within that period through no fault of [his/her] own, [he/she] must report to the employer as soon as possible after the eight-hour period.]

[**Period of service more than 30 days but less than 181 days:** To establish a timely return for purposes of reemployment, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] applied to return to work no later than 14 days after [he/she] completed the military service. The application that [name of plaintiff] submitted does not need to follow any particular format and [he/she] may make it orally or in writing. If it is impossible or unreasonable for [name of plaintiff] to apply within 14 days through no fault of [his/her] own, [he/she] must submit the application to [name of defendant] not later than the next full calendar day after it becomes possible to do so.]

[**Period of service more than 180 days:** To establish a timely return for purposes of reemployment, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] applied to return to work no later than 90 days after [he/she] completed the military service. The application that [name of plaintiff] submitted does not need to follow any particular format and [he/she] may make it orally or in writing.]

[**Prompt reemployment:** To prove that [name of defendant] violated the reemployment requirement of USERRA, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] failed to offer [him/her] reinstatement as soon as was practicable under the circumstances. Uncertainty or mistake about what rights USERRA grants — on the part of either [name of plaintiff] or [name of defendant] — does not affect USERRA's prompt

reinstatement requirement. [Name of defendant] must prove that unusual circumstances justified or excused any delay in [name of plaintiff]'s reemployment.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] left employment with [name of defendant] to perform service in a uniformed service?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. [That [name of plaintiff] gave [name of defendant] advance notice of the service/That it was impossible or unreasonable for [name of plaintiff] to give advance notice of the service]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[3. That the cumulative length of [name of plaintiff]'s absences from employment with [name of defendant] because of military service does not exceed five years?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

4. That [name of plaintiff] timely returned to [name of defendant] or timely applied for reemployment with [name of defendant] after completing the service?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

5. That [name of plaintiff] was separated from the service under honorable conditions?

Answer Yes or No _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

USERRA provides reemployment rights to "any person whose absence from a position of employment is necessitated by service in the uniformed services." 38 U.S.C. § 4312(a). To invoke the right to reemployment, a returning service member must comply with the procedural requirements of 38 U.S.C. § 4312. *Rogers v. City of San Antonio*, 392 F.3d 758, 762-63 (5th Cir. 2004). 38 U.S.C. § 4312 does not require a showing of discriminatory intent. *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1235 (11th Cir. 2005).

38 U.S.C. § 4313 details the manner in which an employer must reemploy a service member, including setting forth a means to determine to what position the employee must be reinstated.

A person who is reemployed under "USERRA is entitled to the seniority and other

rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." 38 U.S.C. § 4316(a).

Reemployment-position claims

When a claim is for an employer's failure to reinstate an employee to the same position, or a to a position which is similar, the Committee recommends the insertion of the following language:

> It is your duty as a jury to determine, first, the applicable reemployment position and, second, whether Defendant employed Plaintiff in that position. USERRA sets an order of priority to determine which reemployment position is appropriate. Generally speaking, an employee is entitled to the position [he] [she] would have but for [his] [her] service in the uniformed services, or a position of like seniority, status and pay. However, if Plaintiff is not qualified to perform the duties of such a position, then [he] [she] is entitled to the position [he] [she] held as of the date [his] [her] leave to service in the uniformed services began.
>
> Should you find that Plaintiff is not qualified to be employed in the position of employment in which Plaintiff would have been employed but for the interruption of employment by service in the uniformed services, and further find that Plaintiff is not qualified for [his] [her] position prior to [his] [her] service in the uniformed services for any reason you must then decide if Defendant failed to use reasonable efforts to enable Plaintiff to become qualified. If you make each of these findings, then Defendant has a duty to provide Plaintiff any position which is the nearest approximation to first, the position Plaintiff would have been in but for [his] [her] service in the uniformed services, or second, the position Plaintiff was in prior to [his] [her] service in the uniformed services.
>
> Plaintiff bears the burden of proof to show that Defendant failed to reemploy [him] [her] in an appropriate position, that is, the position which reflected with reasonable certainty the pay, benefits, seniority, and other job perquisites that Plaintiff would have attained but for [his] [her] military service or a position of like seniority, status, and pay; or to [his] [her] pre-service position; or to a position which was the nearest approximation to any of these positions.
>
> To determine if a position is of like seniority, status, and pay, you may examine any agreements, policies of the company, and practices at the

> company. In evaluating if a reemployment position is of like status, you may consider the opportunities for advancement, the general working conditions, the location of the job, the shift assignment, the rank, and the responsibility.

See 38 U.S.C. § 4313.

Affirmative defenses to reemployment claims

Affirmative defenses to a reemployment claim under USERRA are statutory. *See* 38 U.S.C. § 4312(d). When a defendant raises affirmative defenses, the following language, as appropriate, should be inserted in the charge:

> Defendant has raised [an] affirmative defense[s] against Plaintiff's claims. Defendant bears the burden of proof by a preponderance of the evidence on [this] [these] defense[s].
>
> Even if Plaintiff is otherwise eligible for reemployment benefits, Defendant is not required to reemploy [him] [her] if it proves by a preponderance of the evidence that the employment position vacated by Plaintiff in order to perform service in the uniformed services was for a brief, nonrecurring period and that there was no reasonable expectation that the employment would continue indefinitely or for a significant period.
>
> Even if Plaintiff is otherwise eligible for reemployment benefits, Defendant is not required to reemploy [him] [her] if Defendant proves by a preponderance of the evidence that its circumstances had so changed as to make reemployment impossible or unreasonable. The fact that Defendant may have hired a replacement worker in Plaintiff's pre-service position does not allow Defendant to refuse to reemploy Plaintiff when [he] [she] returned from military service, even if reemployment of Plaintiff might require the termination of that replacement employee.
>
> Even if Plaintiff is otherwise eligible for reemployment benefits, Defendant was not required to reemploy [him] [her] if Defendant proves by a preponderance of the evidence that assisting Plaintiff in becoming qualified for reemployment would have imposed an undue hardship.
>
> [The term "qualified" means that Plaintiff has the ability to perform the essential tasks of the position. Plaintiff's inability to perform one or more non-essential tasks of a position does not make [him] [her] unqualified.
> "Undue hardship" as used in this charge, means an action requiring significant difficulty or expense, when considered in light of-

> (1) The nature and cost of the action needed to comply with USERRA;
> (2) The overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
> (3) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and
> (4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

See 20 C.F.R. § 1002.139(c). For the statutory definitions of "undue hardship," see 38 U.S.C. § 4303(15)(A)-(D).

Discharge for cause during protected period

Once a plaintiff is reemployed under USERRA, he or she is entitled not to be terminated, except for cause, for a specified time of such reemployment. *See* 38 U.S.C. § 4316(c). Hence, where appropriate, the following charge should be inserted:

> [Because Plaintiff performed more than 180 days of service in the services prior to [his] [her]return to employment with Defendant, Defendant was prohibited from terminating Plaintiff, except for cause, for the first year of Plaintiff's reemployment.]
>
> [Because Plaintiff performed more than 30 but less than 181 days of service in the services prior to [his] [her]return to employment with Defendant, Defendant was prohibited from terminating Plaintiff, except for cause, for the first 180 days of Plaintiff's reemployment.]
>
> Where, as here, Defendant alleges the discharge was based upon Plaintiff's conduct, Defendant bears the burden of proving by a preponderance of the evidence that its discharge of Plaintiff for the conduct in question was reasonable, and that Plaintiff had prior notice that the conduct in question would constitute cause for discharge. Such notice may be written, oral, or fairly implied under the circumstances.
>
> OR
>
> Where, as here, Defendant alleges a legitimate nondiscriminatory reason for

> the termination of Plaintiff, such as a layoff or elimination of Plaintiff's position, Defendant bears the burden of proving by a preponderance of the evidence that the layoff or job elimination was for a legitimate nondiscriminatory reason and that such layoff would have affected anybody in Plaintiff's position, regardless of his or her protected status or activity.

Other USERRA Considerations:

Entitlement to benefits under USERRA ends upon any discharge from uniformed service that is not an honorable discharge. 38 U.S.C. § 4304.

> The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

38 U.S.C. 4303(16).

USERRA provides that a court may award three kinds of relief: (1) an injunction requiring an employer to comply with USERRA's provisions; (2) compensation for lost wages or benefits suffered by reason of the employer's failure to comply with USERRA, and (3) liquidated damages in an amount equal to lost wages or benefits if the employer's failure to comply with USERRA was willful. 38 U.S.C. § 4323(d)(1)(A)-(C).

USERRA does not allow damages for mental anguish or emotional distress, nor does it allow recovery of punitive damages. *Dees v. Hyundai Motor Mfg. Ala., LLC* 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009), *aff'd* 368 F. App'x 49 (11th Cir. 2010) (per curiam).

4.21 Retaliation—Title VII and 42 U.S.C. § 1981

In this case, [name of plaintiff] claims that [name of defendant] retaliated against [name of plaintiff] because [he/she] took steps to enforce [his/her] lawful rights under [describe the act or statute involved, e.g., Title VII of the Civil Rights Act].

Laws that prohibit discrimination in the workplace also prohibit an employer from taking any retaliatory action against an employee because the employee has asserted rights or made complaints under those laws.

[***Opposition clause claims only:*** An employee may make a discrimination complaint as a means to enforce what [he/she] believed in good faith to be [his/her] lawful rights. So, even if a complaint of discrimination against an employer is later found to be invalid or without merit, the employee cannot be penalized in retaliation for having made such a complaint if you find that the employee made the complaint as a means of seeking to enforce what the employee believed in good faith to be [his/her] lawful rights. To establish "good faith," however, it is insufficient for [name of plaintiff] merely to allege that [his/her] belief in this regard was honest and bona fide; the allegations and the record must also establish that the belief, though perhaps mistaken, was objectively reasonable.]

[Name of plaintiff] claims that [name of defendant] [describe adverse employment action] because [name of plaintiff] [describe protected activity].

[Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the defendant's defense].

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] engaged in a protected activity;

Second: [Name of defendant] then took an adverse employment action;

Third: [Name of plaintiff]'s protected activity was a motivating factor that prompted [name of defendant] to take the adverse employment action; and

Fourth: [Name of plaintiff] suffered damages because of the adverse employment action.

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

[***For "participation clause" claims:*** For the first element, [name of plaintiff] claims that [he/she] [describe participation clause activity]. If you find that [name of plaintiff] [describe participation clause activity], that action is "protected activity."]

[***For "opposition clause" claims:*** For the first element, [name of plaintiff] claims that [he/she] engaged in protected activity when [he/she] [describe opposition clause activity]. That action is "protected activity" if it was based on [name of plaintiff]'s good-faith, reasonable belief that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] had a "good faith" belief if [he/she] honestly believed that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] had a "reasonable" belief if a reasonable person would, under the circumstances, believe that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] does not have to prove that [name of defendant] actually discriminated against [him/her/another employee] because of [protected trait]. But [he/she] must prove that [he/she] had a good-faith, reasonable belief that [name of defendant] did so.]

For the second element, [name of plaintiff] claims that [name of defendant] took an adverse employment action against [him/her] when [name of defendant] [describe adverse employment action]. You must decide whether [describe adverse employment action] is an adverse employment action.

An "adverse employment action" is any type of action that would

have made a reasonable employee reluctant to make or support a charge of discrimination. Put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination because [he/she] knew that [name of defendant] would [describe adverse employment action], then that action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, it is not an adverse employment action.

For the third element, if you find that [name of plaintiff] engaged in protected activity and that [name of defendant] took an adverse employment action against [him/her], you must decide whether [name of plaintiff]'s protected activity was a "motivating factor" in the decision.

To prove that protected activity was a motivating factor in [name of defendant]'s decision, [name of plaintiff] does not have to prove that [his/her] protected activity was the only reason that [name of defendant] [describe adverse employment action]. It is enough if [name of plaintiff] proves that [his/her] protected activity influenced the decision. If [name of plaintiff]'s protected activity made a difference in [name of defendant]'s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]'s protected activity was not a motivating factor in the decision and that [he/she] [describe adverse employment action] for [another reason/other reasons]. An employer may not take an adverse action against an employee because of the employee's protected activity, but an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision and you find that [name of defendant]'s decision was not motivated by [name of plaintiff]'s protected activity, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [his/her] protected

activity was a motivating factor in [name of defendant]'s decision to [describe adverse employment action]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]'s protected activity was a motivating factor in [name of defendant]'s decision to [describe adverse employment action], you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] that [name of defendant] gave for the decision. If you do not believe the reason[s] that [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true retaliatory reasons for the decision.]

[**Including Affirmative Defense (if applicable, see annotations):** If you find in [name of plaintiff]'s favor the first three elements [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have [describe adverse employment action] [name of plaintiff] even if [name of defendant] had not taken [name of plaintiff]'s protected activity into account. If you find that [name of plaintiff] would have been [describe adverse employment action] for reasons other than [his/her] protected activity, you must make that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must decide whether [name of defendant]'s acts were the proximate cause of damages that [name of plaintiff] sustained. Put another way, you must decide, if [name of defendant] had not [describe adverse employment action] [name of plaintiff], whether these damages would have occurred.]

[**Without Affirmative Defense:** For the fourth element, you must decide whether [name of defendant]'s acts were the proximate cause of damages that [name of plaintiff] sustained. Put another way, you must decide, if [name of defendant] had not [describe adverse employment action] [name of plaintiff], whether these damages would have occurred.]

If you find that [name of defendant]'s acts were the proximate cause of damages that [name of plaintiff] sustained, you must determine

the amount of damages.

[Insert damages instruction based on substantive charge damages instruction. For claims under Title VII, please see Pattern Instruction 4.5, *supra*. For claims under § 1981, please see Pattern Instruction 4.10, *supra*.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] engaged in protected activity?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

2. That [name of defendant] took an adverse employment action against [name of plaintiff]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of plaintiff]'s protected activity was a motivating factor that prompted [name of defendant] to take that action?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[4. That [name of defendant] would have [describe adverse employment action] [name of plaintiff] even if [name of defendant] even if [name of defendant] had not taken [name of plaintiff]'s protected activity into account?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

5. That [name of plaintiff] suffered damages because of the adverse employment action?

Answer Yes or No _____

[Insert damages interrogatories based on substantive charge damages interrogatories. For claims under Title VII, please see Pattern Instruction 4.5, *supra*. For claims under § 1981, please see Pattern Instruction 4.10, *supra*.]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Causes of Action

Pattern Instruction 4.21 is intended to be used for retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-3(a). It may also be used for claims under 42 U.S.C. § 1981 ("§ 1981"), though the Committee recommends that district courts review the causation annotation prior to instructing a jury on § 1981 retaliation.

Pattern Instruction 4.21 is *not* intended to be used for retaliation claims arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(d); the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12203(a); and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3). For retaliation claims under those statutes, please see Pattern Instruction 4.22, *infra*. Pattern Instruction 4.21 is also not intended to be used for retaliation claims arising under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* ("USERRA") or the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* For USERRA retaliation claims, please see Pattern Instruction 4.19, *supra*. For FMLA retaliation claims, please see Pattern Instruction 4.15, *supra*. Finally, Pattern Instruction 4.21 is not intended to be used for Title VII retaliatory hostile work environment claims. For retaliatory hostile work environment claims, please see annotation I(B) to Pattern Instructions 4.6 and 4.7.

II. Elements and Defenses

A. Participation Clause Claims v. Opposition Clause Claims

Title VII's anti-retaliation provision contains two clauses: the "opposition clause" and the "participation clause." 42 U.S.C. § 2000e-3(a). The opposition clause "prohibits retaliation against an employee for opposing any practice made unlawful by Title VII." *Valdes v. Miami-Dade Coll.*, 463 F. App'x 843, 846 (11th Cir. 2012) (per curiam). The participation clause "protects activities which occur in conjunction with or after the filing of a formal charge with the EEOC." *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). Due to differences between these two clauses, the pattern charge provides separate charges for each type of claim.

The Eleventh Circuit has held that "expansive protection is available" for participation clause activity. *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1176-77 (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969)). Therefore, an employee cannot be fired for anything written in an EEOC charge. *Id.* Thus, if employee engaged in participation clause activity, that activity is protected under Title VII, and no "good faith" inquiry is necessary.

In contrast, where a plaintiff's retaliation claim arises from the *opposition* to an allegedly unlawful practice, "a plaintiff must show that he 'had a good faith, reasonable belief that the employer was engaged in unlawful employment practices.'" *Boyland v. Corr. Corp. of Am.*, 390 F. App'x 973, 975 (11th Cir. 2010) (per curiam). The plaintiff "need not prove the underlying claim of discrimination which led to [his] protest." *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989). The plaintiff must show that he held a reasonable, good faith belief that the discrimination existed. *Id.* To demonstrate that he held a reasonable, good faith belief that discrimination occurred, the plaintiff must show not only that he subjectively believed that his employer's behavior was discriminatory, "but also that his belief was *objectively* reasonable in light of

the facts and record presented." *Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1213 (11th Cir. 2008) (quoting *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997)). The protection afforded under the opposition clause extends to an employee who speaks out about sexual harassment, not only on her own initiative but also in answering questions during an employer's investigation of a co-worker's complaints. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 277 (2009).

Section 1981 does not contain an explicit anti-retaliation provision, but the Eleventh Circuit has interpreted § 1981 to provide for a retaliation claim based on an employee's complaints of race discrimination. *See, e.g., Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1412-13 (11th Cir. 1998). The Eleventh Circuit analyzes claims brought under § 1981 "using the burden-shifting scheme established for Title VII claims, since both statutes have the same proof requirements." *Jackson v. Geo Grp., Inc.*, 312 F. App'x 229, 233 (11th Cir. 2009) (per curiam). In applying Title VII's framework to § 1981 retaliation claims, the Eleventh Circuit has applied Title VII's anti-retaliation provision and noted the distinction between "opposition clause" and "participation clause" activity. *Id.* at 233-34 & n.8 (applying Title VII's anti-retaliation provision to § 1981 retaliation claim and noting that the plaintiff only had an "opposition clause" claim).

Pattern Instruction 4.21 includes alternative instructions for participation clause claims and opposition clause claims.

B. Adverse Employment Action

Pattern Instruction 4.21 includes a charge on the definition of an adverse employment action, which is based on the Supreme Court's decision in *Burlington Northern &Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which requires proof that the challenged retaliatory conduct is "materially adverse." *Id.* at 68.

C. Third Party Reprisals

In *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), the Supreme Court held that third-party reprisals are actionable under the anti-retaliation provision of Title VII. *Id.* at 868. The plaintiff in *Thompson* stated a claim for retaliation by alleging that he was intentionally terminated because his fiancée filed an EEOC charge of discrimination against their mutual employer. *Id.* at 870. In cases involving third party reprisals, the charge will need to be adapted.

D. Causation

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that, based on the statutory language of the ADEA, a plaintiff must prove that "age was the 'but-for' cause of the employer's adverse decision," not merely a motivating factor in the

decision. *Id.* at 176-77. The Court also rejected the mixed motive defense (also known as the same decision defense) in the context of the ADEA, noting that unlike under Title VII, a mixed motive defense was not incorporated into the ADEA. *Id.* at 173-75. The Eleventh Circuit has declined to extend the rationale of *Gross* to retaliation claims under Title VII. *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926, 931 (11th Cir. 2012) (noting that a circuit split exists as to whether *Gross* extends to Title VII retaliation claims). For this reason, Pattern Instruction 4.21 instructs that the plaintiff's protected activity must be a "motivating factor" behind the adverse employment action, and it includes an optional "mixed motive" defense. Like the Eleventh Circuit, the Fifth Circuit concluded that it is not error to give a "mixed motive" instruction in Title VII retaliation cases. *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir. 2012). The Supreme Court granted certiorari in that case on the question whether the anti-retaliation provision of Title VII and similarly worded statutes require a plaintiff to prove "but for" causation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 978, 979 (2013). The Supreme Court did not issue a decision in *Nassar* prior to the date of this publication. The Committee recommends that district courts review this issue before instructing a jury on Title VII retaliation. If the *Gross* "but-for" standard applies to Title VII retaliation claims, then Pattern Instruction 4.22—which includes "because of language" and does not include the "same decision" affirmative defense—should be used for Title VII retaliation claims.

The Eleventh Circuit did not, prior to this publication, decide whether the rationale of *Gross* extends to § 1981 claims, including § 1981 retaliation claims. *See* Annotation II(A) to Pattern Instruction 4.9, *supra*. The same substantive analysis applies to § 1981 and Title VII retaliation claims. *E.g., Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008) (applying same standard to Title VII and § 1981 retaliation claims). Therefore, the Committee has included the same jury instruction on retaliation for Title VII and § 1981 claims. However, the Committee recommends that district courts review this issue prior to instructing a jury on § 1981 retaliation.

E. Pretext

Pattern Instruction 4.21 includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*.

III. Remedies

The remedies for Title VII retaliation claims match the remedies for Title VII disparate treatment claim. *See* 42 U.S.C. §§ 1981a, 2000e-5(e)(3)(B), (g)(1). Thus, the jury charges on damages in the corresponding disparate treatment instructions may be incorporated into the model retaliation instruction as appropriate.

IV. When the Case Involves Both Discrimination and Retaliation Claims

In some cases, a plaintiff will bring both discrimination and retaliation claims. In those cases, the court should charge separately all of the elements of a discrimination and retaliation claim except damages, then give a charge on damages that applies to both types of claims.

4.22 Retaliation—ADEA, ADA and FLSA

In this case, [name of plaintiff] claims that [name of defendant] retaliated against [name of plaintiff] because [he/she] took steps to enforce [his/her] lawful rights under [describe the act or statute involved, e.g., ADEA].

Laws that prohibit discrimination in the workplace also prohibit an employer from taking any retaliatory action against an employee because the employee has asserted rights or made complaints under those laws.

[***Opposition clause claims only:*** An employee may make a discrimination complaint as a means to enforce what [he/she] believed in good faith to be [his/her] lawful rights. So, even if a complaint of discrimination against an employer is later found to be invalid or without merit, the employee cannot be penalized in retaliation for having made such a complaint if you find that the employee made the complaint as a means of seeking to enforce what the employee believed in good faith to be [his/her] lawful rights. To establish "good faith," however, it is insufficient for [name of plaintiff] merely to allege that [his/her] belief in this regard was honest and bona fide; the allegations and the record must also establish that the belief, though perhaps mistaken, was objectively reasonable.]

[Name of plaintiff] claims that [name of defendant] [describe adverse employment action] because [name of plaintiff] [describe protected activity].

[Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the defendant's defense].

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] engaged in a protected activity;

Second: [Name of defendant] then took an adverse employment action;

Third: [Name of defendant] took the adverse employment action because of [name of plaintiff]'s protected activity; and

Fourth: [Name of plaintiff] suffered damages because of the adverse employment action.

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

[***For "participation clause" claims:*** For the first element, [name of plaintiff] claims that [he/she] [describe participation clause activity]. If you find that [name of plaintiff] [describe participation clause activity], that action is "protected activity."

[***For "opposition clause" claims:*** For the first element, [name of plaintiff] claims that [he/she] engaged in protected activity when [he/she] [describe opposition clause activity]. That action is "protected activity" if it was based on [name of plaintiff]'s good-faith, reasonable belief that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] had a "good faith" belief if [he/she] honestly believed that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] had a "reasonable" belief if a reasonable person would, under the circumstances, believe that [name of defendant] discriminated against [him/her/another employee] because of [protected trait]. [Name of plaintiff] does not have to prove that [name of defendant] actually discriminated against [him/her/another employee] because of [protected trait]. But [he/she] must prove that [he/she] had a good-faith, reasonable belief that [name of defendant] did so.]

For the second element, [name of plaintiff] claims that [name of defendant] took an adverse employment action against [him/her] when [name of defendant] [describe adverse employment action]. You must decide whether [describe adverse employment action] is an adverse employment action.

An "adverse employment action" is any type of action that would have made a reasonable employee reluctant to make or support a

charge of discrimination. Put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination because [he/she] knew that [name of defendant] would [describe adverse employment action], then that action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, it is not an adverse employment action.

For the third element, if you find that [name of plaintiff] engaged in protected activity and that [name of defendant] took an adverse employment action against [him/her], you must decide whether [name of defendant] took that action because of [name of plaintiff]'s protected activity. Put another way, you must decide whether [name of plaintiff]'s protected activity was the main reason for [name of defendant]'s decision.

To determine that [name of defendant] took an adverse employment action because of [name of plaintiff]'s protected activity, you must decide that [name of defendant] would not have taken the action had [name of plaintiff] not engaged in the protected activity but everything else had been the same.

[Name of defendant] claims that [he/she/it] did not [describe adverse employment action] because of [name of plaintiff]'s [describe protected activity] and that [he/she/it] took the action for [another reason/other reasons]. An employer may not take an adverse action against an employee because of the employee's protected activity. But an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]'s reason[s] for [his/her/its] decision, and you find that [name of defendant] did not make [his/her/its] decision because of [name of plaintiff]'s protected activity, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]'s judgment — even if you do not agree with it.

[**Pretext (optional, see annotations)**: As I have explained, [name of plaintiff] has the burden to prove that [name of defendant]'s decision to [describe adverse employment action] was because of

[name of plaintiff]'s protected activity. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]'s [describe adverse employment action] was because of [name of plaintiff]'s protected activity, you may consider the circumstances of [name of defendant]'s decision. For example, you may consider whether you believe the reason[s] that [name of defendant] gave for the decision. If you do not believe the reason[s] that [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true retaliatory reasons for the decision.]

For the fourth element, you must decide whether [name of defendant]'s acts were the proximate cause of damages that [name of plaintiff] sustained. Put another way, you must decide, if [name of defendant] had not [describe adverse employment action] [name of plaintiff], would these damages have occurred?]

If you find that [name of defendant]'s acts were the proximate cause of damages that [name of plaintiff] sustained, you must determine the amount of damages.

[Insert damages instruction based on substantive charge damages instruction. For claims under the ADEA, please see Pattern Instruction 4.10, *supra*. For claims under the ADA, please see Pattern Instruction 4.11, *supra*. For claims under the FLSA, please see Pattern Instruction 4.10, *supra*, and the accompanying annotations].

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] engaged in protected activity?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your

answer is “Yes,” go to the next question.]

2. That [name of defendant] took an adverse employment action against [name of plaintiff]?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

3. That [name of defendant] took the adverse employment action because of [name of plaintiff]’s protected activity?

Answer Yes or No _____

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

4. That [name of plaintiff] suffered damages because of the adverse employment action?

Answer Yes or No _____

[Insert damages interrogatories based on substantive charge damages interrogatories. For claims under the ADEA, please see Pattern Instruction 4.10, *supra*. For claims under the ADA, please see Pattern Instruction 4.11, *supra*. For claims under the FLSA, please see Pattern Instruction 4.10, *supra*, and the accompanying annotations].

SO SAY WE ALL.

_____
Foreperson’s Signature

DATE: _____

ANNOTATIONS AND COMMENTS

I. Causes of Action

Pattern Instruction 4.22 is intended to be used for retaliation claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(d); the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12203; and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3).

Pattern Instruction 4.22 is *not* intended to be used for retaliation claims arising under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-3(a) and 42 U.S.C. § 1981 ("§ 1981"). For retaliation claims under those statutes, please see Pattern Instruction 4.21, *supra*. Pattern Instruction 4.22 is also not intended to be used for retaliation claims arising under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* ("USERRA") or the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* For USERRA retaliation claims, please see Pattern Instruction 4.19, *supra*. For FMLA retaliation claims, please see Pattern Instruction 4.15, *supra*.

II. Elements and Defenses

A. Participation Clause Claims v. Opposition Clause Claims

Title VII's anti-retaliation provision contains two clauses: the "opposition clause" and the "participation clause." 42 U.S.C. § 2000e-3(a). The opposition clause "prohibits retaliation against an employee for opposing any practice made unlawful by Title VII." *Valdes v. Miami-Dade Coll.*, 463 F. App'x 843, 846 (11th Cir. 2012) (per curiam). The participation clause "protects activities which occur in conjunction with or after the filing of a formal charge with the EEOC." *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). If the plaintiff has a "participation clause" claim, then he must simply show that he participated in activities related to an EEOC charge; if the plaintiff has an "opposition clause" claim, he must show that he had a good faith belief that the employer engaged in unlawful employment practices. *See* Annotation II(A) to Pattern Instruction 4.21, *supra*. Due to differences between these two clauses, the pattern charge provides separate charges for each type of claim.

The anti-retaliation provisions of the ADEA and the ADA track the language of Title VII's anti-retaliation provision. *See* 29 U.S.C. § 623(d) (prohibiting discrimination "because" employee opposed practices made unlawful by the ADEA or participated in activities in connection with an ADEA EEOC charge); 42 U.S.C. § 12203(a) (prohibiting discrimination "because" employee opposed practices made unlawful by the ADA or

participated in activities in connection with an ADA EEOC charge). The anti-retaliation provisions of the FLSA are similar to Title VII's. 29 U.S.C. § 215(a)(3) (prohibiting discrimination "because" employee participated in activities in connection with an FLSA EEOC charge or took other specified actions); 29 U.S.C. § 218c (prohibiting discrimination "because" employee took certain actions in objection to FLSA violations). Therefore, Pattern Instruction 4.22 includes alternative instructions for participation clause claims and opposition clause claims.

B. Adverse Employment Action

Pattern Instruction 4.22 includes a charge on the definition of an adverse employment action, which is based on the Supreme Court's decision in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which requires proof that the challenged retaliatory conduct is materially adverse. *Id.* at 68. This definition of adverse employment action applies to retaliation claims under the ADA, ADEA, and FLSA. *See, e.g.*, *Burgos-Stefanelli v. Sec'y, U.S. Dept. of Homeland Sec.*, 410 F. App'x 243, 246 (11th Cir. 2011) (applying *Burlington Northern* to an ADA retaliation claim); *Brown v. Northside Hosp.*, 311 F. App'x 217, 224 (11th Cir. 2009) (applying *Burlington Northern* to an ADEA retaliation claim); *Darveau v. Detecon, Inc.*, 515 F.3d 334, 342 (4th Cir. 2008) (applying *Burlington Northern* to an FLSA retaliation claim).

C. Causation

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that, based on the statutory language of the ADEA, a plaintiff must prove that "age was the 'but-for' cause of the employer's adverse decision," not merely a motivating factor in the decision. *Id.* at 176-77. The Court also rejected the mixed motive defense (also known as the same decision defense) in the context of the ADEA, noting that unlike under Title VII, a mixed motive defense was not incorporated into the ADEA. *Id.* at 173-75. Although the Eleventh Circuit has not, at the time of this publication, issued an opinion on this matter, the Committee believes that the rationale of *Gross* extends to retaliation claims under the ADEA, the ADA, and the FLSA because the statutory causation language is the same as or similar to the statutory causation language applicable to ADEA discrimination claims. *See* 29 U.S.C. § 215(a)(3) (FLSA); 29 U.S.C. § 623(a), (d) (ADEA); 42 U.S.C. § 12203(a) (ADA). For these reasons, Pattern Instruction 4.22 instructs that the adverse employment action must be "because of" the plaintiff's protected activity.

The Supreme Court granted certiorari to determine whether the rationale of *Gross* extends to cases under the anti-retaliation provision of Title VII and similarly worded statutes, but by the date of this publication, the Supreme Court had not issued an opinion. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 978, 979 (2013) (granting certiorari in *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 n.16 (5th Cir. 2012)). Because the anti-retaliation provisions of the ADEA, ADA and the FLSA are worded similarly to the

anti-retaliation provision of Title VII, *Nassar* may provide guidance regarding the reach of *Gross.* Therefore, the Committee recommends reviewing this issue before instructing a jury on causation.

The Committee recommends that district courts review this issue prior to instructing a jury on a retaliation claim.

D. Pretext

Pattern Instruction 4.22 includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*.

III. Remedies

The remedies for ADA and ADEA retaliation claims match the remedies for disparate treatment claims under the ADA and ADEA, and the remedies for an FLSA retaliation claim are governed by the same damages measures as an ADEA retaliation claim, subject to the limitations discussed in the annotations following Pattern Instruction 4.10, *supra*. *See* 29 U.S.C. § 216(b) (FLSA); 29 U.S.C. § 626(b) (ADEA); 42 U.S.C. § 12117(a) (ADA). Thus, the jury charges on damages in the corresponding disparate treatment instructions may be incorporated into the model retaliation instruction as appropriate.

IV. When the Case Involves Both Discrimination and Retaliation Claims

In some cases, a plaintiff will bring both discrimination and retaliation claims. In those cases, the court should charge all of the elements of a discrimination and retaliation claim except damages separately, then give a charge on damages that applies to both types of claims.

4.23 Miscellaneous Issues — Constructive Discharge

In this case, [name of plaintiff] claims that [he/she] lost wages and benefits because [name of defendant] "constructively discharged" [name of plaintiff] from [his/her] job. Put another way, [name of plaintiff] claims that [he/she] left [his/her] job because the hostile work environment made [his/her] working conditions intolerable.

[Name of defendant] denies that [he/she/it] constructively discharged [name of plaintiff] and claims that [name of plaintiff] voluntarily quit.

To prove constructive discharge, [name of plaintiff] must prove that the hostile work environment made [his/her] working conditions so intolerable that a reasonable person in [his/her] position would have felt compelled to resign.

If you find that [name of defendant] constructively discharged [name of plaintiff], you may award [name of plaintiff] lost wages and benefits caused by the constructive discharge. If you find that [name of plaintiff] was not constructively discharged, you may not award [name of plaintiff] lost wages and benefits due to the loss of employment.

ANNOTATIONS AND COMMENTS

A constructive discharge occurs where working conditions are so intolerable that a reasonable person would have felt compelled to resign. *Akins v. Fulton County*, 420 F.3d 1293, 1302 (11th Cir. 2005). In evaluating constructive discharge claims, the Eleventh Circuit does not consider the plaintiff's subjective feelings. Instead, it employs an objective standard. *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1231 (11th Cir. 2001) (per curiam).

For a discussion of when the *Ellerth/Faragher* affirmative defense may apply in a constructive discharge case, *see Pennsylvania State Police v. Suders*, 542 U.S. 129, 139-41 (2004).

When this instruction is used, it may be necessary to adapt the verdict form accordingly.

4.24 Miscellaneous Issues — Employee or Independent Contractor

It is not always clear whether the law considers someone an "employee," and it is not always clear who the law considers someone's "employer." Some people, for example, perform services for others while remaining self-employed as independent contractors.

In this case, you must decide: Was [name of plaintiff] an employee of [name of defendant], or was [name of plaintiff] an independent contractor? You should answer this question in light of the economic realities of the entire relationship between the parties. There are a number of factors you must consider, based on all the evidence in the case:

(a) Who controls [name of plaintiff]'s work? In an employer/employee relationship, the employer has the right to control the employee's work, to set the means and manner in which the work is done, and set the hours of work. In contrast, an independent contractor generally must accomplish a certain work assignment within a desired time, but the details, means, and manner by which the contractor completes that assignment are determined by the independent contractor, normally using special skills necessary to perform that kind of work.

(b) How is [name of plaintiff] paid? An employer usually pays an employee on a time worked, piecework, or commission basis, and an employer usually provides vacation or sick time, insurance, retirement, and other fringe benefits to the employee. An independent contractor is ordinarily paid an agreed or set amount, or according to an agreed formula, for a given task or job, and no benefits are provided.

(c) How much risk or opportunity does [name of plaintiff] have? An independent contractor is generally one

who has the opportunity to make a profit or faces a risk of taking a loss. But an employee is generally compensated at a predetermined rate, has no risk of loss, and has social security taxes paid by the employer.

(d) Who provides [name of plaintiff]'s tools, equipment, and supplies? An independent contractor usually provides the tools, equipment, and supplies necessary to do the job — but an employee usually does not.

(e) How does [name of plaintiff] offer services? Independent contractors generally offer their services to the public or others in a particular industry, have procured the necessary licenses for performing their services, and may have a business name or listing in the phone book. Employees ordinarily work for only one or just a few employers, and do not have business names or listings.

(f) What is the parties' intent? The parties' intent is always important. But the description the parties themselves give to their relationship is not controlling — substance governs over form.

You should consider all the circumstances surrounding the work relationship — no single factor determines the outcome. Nevertheless, the extent of the right to control the means and manner of the worker's performance is the most important factor.

ANNOTATIONS AND COMMENTS

The central issue in determining employee/independent contractor status is the hiring party's right to control the manner and means by which the work is accomplished. *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (claim under the ADEA). Whether a person is an employee or an independent contractor is a question of fact for the jury. *Id.; see also Morrison v. Amway Corp.*, 323 F.3d 920, 926-28 (11th Cir. 2003) (claim under the FMLA).

In cases under the Fair Labor Standards Act, the Court of Appeals has applied an "economic realities" test under which persons are considered employees if they "are dependent upon the business to which they render service." *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 299-300 (5th Cir. 1975); *Villareal v. Woodham*, 113 F.3d 202, 205 (11th Cir. 1997).

This instruction follows the Eleventh Circuit's adoption of a standard that combines the "economic realities" test and the common law test. *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1234 (11th Cir. 2004) (claim under Title VII); *see also Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1340 (11th Cir. 2000) (the term "employee" as used in the ERISA statute refers to the common law analysis).

4.25 Miscellaneous Issues — Joint Employers

It is not always clear whether the law considers someone an "employee," and it is not always clear who the law considers someone's "employer." Some people, for example, perform services for others while remaining self-employed as independent contractors. Others are clearly employees. But it may not always be clear who is an employer of the employee. Sometimes an employee may have more than one employer at the same time.

So, in this case, you must decide: Was [name of plaintiff] [name of defendant]'s employee as well as an employee of [name of alleged other employer]? You should answer this question in light of the economic realities of the entire relationship between the parties based on the evidence.

Consider all the following factors to the extent you decide that each applies to this case:

(a) the nature and degree of control over the employee and who exercises that control;

(b) the degree of supervision, direct or indirect, over the employee's work and who exercises that supervision;

(c) who exercises the power to determine the employee's pay rate or method of payment;

(d) who has the right, directly or indirectly, to hire, fire, or modify the employee's employment conditions;

(e) who is responsible for preparing the payroll and paying wages;

(f) who made the investment in the equipment and facilities the employee uses;

(g) who has the opportunity for profit and loss;

(h) the employment's permanence and exclusiveness;

(i) the degree of skill the job requires;

(j) the ownership of the property or facilities where the employee works; and

(k) the performance of a speciality job within the production line integral to the business.

Consideration of all the circumstances surrounding the work relationship is essential. No single factor is determinative. Nevertheless, the extent of the right to control the means and manner of the worker's performance is the most important factor.

ANNOTATIONS AND COMMENTS

This instruction is derived from *Aimable v. Long and Scott Farms*, 20 F.3d 434 (11th Cir. 1994), which applies the economic realities test. See also *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) and *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999) (per curiam), which were "vertical" joint employment cases. For "horizontal" joint employment issues under the Fair Labor Standards Act, consideration of the regulations may be of assistance. *See* 29 C.F.R. § 791.2(a).

Under the regulations:

> Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> > (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
> >
> > (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
> >
> > (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 791.2(b) (footnotes omitted).

The Eleventh Circuit determined that the question of employer status under the ADEA intertwines jurisdiction and the merits and so must be resolved by the jury. *Garcia v. Copenhaver, Bell & Assoc*., 104 F.3d 1256, 1264 (11th Cir. 1997). Similarly, in *Morrison v. Amway Corp*., 323 F.3d 920, 930 (11th Cir. 2003), the court held that eligible employee status under the Family Medical Leave Act is not solely a jurisdictional issue. Rather, eligible employee status is to be decided by a jury or under Federal Rule of Civil Procedure 12(b)(6) or Federal Rule of Civil Procedure 56. *Morrison*, 323 F.3d at 930.

4.26 Miscellaneous Issues — Alter Ego — Corporation as Alter Ego of Stockholder

In this case, [name of plaintiff] claims that [name of corporation] was [name of stockholder]'s mere instrument or tool — what the law calls an alter ego. Should you find that [name of plaintiff] has proved this claim by a preponderance of the evidence, the law requires you to disregard the separate status of [name of corporation] and hold [name of stockholder] legally responsible for the corporation's acts.

Under our free-enterprise economic system, the law permits — even encourages — people to form corporations as a way to attract stockholder investments. Stockholders can invest their money in corporate enterprises without risking individual liability for corporate acts and transactions. In return, society gets the benefit of jobs and other commercial activity that corporate businesses create. So, in most cases, the status of a corporation as a separate legal entity apart from its owners or stockholders must be respected and preserved.

But this rule is not absolute, and you can disregard the separate status of a corporation when a stockholder uses the corporation as a mere tool for the purpose of evading or violating a statutory or other legal duty, or for accomplishing some fraud or other illegal purpose.

To decide whether to treat [name of corporation] as the alter ego of [name of stockholder], you should consider:

(a) the purpose for which the stockholder formed or acquired the corporation;

(b) whether the corporation kept books and records, held regular director meetings, and observed other corporate legal formalities;

(c) whether the corporate funds were comingled with the stockholder's funds;

(d) the activity or inactivity of others as officers or directors in the corporation's business affairs; and

(e) any other factors the evidence disclosed tending to show that the corporation was or was not operated as an entity separate from its owner.

ANNOTATIONS AND COMMENTS

To prove that a defendant shareholder is the alter ego of a corporation, it must be shown that the shareholder disregarded the corporate entity and made it a mere instrumentality for the conducting of his own affairs and that such control was used to commit fraud or perpetrate the violation of a statutory or other legal duty. *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1506-07 (11th Cir. 1988). These requirements are typical under state law as well. *See, e.g.*, *Ex parte Thorn*, 788 So. 2d 140 (Ala. 2000); *U.S. v. Fidelity Capital Corp*., 920 F.2d 827 (11th Cir. 1991) (applying Georgia law); *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1055 (Fla. 2008) (per curiam).

4.27 Miscellaneous Issues — Alter Ego — Subsidiary as Alter Ego of Parent Corporation

In this case, [name of plaintiff] claims that [name of subsidiary] was the mere instrument or tool of its parent corporation, [name of parent corporation]— what the law calls an alter ego. Should you find that [name of plaintiff] has proved this claim by a preponderance of the evidence, the law requires you to disregard the separate status of [name of subsidiary] and hold [name of corporation] legally responsible for the subsidiary's acts.

Under our free-enterprise economic system, the law permits — even encourages — people, and even other corporations, to form corporations as a way to attract stockholder investments. Parent corporations can invest their money in subsidiary enterprises without risking liability for the subsidiary's acts and transactions. In return, society gets the benefit of jobs and other commercial activity that the subsidiary's business creates. So, in most cases, the status of a subsidiary corporation as a separate legal entity apart from its parent corporation must be respected and preserved.

But this rule is not absolute, and you can disregard the separate status of a subsidiary corporation when the parent corporation uses the subsidiary as a mere tool for the purpose of evading or violating a statutory or other legal duty, or for accomplishing some fraud or other illegal purpose.

To decide whether to treat [name of subsidiary] as the alter ego of [name of corporation], you should consider:

(a) whether the parent caused the subsidiary's incorporation;

(b) whether the parent and subsidiary have common stock ownership, or directors or officers in common;

(c) whether the business purpose or function of the subsidiary is separate and distinct from the parent;

(d) whether the two entities kept separate corporate books and records (even though they may have filed joint tax returns as required by law);

(e) whether the parent finances the subsidiary or pays the subsidiary's salaries and other expenses;

(f) whether the subsidiary's funds were comingled — or not mingled — with the parent's funds; and

(g) any other factor the evidence disclosed tending to show that the subsidiary was or was not operated as an entity separate from its parent.

You should consider all these factors. No single factor is determinative.

ANNOTATIONS AND COMMENTS

To prove that a subsidiary should be treated as the alter ego of its parent corporation, it must be shown that the corporation so controls the operation of the subsidiary as to make it a mere instrumentality of the corporation and that such control is used for the purpose of committing fraud or perpetrating the violation of a statutory or other legal duty. *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1505-06 (11th Cir. 1988) (federal common law); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985).

The Eleventh Circuit has stated that, in order for a court to pierce the corporate veil, "a plaintiff must show (1) that the subsidiary is a mere instrumentality of the parent and (2) improper conduct." *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1320 (11th Cir. 1998) (applying Florida law).

5 Civil Rights Constitutional Claims (42 U.S.C. '1983)

5.1 Civil Rights — 42 U.S.C. §1983 Claims — First Amendment Claim — Prisoner Alleging Retaliation or Denial of Access to Courts

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, violated [his/her] rights under the First Amendment to the United States Constitution.

Specifically, [name of plaintiff] claims that [name of defendant] violated [his/her] constitutional right of access to the courts by [describe [name of defendant]'s conduct, *e.g.*, by making a disciplinary report against [him/her]] because [he/she] [attempted to use the legal system/communicated an intent to use the legal system] about [describe [name of plaintiff]'s grievance, *e.g.*, concerning [his/her] continuation in a close-confinement status].

A convicted prisoner loses some constitutional rights, such as the right to liberty, after being convicted of a criminal offense. But the prisoner keeps other constitutional rights. One of those retained rights is the First Amendment right of access to the courts to challenge the lawfulness of [name of plaintiff]'s conviction and the constitutionality of [his/her] confinement conditions. If [name of plaintiff] had no right to go to court to address these claims, the Constitution's guarantees would have no meaning, because there would be no way to enforce the guarantees.

The Constitutional right of access to the courts means that a prisoner has the right to file claims and other papers with the court, and the exercise of that right, or plan to exercise that right, cannot be the basis for a penalty or further punishment. This is true because, once again, if [name of plaintiff] could be punished for exercising a constitutional right or for giving a good-faith notice of intent to do so, the right itself would be meaningless.

But to maintain discipline and security, prison authorities do have the right to impose reasonable restrictions on the exercise of constitutional rights.

[The prohibition against prisoners making written threats is one reasonable restriction on the exercise of First Amendment rights. And, in this case, [name of defendant] claims that [name of plaintiff]'s communication to [him/her/it] about a lawsuit was nothing more than a written threat intended to harass prison officials — not a good-faith notice of intent to sue that was given in an effort to reach a settlement in a pending, legitimate dispute.]

So to succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] [attempted to use the legal system/communicated [his/her] intent to use the legal system to [name of defendant]];

Second: That [name of plaintiff]'s [attempt to use the legal system/communication to [name of defendant] of [his/her] intent to use the legal system] was made in good faith as an exercise of [his/her] First Amendment rights and was not a bad-faith threat intended as an act of harassment;

Third: That [name of defendant] intentionally retaliated against or punished [name of plaintiff] because of [his/her] [attempt to use the legal system / communication of [his/her] intent to use the legal system to [name of defendant]]; and

Fourth: That [name of defendant] acted under color of law when [he/she] retaliated against or punished [name of plaintiff].

For the third element, [name of defendant] "retaliates against" [name of plaintiff] if [name of defendant]'s actions would likely deter a similarly situated reasonable person in [name of plaintiff]'s position from exercising First Amendment rights.

[For the fourth element, the parties have agreed that [name of defendant] acted under color of law. So you should accept that as a proven fact.]

[For the fourth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find for [name of plaintiff] and against [name of defendant] on this claim, you must consider the issue of [name of plaintiff]'s damages, if any, caused by [name of defendant]'s violation[s] of [name of plaintiff]'s constitutional rights. [Name of plaintiff] bears the burden to prove any damages by a preponderance of the evidence. [Name of defendant]'s conduct caused [name of plaintiff]'s damages if [name of plaintiff] would not have been damaged without [name of defendant]'s conduct, and the damages were a reasonably foreseeable consequence of [name of defendant]'s conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [Name of Plaintiff] has proved them by a preponderance of

the evidence, and no others: [List recoverable damages.] [**See Annotations and Comments, Part IV.**]

[**Nominal Damages.** You may award $1.00 in nominal damages and no compensatory damages if you find that: (a) [name of plaintiff] has submitted no credible evidence of injury; or (b) [name of plaintiff]'s injuries have no monetary value or are not quantifiable with any reasonable certainty[; or (c) [name of defendant] used both justifiable and unjustifiable force against [name of plaintiff] and it is entirely unclear whether [name of plaintiff]'s injuries resulted from the use of justifiable or unjustifiable force].]

[**Mitigation of Damages:** Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to "mitigate" those damages — to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So if you find that [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of [name of plaintiff]'s damages by the amount that [he/she] could have reasonably received if [he/she] had taken advantage of such an opportunity.]

[**Punitive Damages.** To be used only for claims against individual defendants if plaintiff offers evidence of physical injury: [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [name of plaintiff] to an award of punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages.

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s

federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

[Name of defendant] acts with malice if [his/her] conduct is motivated by evil intent or motive. [Name of defendant] acts with reckless indifference to the protected federal rights of [name of plaintiff] when [name of defendant] engages in conduct with a callous disregard for whether the conduct violates [name of plaintiff]'s protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of punitive damages to be awarded. [You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.]]

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Applicability of Instructions in this Chapter

The instructions in this Chapter apply to constitutional claims asserted under 42 U.S.C. §1983 for actions taken under color of state law and claims asserted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for actions taken under color of federal law. *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) ("[F]ederal courts incorporate §1983 law into *Bivens* actions." (citation omitted)).

II. Qualified Immunity

In cases under §1983 or *Bivens*, the named defendants will usually assert on motion for summary judgment prior to trial a qualified immunity defense to be addressed by the court under the standards summarized in *Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 733-34 (11th Cir. 2010). The instructions in this chapter presume that the court has previously determined that the defendants do not have a qualified immunity defense. If there is a genuine issue of material fact pertaining to the qualified immunity defense and that issue is not subsumed in the elements of the claim the plaintiff must prove, the model instructions should be revised accordingly.

III. Retaliation

The definition of retaliation provided in this instruction is derived from *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008).

IV. Damages

The Eleventh Circuit has noted that physical injury "rarely" results from a First Amendment violation. *Al-Amin v. Smith*, 637 F.3d 1192, 1197 (11th Cir. 2011). Pursuant to the Prison Litigation Reform Act of 1995 ("PLRA"), "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). Accordingly, a prisoner who suffers a constitutional injury without physical injury may recover nominal damages, but not compensatory or punitive damages. *Al-Amin v. Smith*, 637 F.3d 1192, 1198 (11th Cir. 2011) (affirming district court's exclusion at trial of evidence concerning compensatory and punitive damages where there was no evidence plaintiff suffered a physical injury); *Hale v. Sec'y for Dep't of Corrs.*, 345 F. App'x 489, 491 (11th Cir. 2009) (affirming summary judgment in favor of Department of Corrections to the extent plaintiff's claim for compensatory and punitive damages were rejected due to absence of evidence of physical injury, but vacating and remanding summary judgment against plaintiff on his claim for nominal damages resulting from violation of his First Amendment rights). The "availability of declaratory or injunctive relief" as

determined by the court is not affected by the PLRA. *Boxer X v. Harris*, 437 F.3d 1107, 1111 n.3 (11th Cir. 2006).

In those rare cases where an incarcerated plaintiff does suffer a physical injury resulting from a First Amendment violation, the jury should be instructed concerning recoverable damages. "[W]hen §1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986); *accord Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990). Damages may include monetary losses, such as lost wages, damaged property, and future medical expenses. *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000) (citations omitted); *e.g., Christopher v. Florida*, 449 F.3d 1360, 1368 (11th Cir. 2006). Damages also may be awarded based on "physical pain and suffering" and "demonstrated impairment of reputation, and personal humiliation." *Slicker*, 215 F.3d at 1231(citations omitted). *See generally*, Joanne Rhoton Galbreath, Annotation, *Supreme Court's Views as to Measure or Elements of Damages Recoverable in Federal Civil Rights Action Under 42 USCS §1983*, 91 L. Ed. 2d 647 (2008).

"[C]ompensatory damages under §1983 may be awarded only based on actual injuries caused by the defendant and cannot be presumed or based on the abstract value of the constitutional rights that the defendant violated." *Slicker*, 215 F.3d at 1229. Consequently, when a plaintiff does not provide any "proof of a specific, actual injury caused by" the defendant's conduct, the plaintiff is not entitled to compensatory damages. *Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994). Accordingly, and due to the limitations imposed under the PLRA, the model instructions provide that only "recoverable damages claimed by Plaintiff and warranted by the evidence" should be included. Where appropriate, instructions concerning punitive damages and mitigation of damages also should be included.

5.2 Civil Rights — 42 U.S.C. §1983 Claims — Fourth Amendment Claim — Private Person Alleging Unlawful Arrest, Unlawful Search, or Excessive Force

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, intentionally deprived [him/her] of [his/her] rights under the United States Constitution.

Specifically, [name of plaintiff] claims that while [name of defendant] was acting under color of law as a member of [name of law enforcement agency], [name of defendant] intentionally committed acts that violated [name of plaintiff]'s constitutional right[s] [not to be arrested or seized without probable cause / not to be subjected to an unreasonable search of one's home or dwelling / to be free from the use of excessive or unreasonable force during an arrest].

Under the Fourth Amendment to the United States Constitution, every person has the right [not to be seized or arrested without probable cause / not to be subjected to an unreasonable search of one's home or dwelling / not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer — even though the arrest is otherwise made in accordance with the law].

A person may sue in this court for an award of money damages against anyone who, under color of law, intentionally commits acts that violate the person's rights under the United States Constitution.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s federal constitutional right [not to be arrested or seized without probable cause / not to be subjected to an unreasonable search of one's home or dwelling / not to be subjected to

excessive or unreasonable force during an arrest];

Second: That [name of defendant] acted under color of law; and

Third: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries.

[[Name of plaintiff] claims that [name of defendant] seized or arrested [name of plaintiff] without probable cause. [Name of defendant] may arrest a person without a warrant whenever the facts and circumstances within [name of defendant]'s knowledge, based on reasonably trustworthy information, would cause a reasonable officer to believe that the person has committed, is committing, or is about to commit an offense. It is a criminal offense for any person to [describe criminal offense [name of plaintiff] was alleged to have committed].]

[[Name of plaintiff] claims there was an unreasonable search of [his/her] home. The Constitution protects against unreasonable searches. The general rule is that a law enforcement official must get a search warrant from a judicial officer before conducting any search of a home. But there are certain exceptions to this general rule. One exception is [a search conducted by consent. If a person in lawful possession of a home freely and voluntarily invites or consents to a search, law enforcement officers may reasonably and lawfully conduct the search to the extent of the consent/recognized in emergency situations in which a law enforcement officer may enter and make a safety inspection for the purpose of ensuring or protecting the officer's and others' well-being. But the officer must have a reasonable and good-faith belief that there is a serious threat to the officer's safety or the safety of someone else].]

[[Name of plaintiff] claims that [name of defendant] used excessive force when arresting [him/her]. Every person has the constitutional right not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer — even though

the arrest is otherwise lawful. But in making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest. Whether a specific use of force is excessive or unreasonable depends on factors such as the crime's severity, whether a suspect poses an immediate violent threat to others, and whether the suspect resists or flees.

You must decide whether the force [name of defendant] used in making the arrest was excessive or unreasonable based on the degree of force a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances. [Name of defendant]'s underlying intent or motivation is irrelevant.]

[For the second element, the parties have agreed that [name of defendant] acted under color of law. So you should accept that as a proven fact.]

[For the second element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color"of law when acting within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

For the third element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

If you find in [name of plaintiff]'s favor for each fact that [he/she] must prove, you must decide the issue of [his/her] compensatory damages. To recover compensatory damages [name of plaintiff] must prove by a preponderance of the evidence that [he/she] would not have been damaged without [name of defendant]'s conduct, and the damages were a reasonably foreseeable consequence of [name of defendant]'s conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury — tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damage, to the extent you find that [Name of Plaintiff] has proved them by a preponderance of the evidence, and no others: [List recoverable damages, *e.g.*:

(a) The reasonable value of medical care and supplies that [name of plaintiff] reasonably needed and actually obtained, and the present value of medical care and supplies that [name of plaintiff] is reasonably certain to need in the future;

(b) Wages, salary, profits, and the reasonable value of working time that [name of plaintiff] lost because of [his/her] inability or diminished ability to work, and the present value of such compensation that [name of plaintiff] is reasonably certain to lose in the future because of [his/her] inability or diminished ability to work;

(c) [Name of plaintiff]'s physical injuries, including ill health, physical pain and suffering, disability, disfigurement,

discomfort, and any such physical harm that [name of plaintiff] is reasonably certain to experience in the future;

(d) [Name of plaintiff]'s mental and emotional distress, impairment of reputation, personal humiliation, and any related harm that [name of plaintiff] is reasonably certain to experience in the future; and

(e) the reasonable value of [name of plaintiff]'s property that was lost or destroyed because of [name of defendant]'s conduct.]

[**Nominal Damages.** You may award $1.00 in nominal damages and no compensatory damages if you find that: (a) [name of plaintiff] has submitted no credible evidence of injury; or (b) [name of plaintiff]'s injuries have no monetary value or are not quantifiable with any reasonable certainty[; or (c) [name of defendant] used both justifiable and unjustifiable force against [name of plaintiff] and it is entirely unclear whether [name of Plaintiff]'s injuries resulted from the use of justifiable or unjustifiable force].]

[**Mitigation of Damages:** Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to "mitigate" those damages — to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So if you find that [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of [name of plaintiff]'s damages by the amount that [he/she] could have reasonably received if [he/she] had taken advantage of such an opportunity.]

[**Punitive Damages.** To be used only for claims against individual defendants if plaintiff offers evidence of physical injury: [Name of

plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [name of plaintiff] to an award of punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages.

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

[Name of defendant] acts with malice if [his/her] conduct is motivated by evil intent or motive. [Name of defendant] acts with reckless indifference to the protected federal rights of [name of plaintiff] when [name of defendant] engages in conduct with a callous disregard for whether the conduct violates [name of plaintiff]'s protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of punitive damages to be awarded. [You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.]]

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

If the plaintiff claims that more than one defendant is liable for an unlawful search or seizure or use of excessive force, the model charge may be modified to accommodate multiple defendants. Further, if the plaintiff seeks to hold a government entity or individual supervisor liable, Pattern Instruction 5.6 *et seq.* may be incorporated into the instant instruction as appropriate. In doing so, the court should make clear that government entities are immune from punitive damages.

I. Claims by Private Person Compared to Claims by Convicted Prisoners and Pretrial Detainees

Claims of excessive force against law enforcement officials in the course of making an arrest, investigatory stop, or other "seizure" of a private person are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. M.S. Connor*, 490 U.S. 386, 388, 395 n.10 (1989). On the other hand, claims involving the mistreatment of pretrial detainees while in custody are governed by the Fourteenth Amendment's Due Process Clause, and similar claims by convicted prisoners are governed by the Eighth Amendment's Cruel and Unusual Punishment Clause. *E.g.*, *Lumley v. City of Dade City, Fla.*, 327 F.3d 1186, 1196 (11th Cir. 2003). Pattern Instruction 5.3**,** *infra*, should be applied in cases where the plaintiff's claim concerns action taken against Plaintiff while he/she was in custody as a pretrial detainee or convicted prisoner.

II. Causation

"A §1983 claim requires proof of an affirmative causal connection between the defendant's acts or omissions and the alleged constitutional deprivation." *Troupe v. Sarasota Cnty., Fla.*, 419 F.3d 1160, 1165 (11th Cir. 2005) (citing *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986)). The requisite causation includes proof of legal and proximate causation. *Jackson v. Sauls*, 206 F.3d 1156, 1168 n.16 (11th Cir. 2000). Thus, "a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue." *Id.* at 1168. The model instruction makes clear that the plaintiff must prove both legal and proximate causation in accordance with Eleventh Circuit case law.

III. Compensatory Damages

"[W]hen §1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986); *accord Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990). "In addition to damages based on monetary loss or physical pain and suffering, . . . a §1983 plaintiff also may be awarded compensatory

damages based on demonstrated mental and emotional distress, impairment of reputation, and personal humiliation." *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000) (citations omitted). Damages may be awarded for future medical expenses and other losses. *E.g.*, *Christopher v. Florida*, 449 F.3d 1360, 1368 (11th Cir. 2006). *See generally*, Joanne Rhoton Galbreath, Annotation, *Supreme Court's Views as to Measure or Elements of Damages Recoverable in Federal Civil Rights Action Under 42 USCS §1983*, 91 L. Ed. 2d 647 (2008).

"[C]ompensatory damages under §1983 may be awarded only based on *actual injuries* caused by the defendant and cannot be presumed or based on the abstract value of the constitutional rights that the defendant violated." *Slicker*, 215 F.3d at 1229 (italics in original). Consequently, when a plaintiff does not provide any "proof of a specific, actual injury caused by" the defendant's conduct, the plaintiff is not entitled to compensatory damages. *Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994). The availability of nominal damages is discussed in detail *infra* part V.

IV. Mitigation of Damages

The general rule requiring plaintiffs to mitigate damages applies in actions under 42 U.S.C. §1983. *See, e.g.*, *Murphy v. City of Flagler Beach*, 846 F.2d 1306, 1309-10 (11th Cir. 1988). Accordingly, the model instruction provides an optional bracketed charge regarding mitigation of damages.

V. Nominal Damages

The nominal damages instruction reflects the three situations identified in *Slicker* where an award of nominal damages is appropriate. *Slicker*, 215 F.3d at 1232. The third situation is bracketed because it only applies in excessive force cases "where there is evidence that both justifiable and unjustifiable force might have been used and the injury may have resulted from the use of justifiable force." *Id.* (citation omitted).

A plaintiff is not automatically entitled to a nominal damages instruction for constitutional violations; the plaintiff must request the instruction. *See Oliver v. Falla*, 258 F.3d 1277, 1282 (11th Cir. 2001) (finding that because the plaintiff failed to request a nominal damages instruction, he waived any entitlement to such damages).

In cases that are not subject to the Prison Litigation Reform Act, an award of nominal damages may be sufficient to justify an award of punitive damages in a §1983 action. *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1177-78 & n.3 (11th Cir. 2009) (noting that if plaintiff organization is successful on its claim of a First Amendment violation permitting nominal damages, then "punitive damages may be available" as well); *Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir. 1991) (affirming award of punitive damages even though jury awarded plaintiff nominative damages but not compensatory damages).

VI. Punitive Damages

In order to receive punitive damages in §1983 actions, a plaintiff must show that the defendant's conduct was "motivated by evil motive or intent" or involved "reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

Punitive damages in §1983 claims are not recoverable against government entities. *Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008). Because many §1983 claims are brought against government officials in their official capacities or against municipal entities themselves, punitive damages are not recoverable in a large number of §1983 claims. However, punitive damages are recoverable against all other defendants in §1983 suits (for instance, individual capacity suits), and the statutorily mandated caps set out in § 102 of the 1991 Civil Rights Act, 42 U.S.C. § 1981a(b)(3), do not apply to §1983 claims. Title 42 U.S.C. § 1981a(a) lists the causes of action under which the statutory punitive damages caps apply. In a case brought against both individuals and government entities, the jury instructions should expressly state that punitive damages may be assessed only against the individual defendants for their respective conduct.

5.3 Civil Rights — 42 U.S.C. §1983 Claims — Eighth or Fourteenth Amendment Claim — Convicted Prisoner or Pretrial Detainee Alleging Excessive Force

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, intentionally deprived [him/her] of [his/her] rights under the United States Constitution.

Specifically, [name of plaintiff] claims that [name of defendant], while working as a [correctional officer] at [name of corrections facility], intentionally violated [name of plaintiff]'s [Eighth Amendment right as a prisoner to be free from cruel and unusual punishment/Fourteenth Amendment right to be free from the use of excessive force against [him/her] while being detained as a pretrial detainee].

The Constitution guarantees that every person who is [convicted of a crime or a criminal offense has the right not to be subjected to cruel and unusual punishment] [arrested and detained] must not be subjected to excessive force while detained. This includes, of course, the right not to be assaulted or beaten without legal justification while incarcerated.

A person may sue in this court for an award of money damages against anyone who, under color of law, intentionally violates the person's rights under the United States Constitution.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] intentionally [describe the alleged conduct];

Second: That the force used against [name of plaintiff] by [name of defendant] was excessive;

Third: That [name of defendant] acted under color of law; and

Fourth: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries. The United States Constitution guarantees the right not to be subjected to excessive force by a law enforcement or corrections officer while being detained in custody. But not every push or shove — even if it later seems unnecessary — is a constitutional violation. Also, an officer always has the right to use the reasonable force that is necessary under the circumstances to maintain order and ensure compliance with jail or prison regulations.

You must decide whether any force used in this case was excessive based on whether the force, if any, was applied in a good-faith effort to maintain or restore discipline, or instead whether it was applied maliciously to cause harm. In making that decision you should consider the amount of force used in relationship to the need presented; the motive of [name of defendant]; the extent of the injury inflicted; and any effort made to temper the severity of the force used. Of course, officers may not maliciously or sadistically use force to cause harm regardless of the significance of the injury to the prisoner.

[For the third element, the parties have agreed that [name of defendant] acted under color of law. So you should accept that as a proven fact.]

[For the third element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in

manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

For the fourth element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

If you find in [name of plaintiff]'s favor with respect to each of the facts that [he/she] must prove, you must then decide the issue of [name of plaintiff]'s compensatory damages. To recover compensatory damages [name of plaintiff] must prove by a preponderance of the evidence that [he/she] would not have been damaged without [name of defendant]'s conduct, and the damages were a reasonably foreseeable consequence of [name of defendant]'s conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork.

But compensatory damages are not restricted to actual loss of money — they also cover the physical aspects of the injury. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like physical pain. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damage, to the extent you find that [Name of Plaintiff] has proved them by a preponderance of the evidence, and no others: [List recoverable damages, *e.g.*:

(a) The reasonable value of medical care and supplies that [name of plaintiff] reasonably needed and actually obtained, and the

present value of medical care and supplies that [name of plaintiff] is reasonably certain to need in the future;

(b) [Name of plaintiff]'s physical injuries, including ill health, physical pain and suffering, disability, disfigurement, discomfort, and any such physical harm that [name of plaintiff] is reasonably certain to experience in the future. You may not award compensatory damages for minor physical injuries such as cuts, scrapes, and bruises;

(c) Wages, salary, profits, and the reasonable value of working time that [name of plaintiff] lost because of [his/her] inability or diminished ability to work, and the present value of such compensation that [name of plaintiff] is reasonably certain to lose in the future because of [his/her] inability or diminished ability to work;

(d) [Name of plaintiff]'s mental and emotional distress, impairment of reputation, personal humiliation, and any related harm that [name of plaintiff] is reasonably certain to experience in the future; and

(e) the reasonable value of [name of plaintiff]'s property that was lost or destroyed because of [name of defendant]'s conduct.]

If you award [name of plaintiff] compensatory damages for physical injuries, you may also award [name of plaintiff] damages for mental and emotional distress, impairment of reputation, and personal humiliation to the extent that [he/she] proves these damages by a preponderance of the evidence.

[**Nominal Damages.** You may award $1.00 in nominal damages and no compensatory damages if you find that: (a) [name of plaintiff] has submitted no credible evidence of injury; or (b) [name of plaintiff]'s injuries have no monetary value or are not quantifiable with any reasonable certainty[; or (c) [name of defendant] used both justifiable and unjustifiable force against [name of plaintiff] and it is entirely unclear

whether [name of plaintiff]'s injuries resulted from the use of justifiable or unjustifiable force].]

[**Mitigation of Damages:** Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to "mitigate" those damages — to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So if you find that [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of [name of plaintiff]'s damages by the amount that [he/she] could have reasonably received if [he/she] had taken advantage of such an opportunity.]

[**Punitive Damages.** To be used only for claims against individual defendants if plaintiff offers evidence of physical injury: [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [name of plaintiff] to an award of punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages.

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

[Name of defendant] acts with malice if [his/her] conduct is motivated by evil intent or motive. [Name of defendant] acts with reckless indifference to the protected federal rights of [name of plaintiff] when [name of defendant] engages in conduct with a callous disregard

for whether the conduct violates [name of plaintiff]'s protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of punitive damages to be awarded. [You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.]]

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth and Fourteenth Amendment Claims

"In the prison context, three distinct Eighth Amendment claims are available to plaintiff inmates alleging cruel and unusual punishment, each of which requires a different showing to establish a constitutional violation." *Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010) (citation omitted). "The Eighth Amendment can give rise to claims challenging specific conditions of confinement, the excessive use of force, and the deliberate indifference to a prisoner's serious medical needs." *Id.* at 1303-04. "Each of these claims requires a two-prong showing: an objective showing of a deprivation or injury that is 'sufficiently serious' to constitute a denial of the 'minimal civilized measure of life's necessities' and a subjective showing that the official had a 'sufficiently culpable state of mind.'" *Id.* at 1304 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Separate instructions are provided for each of these three types of claims brought by prisoners. *See* Pattern Instructions 5.3, 5.4, and 5.5.

Claims by pretrial detainees challenging specific conditions of confinement, the excessive use of force, and the deliberate indifference to a prisoner's serious medical needs are governed by the Fourteenth Amendment, which guarantees the same rights afforded to

convicted prisoners under the Eighth Amendment. *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1326 (11th Cir. 2007) (citation omitted); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) ("[D]ecisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees."). Accordingly, this model instruction may be used for an excessive force claim brought by a pretrial detainee or a convicted prisoner.

II. Elements of Eighth Amendment Excessive Force Claim

As discussed above, an Eighth Amendment excessive force claim consists of an objective and a subjective component. With respect to the objective component, "not . . . every malevolent touch by a prison guard gives rise to a federal cause of action. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). "The Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Id.* at 9-10 (internal quotations omitted). Applying that standard, the Supreme Court ruled that blows directed at a prisoner causing bruising, swelling, loosened teeth, and a cracked dental plate were not *de minimis* for Eighth Amendment purposes. *Id.* at 10.

With respect to the subjective element of an Eighth Amendment excessive force claim, prison officials must not act maliciously and sadistically for the purpose of causing harm. *Id.* at 9; accord *Thomas*, 614 F.3d at 1304; *see also Whitley v. Albers*, 475 U.S. 312, 319 (1986) (holding that "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment forbidden by Eighth Amendment).

The Eleventh Circuit has affirmed much of the language used in the 2005 model instruction to define the elements of an Eighth Amendment excessive force claim, and that language was retained in the present instruction. *Johnson v. Breeden*, 280 F.3d 1308, 1314 (11th Cir. 2002), *overruled in part on other grounds*, *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1177, 175 L. Ed. 2d 995 (2010), *as recognized in Dixon v. Sutton*, No. 2:08-cv-745-WC, 2011 U.S. Dist. LEXIS 49945, at *46-47, n.4 (M.D. Ala. May 9, 2011).

III. *De Minimis* Physical Injury

Pursuant to 42 U.S.C. § 1997e(e), a prisoner cannot recover compensatory damages for mental or emotional injury or punitive damages absent physical injury. *See* Pattern Instruction 2.1, *supra*. The damages limitations under the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(e), apply with equal force to claims by convicted prisoners and pretrial detainees. *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1322 (11th Cir. 2007) (applying PLRA to §1983 claim by a pretrial detainee).

Physical injury must be more than *de minimis* to defeat the emotional-injury bar under § 1997e(e), but the physical injury need not be significant. *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1312-13 (11th Cir. 2002). The Eleventh Circuit

has not precisely defined what constitutes *de minimis* physical injury. Case law indicates that a *de minimis* physical injury includes minor cuts and bruises. *Nolin v. Isbell*, 207 F.3d 1253, 1258 n.4 (11th Cir. 2000) (bruises received during an arrest were non-actionable *de minimis* injury); *Harris v. Garner*, 190 F.3d 1279, 1286-87 (11th Cir. 1999), *vacated*, 197 F.3d 1059 (11th Cir. 1999), *reinstated in pertinent part*, 216 F.3d 970 (11th Cir. 2000) (holding that a forced "dry shave" was a *de minimis* injury); *Siglar v. Hightower*, 112 F.3d 191, 193-94 (5th Cir. 1997) (finding that a sore, bruised ear persisting for three days was *de minimis*).

For information regarding the instructions on causation, compensatory damages, mitigation of damages, nominal damages, and punitive damages, see the annotations following Pattern Instruction 5.2.

IV. The Prison Litigation Reform Act

This pattern instruction is intended to be used in cases where the Prison Litigation Reform Act (PLRA) applies. The PLRA applies to section 1983 claims by prisoners and pretrial detainees who are incarcerated. *See* 42 U.S.C. § 1997e(e)("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."). The PLRA does not apply to lawsuits brought by individuals who are no longer incarcerated. *Napier v. Preslicka*, 314 F.3d 528, 531-32 (11th Cir. 2002). For cases where the PLRA does not apply, modifications to the damages portion of the instruction may be required.

5.4 Civil Rights — 42 U.S.C. §1983 Claims — Eighth or Fourteenth Amendment Claim — Convicted Prisoner or Pretrial Detainee Alleging Indifference to Serious Medical Need

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, intentionally violated [his/her] rights under the United States Constitution.

Specifically, [name of plaintiff] claims that [name of defendant], while working as an employee of [name of corrections facility], deliberately ignored [his/her] serious medical need and caused injury to [him/her].

The United States Constitution provides that anyone who is imprisoned is entitled to necessary medical care, and a corrections officer violates that right by being deliberately indifferent to a prisoner's serious medical need known to the officer.

A person may sue in this court for an award of money damages against anyone who, under color of law, intentionally violates that person's rights under the United States Constitution.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] had a serious medical need;

Second: That [name of defendant] knew that [name of plaintiff] had a serious medical need that posed a risk of serious harm;

Third: That [name of defendant] failed to [provide/get] necessary medical care for [name of plaintiff]'s serious medical need in

disregard or indifference to the risk of serious harm;

Fourth: That [name of defendant] was acting under color of law when [he/she] failed to [provide/get] necessary medical care for [name of plaintiff]'s serious medical need; and

Fifth: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries.

For the first element, [name of plaintiff] must prove a serious medical need. A "serious medical need" is a medical condition that a physician has diagnosed as requiring treatment or a medical condition that is so obvious that even a lay person would easily recognize the need for medical care. In either case, the medical condition must have posed a substantial risk of serious harm to [name of plaintiff] if left unattended.

For the second element, you must determine whether [name of defendant] actually knew [name of plaintiff] had a serious medical need and required immediate attention. Put another way, it is not enough to show that [name of defendant] was careless or neglected [his/her] job duties and should have known about [name of plaintiff]'s need. And it is not enough to show that a reasonable person would have known of the serious medical need.

For the third element, to decide whether [name of defendant] was deliberately indifferent to [name of plaintiff]'s serious medical need, you may consider all the relevant circumstances including the seriousness of [name of plaintiff]'s injury, the length of any delay in providing [name of plaintiff] medical care, and the reasons for any delay. But the law does not require that [name of plaintiff] receive the most advanced medical response to [his/her] serious medical need.

[For the fourth element, the parties have agreed that [name of defendant] acted under color of law. So you should accept that as a proven fact.]

[For the fourth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

For the fifth element, you must determine whether [name of defendant]'s conduct caused [name of plaintiff]'s injuries. [Name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

If you find in [name of plaintiff]'s favor with respect to each of the facts that [he/she] must prove, you must then decide the issue of [name of plaintiff]'s compensatory damages. To recover compensatory damages, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] wouldn't have been damaged without [name of defendant]'s conduct, and the damages were a reasonably foreseeable consequence of [name of defendant]'s conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork.

But compensatory damages are not restricted to actual loss of money — they also cover the physical aspects of the injury. [Name of plaintiff] does not have to introduce evidence of a monetary value for

intangible things like physical pain. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damage, to the extent you find that [Name of Plaintiff] has proved them by a preponderance of the evidence, and no others: [List recoverable damages, *e.g.*:

(a) The reasonable value of medical care and supplies incurred by [name of plaintiff] which were reasonably needed and actually obtained, and the present value of medical care and supplies that [name of plaintiff] is reasonably certain to need in the future

(b) [Name of plaintiff]'s physical injuries that are more than minimal, including ill health, physical pain and suffering, disability, disfigurement, discomfort, and any such physical harm that [name of plaintiff] is reasonably certain to experience in the future. You may not award compensatory damages for minor physical injuries such as cuts, scrapes, and bruises;

(c) Emotional injury if accompanied by more than minimal physical injury to [name of plaintiff];

(d) Wages, salary, profits, and the reasonable value of working time that [name of plaintiff] has lost because of [his/her] inability or diminished ability to work, and the present value of such compensation that [name of plaintiff] is reasonably certain to lose in the future because of [his/her] inability or diminished ability to work; and

(e) The reasonable value of [name of plaintiff]'s property lost or destroyed as a result of [name of defendant]'s conduct.]

If you award [name of plaintiff] compensatory damages for physical injuries, you may also award [name of plaintiff] damages for mental and emotional distress, impairment of reputation, and personal humiliation to the extent that [he/she] proves these damages by a preponderance of the evidence.

[**Nominal Damages.** You may award $1.00 in nominal damages and no compensatory damages if you find that: (a) [name of plaintiff] has submitted no credible evidence of injury; or (b) [name of plaintiff]'s injuries have no monetary value or are not quantifiable with any reasonable certainty.]

[**Mitigation of Damages:** Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to "mitigate" those damages — to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So if you find that [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of [name of plaintiff]'s damages by the amount that [he/she] could have reasonably received if [he/she] had taken advantage of such an opportunity.]

[**Punitive Damages.** To be used only for claims against individual defendants if plaintiff offers evidence of physical injury: [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [name of plaintiff] to an award of punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages.

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s

federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

[Name of defendant] acts with malice if [his/her] conduct is motivated by evil intent or motive. [Name of defendant] acts with reckless indifference to the protected federal rights of [name of plaintiff] when [name of defendant] engages in conduct with a callous disregard for whether the conduct violates [name of plaintiff]'s protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of punitive damages to be awarded. [You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.]]

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth / Fourteenth Amendment

This instruction applies to claims of deliberate indifference to serious medical need by both pretrial detainees and convicted prisoners for the reasons discussed in the annotations following Pattern Instruction 5.3, *supra*.

II. Elements of Claim of Deliberate Indifference to Medical Need

The elements of this claim are derived from *Youmans v. Gagnon*, 626 F.3d 557, 563-64 (11th Cir. 2010), and *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1307 (11th Cir. 2009).

III. *De Minimis* Physical Injury

Medical neglect can result in physical injuries that are not *de minimis* and for which a prisoner may be compensated under the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(e). *See, e.g.*, *Sealock v. Colorado*, 218 F.3d 1205, 1210-11 (10th Cir. 2000) (where prisoner alleged that sergeant was deliberately indifferent to his need for medical attention, heart attack satisfied § 1997e(e)'s physical injury requirement even though prisoner presented no evidence that delay caused by sergeant resulted in any damage to his heart, where jury could find the delay prolonged prisoner's pain and suffering); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 658 (E.D. Pa. 2001) (holding the section 1997e(e) physical injury requirement satisfied where pre-operative transsexual prisoner alleged that after her hormone therapy was withdrawn, she suffered headaches, nausea, vomiting, cramps, hot flashes, hair loss, re-emergence of masculine physical characteristics, depression and suicidal thoughts).

For additional discussion of the requirement that an incarcerated plaintiff suffer more than *de minimis* physical injury to recover compensatory damages, see the annotation following Pattern Instruction 5.3.

For information regarding the instructions on causation, compensatory damages, mitigation of damages, nominal damages, and punitive damages, see the annotation following Pattern Instruction 5.2.

IV. The Prison Litigation Reform Act

This pattern instruction is intended to be used in cases where the Prison Litigation Reform Act (PLRA) applies. The PLRA applies to section 1983 claims by prisoners and pretrial detainees who are incarcerated. *See* 42 U.S.C. § 1997e(e)("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."). The PLRA does not apply to lawsuits brought by individuals who are no longer incarcerated. *Napier v. Preslicka*, 314 F.3d 528, 531-32 (11th Cir. 2002). For cases where the PLRA does not apply, modifications to the damages portion of the instruction may be required.

5.5 Civil Rights — 42 U.S.C. §1983 Claims — Eighth or Fourteenth Amendment Claim — Unlawful Condition of Confinement (e.g., Failure to Protect Convicted Prisoner or Pretrial Detainee from Attack)

In this case, [name of plaintiff] was a prisoner at [name of corrections facility]. [Name of plaintiff] claims that [name of defendant], while acting under color of law, intentionally deprived [name of plaintiff] of [his/her] rights under the United States Constitution while [name of plaintiff] was incarcerated.

Specifically, [name of plaintiff] claims that [name of defendant], while working as an employee of [name of corrections facility], unlawfully [describe disputed condition of confinement, *e.g.*, failed to protect [him/her] from attack by another prisoner].

The United States Constitution guarantees certain minimum conditions of confinement to incarcerated persons, including protection from attack by other prisoners. A corrections officer violates the constitutional rights of an incarcerated person by acting with deliberate indifference to a known threat of harm to that person posed by another prisoner.

An incarcerated person may sue in this court for an award of money damages against anyone who, under color of law, intentionally violates that person's rights under the United States Constitution.

To establish the claim that [name of defendant] unlawfully [describe condition of confinement, *e.g.*, failed to protect [name of plaintiff] from attack by another prisoner], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That there was a substantial risk to [name of plaintiff] that [describe condition of confinement, *e.g.*, [he/she] would be attacked by another prisoner];

Second: That [name of defendant] actually knew of that risk;

Third: That [name of defendant] disregarded that risk or failed to take reasonable measures to protect [name of plaintiff] in response to that risk;

Fourth: That [name of plaintiff] was [describe condition of confinement, *e.g.*, attacked by another prisoner];

Fifth: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Sixth: That [name of defendant] acted under color of law.

[For the second element, it is not necessary that [name of defendant] knew precisely who would attack [name of plaintiff] if [name of defendant] knew there was a substantial risk to [name of plaintiff]'s safety. Also, if [name of plaintiff] shows that [name of defendant] had information [he/she] suspected (or believed) to be true, and if you find that such information indicated a substantial risk of serious harm to [name of plaintiff], [name of defendant] cannot escape liability for failing to confirm those facts. But it is not enough for [name of plaintiff] to show that [his/her] risk of substantial harm was obvious and that [name of defendant] should have known of the risk. [Name of plaintiff] must show that [name of defendant] actually knew of the risk.]

For the fifth element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the sixth element, the parties have agreed that [name of defendant] acted under color of law. So you should accept that as a proven fact.]

[For the sixth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find in [name of plaintiff]'s favor with respect to each of the facts that [he/she] must prove, you must then decide the issue of [name of plaintiff]'s compensatory damages. To recover compensatory damages, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] wouldn't have been damaged without [name of defendant]'s conduct, and the damages were a reasonably foreseeable consequence of [name of defendant]'s conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork.

But compensatory damages are not restricted to actual loss of money — they also cover the physical aspects of the injury. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like physical pain. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damage, to the extent you find that [Name of Plaintiff] has proved them by a

preponderance of the evidence, and no others: [List recoverable damages, *e.g.*:

(a) The reasonable value of medical care and supplies that [name of plaintiff] reasonably needed and actually obtained, and the present value of medical care and supplies that [name of plaintiff] is reasonably certain to need in the future;

(b) [Name of plaintiff]'s physical injuries that are more than minimal, including ill health, physical pain and suffering, disability, disfigurement, discomfort, and any such physical harm that [name of plaintiff] is reasonably certain to experience in the future. You may not award compensatory damages for minor physical injuries such as cuts, scrapes, and bruises;

(c) [Name of plaintiff]'s emotional injury if accompanied by more than minimal physical injury;

(d) Wages, salary, profits, and the reasonable value of working time that [name of plaintiff] has lost because of [his/her] inability or diminished ability to work, and the present value of such compensation that [name of plaintiff] is reasonably certain to lose in the future because of [his/her] inability or diminished ability to work;

(e) The reasonable value of [name of plaintiff]'s property that was lost or destroyed because of [name of defendant]'s conduct.]

If you award [name of plaintiff] compensatory damages for physical injuries, you may also award [name of plaintiff] damages for mental and emotional distress, impairment of reputation, and personal humiliation to the extent that [he/she] proves these damages by a preponderance of the evidence.

[**Nominal Damages.** You may award $1.00 in nominal damages and no compensatory damages if you find that: (a) [name of plaintiff] has submitted no credible evidence of injury; or (b) [name of plaintiff]'s injuries have no monetary value or are not quantifiable with any reasonable certainty.]

[**Mitigation of Damages:** Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to "mitigate" those damages — to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So if you find that [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of [name of plaintiff]'s damages by the amount that [he/she] could have reasonably received if [he/she] had taken advantage of such an opportunity.]

[**Punitive Damages.** To be used only for claims against individual defendants if plaintiff offers evidence of physical injury: [Name of plaintiff] also claims that [name of individual defendant]'s acts were done with malice or reckless indifference to [name of plaintiff]'s federally protected rights, which would entitle [name of plaintiff] to an award of punitive damages in addition to compensatory damages. [Name of plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages.

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

[Name of defendant] acts with malice if [his/her] conduct is motivated by evil intent or motive. [Name of defendant] acts with

reckless indifference to the protected federal rights of [name of plaintiff] when [name of defendant] engages in conduct with a callous disregard for whether the conduct violates [name of plaintiff]'s protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of punitive damages to be awarded. [You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.]]

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth / Fourteenth Amendment

This instruction applies to claims brought by both pretrial detainees and convicted prisoners for the reasons discussed in the annotations following Pattern Instruction 2.3.1, *supra*.

II. Elements of Claim

Any condition of confinement may serve as the basis for a claim under the Eighth or Fourteenth Amendment, and the model instruction addresses the common claim that prison officials failed to protect the plaintiff from attack by another prisoner. *See, e.g.*, *Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 616-17 (11th Cir. 2007). A prison official's failure to protect a prisoner from attack violates the prisoner's constitutional rights "when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not respond reasonably to the risk." *Carter v. Galloway*, 352 F.3d 1346, 1349 (11th Cir. 2003) (quotation omitted). "A plaintiff must also show that the constitutional

violation caused his injuries." *Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1028 (11th Cir. 2001).

Prison officials may avoid liability by showing: (1) "that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger"; (2) "that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent"; or (3) that "they responded reasonably to the risk, even if the harm ultimately was not averted." *Rodriguez*, 508 F.3d at 617-18 (quotation omitted). At the time of publication, no authority designates these arguments as affirmative defenses; therefore, the model instruction does not include separate affirmative defenses on these grounds.

III. Damages

For a discussion of damages which may be recovered on this claim, see the annotations following Pattern Instructions 5.3.

IV. The Prison Litigation Reform Act

This pattern instruction is intended to be used in cases where the Prison Litigation Reform Act (PLRA) applies. The PLRA applies to section 1983 claims by prisoners and pretrial detainees who are incarcerated. *See* 42 U.S.C. § 1997e(e)("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."). The PLRA does not apply to lawsuits brought by individuals who are no longer incarcerated. *Napier v. Preslicka*, 314 F.3d 528, 531-32 (11th Cir. 2002). For cases where the PLRA does not apply, modifications to the damages portion of the instruction may be required.

5.6 Civil Rights — 42 U.S.C. §1983 Claims — Government Entity Liability (Incorporate into Instructions for Claims against Individual Defendants)

[Name of plaintiff] claims that [name of government entity], which employed [name of officer], is liable for violating [name of plaintiff]'s constitutional rights. You should consider whether [name of government entity] is liable only if you find that [name of officer] violated [name of plaintiff]'s constitutional rights.

[Name of government entity] is not liable for violating [name of plaintiff]'s constitutional rights simply because it employed [name of officer]. Rather, [name of government entity] is liable if [name of plaintiff] proves that an official policy or custom of [name of government entity] directly caused [his/her] injuries. Put another way, [name of government entity] is liable if its official policy or custom was the moving force behind [name of plaintiff]'s injuries.

An "official policy or custom" means:

(a) A rule or regulation created, adopted, or ratified by [name of government entity]; or

(b) A policy statement or decision made by [name of government entity]'s policy-maker; or

(c) A practice or course of conduct that is so widespread that it has acquired the force of law — even if the practice has not been formally approved.

You may find that an "official policy or custom" existed if there was a practice that was so persistent, widespread, or repetitious that the [name of government entity]'s policy-maker either knew of it or should have known of it.

[Name of policy-maker] is the [name of government entity]'s "policy-maker."

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into any applicable §1983 instructions against an individual defendant or defendants. In such case, jury interrogatories applicable to the government entity should be added if a special verdict form is used.

II. Elements

This charge is derived from *AFL-CIO v. City of Miami, Fla.*, 637 F.3d 1178, 1187 (11th Cir. 2011). A government entity may not be held liable under §1983 absent a finding that an individual, typically an individual named as a defendant in the case, violated the plaintiff's constitutional rights. *See, e.g.*, *Garczynski v. Bradshaw*, 573 F.3d 1158, 1170 (11th Cir. 2009).

III. Punitive Damages

As discussed in the annotations following Pattern Instruction 2.2.1, *supra*, punitive damages may not be assessed against a government entity.

5.7 Civil Rights — 42 U.S.C. §1983 Claims — Government Entity Liability for Failure to T

[Name of plaintiff] claims that [name of government entity] is liable for failing to adequately [train/supervise] its officer[s] and that this failure caused [name of officer] to violate [name of plaintiff]'s [describe constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force].

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of officer] violated [name of plaintiff]'s [describe constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force];

Second: That [name of officer] was not adequately [trained, supervised] in [describe relevant area, *e.g.*, the use of deadly force];

Third: That [name of official policy-maker] knew — based on at least one earlier instance of unconstitutional conduct materially similar to [name of officer]'s violation of [name of plaintiff]'s constitutional rights — that [additional] [training/supervision] was needed to avoid [describe alleged constitutional violation] likely recurring in the future; and

Fourth: That [name of official policy-maker] made a deliberate choice not to provide [additional] [training/supervision] to [name of officer].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into applicable §1983 instructions when there is a claim against an individual defendant(s). In such case if a special verdict form is used, jury interrogatories applicable to the government entity should also be added.

II. Elements

This instruction is derived from *AFL-CIO v. City of Miami, Fla.*, 637 F.3d 1178, 1188-89 (11th Cir. 2011), and cases cited therein. A government entity may not be held liable under §1983 absent a finding that an individual, typically an individual named as a defendant in the case, violated the plaintiff's constitutional rights. *See, e.g., Garczynski v. Bradshaw*, 573 F.3d 1158, 1170 (11th Cir. 2009).

The model instruction presumes that the parties do not dispute the identity of the final policymaker through which the municipality acts.

The third element of plaintiff's case may be satisfied absent proof of at least one prior incident of materially similar unconstitutional conduct by proof that unconstitutional conduct would obviously result from failing to provide additional training or supervision. *AFL-CIO*, 637 F.3d at 1188. This is an extremely difficult standard to meet and is often resolved before trial. *See, e.g., Gold v. City of Miami*, 151 F.3d 1346, 1352 (11th Cir. 1998). Accordingly, the model instruction does not include a charge on obvious need for additional training or supervision.

III. Punitive Damages

As discussed in the annotations following Pattern Instruction 2.2.1, *supra*, punitive damages may not be assessed against a government entity.

5.8 Civil Rights — 42 U.S.C. §1983 Claims — Supervisor Liability (Incorporate into Instructions for Claims against IndividualDefendants)

[Name of plaintiff] claims that [name of supervisor], who supervised [name of subordinate], is liable in [his/her] supervisory capacity for violating [name of plaintiff]'s [specify constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force]. You should consider whether [name of supervisor] is liable only if you find that [name of subordinate] violated [name of plaintiff]'s [specify constitutional right].

[Name of supervisor] is not liable simply because [he/she] supervised [name of subordinate]. Rather, [name of plaintiff] must prove by a preponderance of the evidence that (1) [name of subordinate] violated [his/her] [specify constitutional right] and (2) one of the following circumstances was present at the time [name of plaintiff]'s constitutional rights were violated:

(a) [Name of supervisor] personally participated in the violation of [name of plaintiff]'s constitutional rights; or

(b) A history of widespread abuse, meaning abuse that was obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences, put [name of supervisor] on notice of the need to take corrective action and [he/she] failed to do so; or

(c) [Name of supervisor] intentionally implemented an "official policy or custom" that resulted in [name of subordinate] acting with deliberate indifference, meaning reckless disregard, to [name of plaintiff]'s [specify constitutional right]; or

(d) [Name of supervisor] directed [name of subordinate] to take the action that resulted in the violation of [name of plaintiff]'s [specify constitutional right]; or

(e) [Name of supervisor] knew that [name of subordinate] would take action[s] in violation of [name of plaintiff]'s [specify constitutional right] and failed to stop [name of subordinate] from doing so.

An "official policy or custom" means a:

(a) A policy statement or decision that is made by [name of supervisor]; or

(b) A practice or course of conduct that is so widespread that it has acquired the force of law, even if the practice has not been formally approved.

You may find that an "official policy or custom" existed if there was a practice that was so persistent, widespread, or repetitious that [name of supervisor] either knew about it, or should have known about it.

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.8) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into applicable §1983 instructions against an individual defendant or defendants. To minimize confusion, it is suggested that the supervisor and subordinate be referenced by their actual names rather than by generic terms such as "Supervisor" and "Subordinate."

II. Elements

The model instruction is derived from *Mathews v. Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007), and the definition of "official policy or custom" provided in Pattern Instruction 5.6, *supra*.

Absent a violation of plaintiff's constitutional rights by a subordinate, a supervisor is not liable under §1983 in his or her individual capacity. *See, e.g.*, *Beshers v. Harrison*, 495 F.3d 1260, 1264 n.7 (11th Cir. 2007).

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] has proved [insert plaintiff's claim]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [name of plaintiff] should be awarded compensatory damages against [name of defendant]'?

Answer Yes or No _____

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

[3. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____

Foreperson's Signature

DATE: _____

Appendix B

Civil Rights — Special Interrogatories — 42 U.S.C. §1983 Claims — For Cases Brought by Non-Prisoners (Prison-Litigation Reform Does Not Apply)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s right to [describe protected right]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[2. That [name of defendant]'s actions were "under color" of state law?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

3. That [name of defendant]'s conduct caused [name of plaintiff]'s injuries?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4.a. That [name of plaintiff] should be awarded compensatory damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

OR

4.b. That [name of plaintiff] should be awarded nominal damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

[5. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

Appendix C

Civil Rights — Special Interrogatories — 42 U.S.C. §1983 Claims — For Cases Brought by Prisoners (Prison-Litigation Reform Applies)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s right to [describe protected right]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[2. That [name of defendant]'s actions were "under color" of state law?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

3. That [name of defendant]'s conduct caused [name of plaintiff] to suffer a physical injury that was more serious than a minor injury?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [name of plaintiff] should be awarded compensatory damages against [name of defendant] to compensate [name of plaintiff] for physical injury?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

5.a. That [name of plaintiff] should be awarded compensatory damages against [name of defendant] to compensate [him/her] for emotional injury?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

OR

5.b. That [name of plaintiff] should be awarded nominal damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

[6. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

6 – Securities Act — 15 U.S.C. § 78j(b) — Rule 10b-5 — 17 C.F.R. §§ 240.10b-5(a), (b), and (c)

6.1 Securities Exchange Act 15 USC § 78j(b) — Rule 10b-5(a) — 17 C.F.R. §§ 240.10b-5(a) — Device, Scheme, or Artifice to Defraud

[Name of plaintiff/The Securities and Exchange Commission, also known as the SEC,] asserts a claim under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that allows [the Securities and Exchange Commission, also known as the SEC,/the SEC] to enact rules and regulations prohibiting certain conduct in the purchase or sale of securities. Rule 10b-5(a) makes it unlawful for a person to employ any device, scheme, or artifice to defraud someone else in connection with the purchase or sale of any security.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

A person who claims that someone violated Rule 10b-5(a) may bring a civil action for damages that [he/she/it] suffered as a result of the violation. [The SEC may also bring a civil action for the violation of Rule 10b-5(a).]

To prove a claim under Rule 10b-5(a), [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First, you must find that [name of defendant] used an instrumentality of interstate commerce in connection with the purchase or sale of a security.

Second, you must find that [name of defendant] used a device, scheme, or artifice to defraud someone in connection with the purchase or sale of a security.

[And third/Third], you must find that [name of defendant] acted knowingly or with severe recklessness.

[The fourth and fifth elements are not required in cases brought by the SEC.]

[Fourth, you must find that [name of plaintiff] justifiably relied on [name of defendant]'s conduct.

And fifth, you must find that [name of plaintiff] suffered actual damages as a proximate result of [name of defendant]'s wrongful conduct.]

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you as you consider the facts [name of plaintiff] must prove.

For the first element — that an instrumentality of interstate commerce was used in connection with the purchase or sale of a security — you must use these definitions:

"Instrumentality of interstate commerce" means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or a facility of a national securities exchange such as the New York Stock Exchange or NASDAQ] [or an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market]. It's not necessary that the facility of a national securities exchange was the means by which the defendant[s] used a device, scheme, or artifice to defraud someone. It's only necessary that the facility was used in some phase of the transaction.

[A "facility of a national securities exchange" may include a computer-trading program or an online discount-brokerage service.]

[If there is a genuine question whether the case involves a "security," additional instructions will be needed here.]

For the second element, [name of plaintiff] must prove that [name of defendant] used a device, scheme, or artifice to defraud in connection with the purchase or sale of a security. [If the SEC brings the case, add the following: The SEC does not need to identify any particular purchase or sale of securities by a specific person, including [name of defendant]. Rather, it's enough if the SEC proves that the device, scheme, or artifice to defraud used by [name of defendant] involved, or touched in any way, the purchase or sale of securities.]

[Name of plaintiff/The SEC] claims that the scheme or device [name of defendant] employed was [describe the alleged scheme or device].

A "scheme" is a design or plan formed to accomplish some purpose. A "device," when used in an unfavorable sense, is a "trick" or "fraud." Put another way, the term "device, scheme, or artifice to defraud" would refer to any plan or course of action that involves: (1) false or fraudulent pretences, (2) untrue statements of material facts, (3) omissions of material facts, or (4) representations, promises, and patterns of conduct calculated to deceive.

A misstatement or omission of fact is "material" if there is a substantial likelihood that a reasonable investor would attach importance to the misrepresented or omitted fact in determining his course of action. Put another way, there must be a substantial likelihood that a reasonable investor would view the misstated or omitted fact's disclosure as significantly altering the total mix of available information. A minor or trivial detail is not a "material fact."

For the third element, [name of plaintiff] must prove that [name of defendant] acted knowingly or with severe recklessness. The term "knowingly" means that [name of defendant] acted with an intent to deceive, manipulate, or defraud. But [name of defendant] didn't act knowingly if [he/she/it] acted inadvertently, carelessly, or by mistake.

To act with "severe recklessness" means to engage in conduct that involves an extreme departure from the standard of ordinary care. A person acts with reckless disregard if it's obvious that an ordinary person under the circumstances would have realized the danger and taken care to avoid the harm likely to follow.

[The following instructions on the fourth and fifth facts are not required to be given in SEC cases. The instruction in SEC cases concludes with the bracketed instruction that is provided at the end of this instruction.]

[For the fourth element, [name of plaintiff] must prove that [he/she/it] "relied" on the deception, manipulation, or fraud alleged, and was "justified" in doing so.]

[Use when fraud-on-the-market theory is not involved: If you find that the device, scheme, or artifice to defraud didn't affect [name of plaintiff]'s investment decision, then [name of plaintiff] didn't "rely" on it and can't recover on the claim. Also, [name of plaintiff] must prove that [his/her/its] reliance on [name of defendant] was justified. Reliance isn't "justified" if [name of plaintiff] intentionally ignored or refused to investigate suspicious circumstances by disregarding a risk that [name of plaintiff] knew about, or was so obvious that [name of plaintiff] should have been aware of it, and the risk was so great as to make it highly probable that harm would follow.

To decide whether [name of plaintiff] justifiably relied on [name of defendant]'s alleged misrepresentations, you should consider:

- [name of plaintiff]'s sophistication and expertise in matters involving finance and securities;

- the existence of a long-standing business or personal relationship between [name of plaintiff] and [name of defendant];

- [name of plaintiff]'s access to relevant information;

- whether [name of defendant] owed a fiduciary duty to [name of plaintiff];

- whether [name of defendant] concealed fraud;

- whether [name of plaintiff] initiated the stock transaction or sought to expedite it; and

- whether [name of defendant]'s misrepresentations were general or specific.

The term "fiduciary duty" means the duty one person owes to another in special relationships of trust and confidence, in which one person justifiably expects the person who owes the duty (the fiduciary) to act in the best interests of the person to whom the duty is owed. The duties a financial advisor, an accountant, and an attorney owe to their clients are types of fiduciary duties.

You must consider all these factors to decide whether [name of plaintiff]'s reliance was justified. No single factor is enough.]

[Use when fraud-on-the-market theory is involved: If you find that [name of plaintiff] didn't rely directly on [name of defendant]'s alleged deception, manipulation, or fraud, you may find that [name of plaintiff] instead relied on the integrity and regularity of the market in which the securities were traded. In that case, if you also find that [name of defendant]'s alleged deception, manipulation, or fraud affected the security's price in the market — consequently affecting the price at which [name of plaintiff] bought or sold the security — those findings would satisfy [name of plaintiff]'s obligation of proving justifiable reliance on [name of defendant]'s conduct.]

[For the fifth element, [name of plaintiff] must prove that [he/she/it]

suffered damage as a proximate result of [name of defendant]'s alleged deception, manipulation, or fraud. For damage to be the "proximate result" of a deception, manipulation, or fraud, [name of plaintiff] must prove that the deception, manipulation, or fraud was a substantial or significant contributing cause of [his/her/its] damages. Ask yourself: If [name of defendant] had not engaged in deception, manipulation, or fraud, would these damages have occurred? [Name of plaintiff] doesn't have to prove that the deception, manipulation, or fraud was the sole cause of the damage, only that it was a substantial or significant contributing cause.]

[If you find that [name of plaintiff] has proved [his/her/its] claim under 10b-5(a) by a preponderance of the evidence, you must then consider [name of plaintiff]'s damages.

[Name of plaintiff] is entitled to recover damages to compensate [him/her/it] for damages suffered as a proximate result of [name of defendant]'s conduct. You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork because [name of plaintiff] can recover only [his/her/its] actual damages.

Actual damages are calculated as the decrease in [name of plaintiff]'s stock value caused by [name of defendant]'s device, scheme, or artifice to defraud. The amount of damages may be expressed in the evidence on a "per-share" basis. Put another way, [name of plaintiff] may demonstrate damages by offering evidence of a dollar amount per share.

Here, [name of plaintiff]'s theory of recoverable compensatory or economic damages is: [describe theory].]

[To be given in SEC cases: If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will

determine the remedy or remedies to be imposed later.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] used an "instrumentality of interstate commerce" in connection with the [for private parties: the purchase or sale of the securities involved in this case] [for SEC cases: the purchase or sale of any securities]?

Answer Yes or No _____

2. That [name of defendant] used a "device, scheme, or artifice to defraud" in connection with the [for private parties: the purchase or sale of the securities involved in this case] [for SEC cases: the purchase or sale of any securities]?

Answer Yes or No _____

3. That [name of defendant] acted "knowingly or with severe recklessness?"

Answer Yes or No _____

Exclude interrogatories 4, 5, and 6 in cases brought by the SEC.]

4. That [name of plaintiff] "justifiably relied" on [name of defendant]'s conduct?

Answer Yes or No _____

5. That [name of plaintiff] suffered damages as a proximate result of [name of defendant]'s wrongful conduct?

Answer Yes or No _____

[Note: If you answered "No" to any of the preceding questions, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you answered "Yes" to each question, go to the next question.]

6. That [name of plaintiff] suffered damages?

Answer Yes or No _____

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

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

The instruction is drafted for general application to all cases under Rule 10b-5(a), which broadly prohibits the use of "any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of <u>any</u> security."
Section 10(b) of the Securities Exchange Act of 1934 [15 USC § 78j(b)] provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [to] use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

With respect to the definition of "security," *see SEC v. Edwards*, 540 U.S. 389, 124 S. Ct. 892, 157 L.Ed.2d 813 (2004) and Exchange Act Section 3(a)(10), 15 U.S.C. § 78c(a)(10). The issue of whether a particular investment is a "security" is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). In those cases where the court determines that the investment at issue is a security, it should so instruct the jury.

In *Gower v. Cohn*, 643 F.2d 1146, 1151 (5th Cir. Unit B, May 1981), the former Fifth Circuit held that a single interstate telephone call satisfied the jurisdictional requirement of use of any means or instrumentality of interstate commerce as long as the telephone call was made in connection with the fraudulent scheme and was an important step in the scheme.

SEC Manipulative and Deceptive Devices and Contrivances Rule, 17 C.F.R. § 240.10b-5 (2004):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> - To employ any device, scheme, or artifice to defraud,

- To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

- To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

"Although Rule 10b-5 could be read broadly to require disclosure of any nonpublic information about a security that is the subject of a transaction, the Supreme Court has held that 'a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.'" *Badger v. Farm Bureau Life*, 612 F.3d 1334, 1340 (11th Cir. 2010) (quoting *Chiarella v. United States*, 445 U.S. 222, 235, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980)). Rather, "in order to be liable under [Rule 10b-5] for failing to disclose a material fact, an entity must have a prior duty to disclose that fact." Id. Applying this standard, the Eleventh Circuit further noted in *Badger* that "courts have uniformly declined to find a duty to disclose running from one party in an arm's-length securities transaction to the shareholders of the counterparty to the transaction, absent some fiduciary or other special relationship between them." *Id.* at 1343 (collecting multiple cases).

6.2 Securities Exchange Act — 15 U.S.C. § 78j(b) — Rule 10b-5(b) — 17 C.F.R. § 240.10b-5(b) — Misrepresentation or Omission of Material Facts

[Name of plaintiff/The Securities and Exchange Commission, also known as the SEC,] asserts a claim under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that allows [the Securities and Exchange Commission, also known as the SEC,/the SEC] to enact rules and regulations prohibiting certain conduct in the purchase or sale of securities.
Rule 10b-5(b) makes it unlawful for a person to commit a fraud in connection with the purchase or sale of a security.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

A person who claims that someone violated Rule 10b-5(b) may bring a civil action for damages that [he/she/it] suffered as a result of the violation. [The SEC may bring a civil action for the violation of Rule 10b-5(b).]

To prove a claim under Rule 10b-5(b), [name of plaintiff/the SEC] must prove each of the following facts by a preponderance of the evidence:

First, you must find that [name of defendant] used an instrumentality of interstate commerce in connection with the purchase or sale of a security.

Second, you must find that [name of defendant] made a misrepresentation of a material fact, or omitted a material fact, in connection with the purchase or sale of a security.

[And third/Third], you must find that [name of defendant] acted knowingly or with severe recklessness.

[The fourth and fifth elements are not required in cases brought by the SEC.]

[Fourth, you must find that [name of plaintiff] justifiably relied on [name of defendant]'s conduct.

And fifth, you must find that [name of plaintiff] suffered actual damages as a proximate result of [name of defendant]'s wrongful conduct.]

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you as you consider the facts [name of plaintiff/the SEC] must prove.

For the first element – that an instrumentality of interstate commerce was used in connection with the purchase or sale of a security – you must use these definitions:

"Instrumentality of interstate commerce" means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or a facility of a national securities exchange such as the New York Stock Exchange or NASDAQ] [, or an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market]. It's not necessary that the misrepresentation or omission of material fact was transmitted using an instrumentality of interstate-commerce. It is enough if the interstate-commerce instrumentality was used in some phase of the transaction.

[A "facility of a national securities exchange" may include a computer-trading program or an online discount-brokerage service. Again, it's not necessary that the facility of a national securities

exchange was the means by which someone transmitted any misrepresentation or omission. It's only necessary that the facility was used in some phase of the transaction?]

[If there is a genuine question whether the case involves a "security," additional instructions will be needed here.]

For the second element, [name of plaintiff/the SEC] must prove that [name of defendant] either made an untrue statement of material fact or omitted a material fact, either of which would tend to mislead the prospective buyer or seller of a security.

A "misrepresentation" is a statement that is not true. An "omission" is the failure to state facts that would be necessary to make the statements made by [name of defendant] not misleading to [name of plaintiff/the SEC].

A misrepresentation or omission of fact is "material" if there is a substantial likelihood that a reasonable investor would attach importance to the misrepresented or omitted fact in determining his course of action. Put another way, there must be a substantial likelihood that a reasonable investor would view the misstated or omitted fact's disclosure as significantly altering the total mix of available information. A minor or trivial detail is not a "material fact."

[Predictions, opinions, and other projections (if they aren't expressed as guarantees) aren't representations of material facts [, and don't require revision or amendment] — unless the person or entity communicating them doesn't believe, or doesn't have a reasonable basis for believing, they're true. But if the person or entity making the predictions, opinions, or projections actually believed them at the time or had a reasonable basis for making them, then the statements are not materially misleading statements of fact. The focus is on whether the statements were false or misleading when they were made. Later events proving that the predictions, opinions, or projections were wrong don't create a violation of Rule 10b-5.]

[If the SEC brings the case, add the following: The SEC does not

need to identify any particular purchase or sale of securities by a specific person, including [name of defendant]. Rather, it's enough if the SEC proves that the misrepresentation or omission involved or touched any purchase or sale of a security in any way.] The SEC claims that [name of defendant] made the following misrepresentations or omissions: [Describe the specific statements or omissions claimed to have been fraudulently made.]

For the second element, [name of plaintiff/the SEC] must first prove that [name of defendant] made one or more of the alleged misrepresentations of fact [or omitted facts that would be necessary to prevent other statements made by [name of defendant] from being misleading to [name of plaintiff/the SEC]]. And second, that the misrepresentation [or omission] involved "material" facts.

If [name of defendant] has previously made false or inaccurate statements regarding material facts, such as statements made in reports [he/she/it] filed with the SEC, information [he/she/it] sent to investors, or statements [he/she/it] made in press releases, [he/she/it] has a duty to correct those statements if it is discovered later that those statements weren't true when made and they remain material to a shareholder's investment decision.

For the third element, [name of plaintiff] must prove that [name of defendant] made the alleged misrepresentations or omissions knowingly, or with severe recklessness. The term "knowingly" means that [name of defendant] acted with an intent to deceive, manipulate, or defraud. But [name of defendant] didn't act knowingly if [he/she/it] acted inadvertently, carelessly, or by mistake.

To act with "severe recklessness" means to engage in conduct that involves an extreme departure from the standard of ordinary care. A person acts with reckless disregard if it's obvious that an ordinary person under the circumstances would have realized the danger and taken care to avoid the harm likely to follow.

As an example, [Name of defendant] acted "knowingly" or with

severe recklessness if [he/she/it] stated material facts that [he/she/it] knew were false [or] [stated untrue facts with reckless disregard for their truth or falsity] [or] [didn't disclose material facts that [he/she/it] knew or was severely reckless in not knowing, and knew or was severely reckless in not knowing that disclosing those facts was necessary to avoid making [his/her/its] other statements misleading.]

[The following instructions on the fourth and fifth elements are not required to be given in SEC cases. The instruction in SEC cases concludes with the bracketed instruction that is provided at the end of this instruction.]

[For the fourth element, [name of plaintiff] must prove that [he/she/it] "relied" on the alleged misrepresentations [or omissions] and was "justified" in doing so.]

[Use when fraud-on-the-market theory is not involved: If you find that the misrepresentation [or omission] didn't affect [name of plaintiff]'s investment decision, then [name of plaintiff] didn't "rely" on it and can't recover on the claim. Also, [name of plaintiff] must prove that [his/her/its] reliance on [name of defendant] was justified. Reliance isn't "justified" if [name of plaintiff] intentionally ignored or refused to investigate suspicious circumstances by disregarding a risk that [name of plaintiff] knew about, or was so obvious that [name of plaintiff] should have known about it, and the risk was so great as to make it highly probable that harm would follow.

To decide whether [name of plaintiff] justifiably relied on [name of defendant]'s alleged misrepresentations, you should consider:

- [name of plaintiff]'s sophistication and expertise in matters involving finance and securities;

- the existence of a long-standing business or personal relationship between [name of plaintiff] and [name of defendant];

- [name of plaintiff]'s access to relevant information;

- whether [name of defendant] owed a fiduciary duty to [name of plaintiff];

- whether [name of defendant] concealed fraud;

- whether [name of plaintiff] initiated the stock transaction or sought to expedite it; and

- whether [name of defendant]'s misrepresentations were general or specific.

The term "fiduciary duty" means the duty one person owes to another in special relationships of trust and confidence, in which one person justifiably expects the person who owes the duty (the fiduciary) to act in the best interests of the person to whom the duty is owed. The duties a financial advisor, an accountant, and an attorney owe to their clients are types of fiduciary duties.

You must consider all these factors to decide whether [name of plaintiff]'s reliance was justified. No single factor is enough.

If you find that [name of defendant] omitted or failed to disclose material facts, then you may presume that [name of plaintiff] relied on [name of defendant]. The law assumes that [name of plaintiff] would have relied on material facts that were intentionally withheld. But [name of defendant] may overcome this presumption if [he/she/it] can prove, by a preponderance of the evidence, that even if [he/she/it] had disclosed the material facts, [name of plaintiff] would have made the same decision regarding the purchase or sale of a security.]

[Use when fraud-on-the-market theory is involved: If you find that [name of plaintiff] didn't rely directly on [name of defendant]'s alleged misrepresentation [or omission], you may find that [name of plaintiff] instead relied on the integrity and regularity of the market in which the

securities were traded. In that case, if you also find that [name of defendant]'s alleged deception, manipulation, or fraud affected the security's price in the market — consequently affecting the price at which [name of plaintiff] bought or sold the security — those findings would satisfy [name of plaintiff]'s obligation of proving justifiable reliance on [name of defendant]'s conduct.]

[For the fifth element, [name of plaintiff] must prove that [he/she/it] suffered damage as a proximate result of [name of defendant]'s alleged misrepresentation [or omission]. For damage to be the "proximate result" of a misrepresentation [or omission], [name of plaintiff] must prove that the misrepresentation [or omission] was a substantial or significant contributing cause of the [his/her/its] alleged damages. Ask yourself: If [name of defendant] had not engaged in misrepresentation [or omission], would these damages have occurred? [Name of plaintiff] doesn't have to prove that the misrepresentation [or omission] was the sole cause of the damage, only that it was a substantial or significant contributing cause.]

[If you find that [name of plaintiff] has proved [his/her/its] claim under 10b-5(b) by a preponderance of the evidence, you must then consider [name of plaintiff]'s damages.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork because [name of plaintiff] can recover only [his/her/its] actual damages.

Actual damages are calculated as the decrease in [name of plaintiff]'s stock value that [name of defendant]'s misrepresentation [or omission] caused. The amount of damages may be expressed in the evidence on a "per-share" basis. Put another way, [name of plaintiff] may demonstrate damages by offering evidence of a dollar amount per share.

Here, [name of plaintiff]'s theory of recoverable compensatory or economic damages is: [describe theory].]

[To be given in SEC cases: If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will determine the remedy or remedies to be imposed later.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] used an "instrumentality of interstate commerce" in connection with the securities transaction involved in this case?

Answer Yes or No _____

2. That [name of defendant] made a false representation of a material fact (or omitted a material fact) in connection with the purchase or sale of a security?

Answer Yes or No _____

3. That [name of defendant] acted "knowingly" or with "severe recklessness?"

Answer Yes or No _____

[Exclude interrogatories 4, 5, and 6 in cases brought by the SEC.]

4. That [name of plaintiff] "justifiably relied" on [name of defendant]'s conduct?

Answer Yes or No _____

5. That [name of plaintiff] suffered damages as a proximate result of [name of defendant]'s wrongful conduct?

Answer Yes or No _____

[Note: If you answered "No" to any of the preceding questions, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you answered "Yes" to each question, go to the next question.]

6.That [name of plaintiff] suffered damages?

Answer Yes or No _____

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

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

Section 10(b) of the Securities Exchange Act of 1934 [15 USC § 78j(b)] provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as

> necessary or appropriate in the public interest or for the protection of investors.

With respect to the definition of "security," *see SEC v. Edwards*, 540 U.S. 389, 124 S. Ct. 892, 157 L.Ed.2d 813 (2004) and Exchange Act Section 3(a)(10), 15 U.S.C. § 78c(a)(10). The issue of whether a particular investment is a "security" is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). In those cases where the court determines that the investment at issue is a security, it should so instruct the jury.

In *Gower v. Cohn*, 643 F.2d 1146, 1151 (5th Cir. Unit B May 1981), the former Fifth Circuit held that a single interstate telephone call satisfied the jurisdictional requirement of use of any means or instrumentality of interstate commerce as long as the telephone call was made in connection with the fraudulent scheme and was an important step in the scheme.

"To succeed on a Rule 10b-5 fraud claim, a plaintiff must establish (1) a false statement or omission of material fact; (2) made with scienter; (3) upon which the plaintiff justifiably relied; (4) that proximately caused the plaintiff's injury." *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997) (citing *Bruschi v. Brown*, 876 F.2d 1526, 1528 (11th Cir. 1989)). "Scienter" is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S 680, 686 n.5, 100 S. Ct. 1945, 1950 n.5, 64 L. Ed. 2d 611 (1980). In the Eleventh Circuit, "scienter" may also consist of "severe recklessness" by the defendant, *see, e.g., Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 790 (11th Cir. 2010); however, the Supreme Court has left open the question whether recklessness may satisfy the scienter requirement. *See Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323, 179 L.Ed.2d 398 (2011) ("We have not decided whether recklessness suffices to fulfill the scienter requirement."); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3, 127 S. Ct. 2499, 2507 n.3, 168 L.Ed.2d 179 (2007) (declining to decide issue because "whether and when recklessness satisfies the scienter requirement is not presented in this case").

With respect to the causation element, "a plaintiff must prove both 'transaction causation' and 'loss causation.'" *Robbins*, 116 F.3d at 1447. The former is merely "another way of describing reliance," while the latter concerns "the link between the defendant's misconduct and the plaintiff's economic loss." *Id.* Although some courts have held that, under a "fraud-on-the-market" theory, plaintiffs may establish loss causation if they show that the price of their security on the date of purchase was inflated due to the misrepresentation, *see id.* at 1448, the Eleventh Circuit has rejected such a view. Rather, "the fraud on the market theory, as articulated by the Supreme Court, is used to support a rebuttable presumption of reliance, not a presumption of causation." Id. at 1448 (citing *Basic v. Levinson*, 485 U.S. 224, 241-42, 108 S. Ct. 978, 992, 99 L.Ed.2d 194 (1988)).

In *Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194, 1205 (11th Cir. 2001), the Eleventh Circuit held that in order for secondary actors, such as a law firm or accounting firm, to be liable under Rule 10b-5, "the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant [the secondary actor] at the time that the plaintiff's investment decision was made." In a case involving a secondary actor, the jury should be instructed that, in order to prove reliance, the plaintiff is required to prove that misrepresentations publicly attributable to the secondary actor were made to the plaintiff at the time the plaintiff's investment decision was made.

A duty to correct "applies when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not. The company then must correct the prior statement within a reasonable time." *Stransky v. Cummins Engine Co., Inc.,* 51 F.3d 1329, 1331 (7th Cir 1995), (citing *Backman v. Polaroid Corp.,* 910 F.2d 10, 16-17 (1st Cir. 1990)). *See also, In re Burlington Coat Factory Secs. Litig.,* 114 F.3d 1410, 1430-32 (3d Cir. 1997) (noting that a duty to correct may also arise with forward-looking statements if they are based on assumptions that the speaker later learns were incorrect when made). The duty to update is a distinct doctrine; it may apply "when a company makes a forward-looking statement - a projection - that because of subsequent events becomes untrue." *Stransky,* 51 F.3d at 1332. *See also, In re Int'l. Bus. Mach. Corp. Sec. Litig.,* 163 F.3d 102, 110 (2d Cir. 1998).

There is a split among the courts whether there is a duty to update information disclosed to the public to insure the accuracy of statements and representations previously made in light of new information or developments. The Eleventh Circuit has not addressed whether there is a duty to update. In a case where the evidence suggests a change in information or other developments and a party determines there was a duty to update, the court will need to determine if, considering the current legal authority, a duty to update information instruction is required to be given and, if so, the form of instruction to be given. *See* Eric R. Smith, Thomas D. Washburne, Jr. & Uyen H. Pham, DUTY TO UPDATE PREVIOUSLY DISCLOSED INFORMATION, Practical Law Company (2011), http://www.venable.com/files/Publication/d90ad0bd-0947-4956-aa70-1026f1ac03be/Presentation/PublicationAttachment/cf3d0d7f-ca04-4b19-96e1-1510529d9821/Duty_to_Update_Previously_Disclosed_Information.pdf. *Compare In Re Burlington Coat Factory Secs. Litig.,* 114 F.3d 1410 (3rd Cir. 1997) (duty triggered where representation remained alive) and *Ill. State Bd. of Inv. v. Authentidate Holding Corp., et al.,* 369 F. App'x 260 (2d Cir. 2010) (duty depends on significance of information and whether there were cautionary statements) *with Gallagher v. Abbott Laboratories,* 269 F.3d 806 (7th Cir. 2001) (no duty to update).

6.3.1 Securities Exchange Act 15 USC §§ 10(b) and 20A — Rule10b-5(a) — 17 C.F.R. §§ 240.10b-5 — Insider Trading — Private-Plaintiff Version

[Name of plaintiff] asserts a claim under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that allows the Securities and Exchange Commission, also known as the SEC, to enact rules and regulations prohibiting certain conduct in the purchase or sale of securities. Exchange Act § 10(b) and Rule 10b-5(a) make it unlawful for a person to employ any device, scheme, or artifice to defraud someone else in connection with the purchase or sale of any security.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

A person who claims that someone violated Exchange Act § 10(b) and Rule 10b-5(a) may bring a civil action for damages that [he/she/it] suffered as a result of the violation.

In this case, [name of plaintiff] claims that [name of defendant] committed fraud by engaging in "insider trading" in the stock of [name of stock]. [Name of plaintiff] further claims that [he/she/it] purchased stock of [name of stock] at the same time that [name of defendant] engaged in insider trading, and [he/she/it] suffered a loss as a result.

To prove [his/her] claim that [name of defendant] engaged in insider trading in violation of Exchange Act § 10(b) and Rule 10b-5(a), [name of plaintiff] must prove each of the following five elements by a preponderance of the evidence:

First, you must find that [name of defendant] used an instrumentality of interstate commerce in connection with the purchase

or sale of a security.

Second, you must find that [name of defendant] used a device, scheme, or artifice to defraud someone in connection with the purchase or sale of a security.

Third, you must find that [name of defendant] acted knowingly or with severe recklessness.

Fourth, you must find that [name of plaintiff]'s [purchase] [or] [sale] of [name of stock] stock was contemporaneous with [name of defendant]'s insider trading.

And fifth, you must find that [name of plaintiff] suffered damage because of [his/her] [purchase] [or] [sale] of the stock.

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you as you consider the facts [name of plaintiff] must prove.

For the first element – that an instrumentality of interstate commerce was used in connection with the purchase or sale of a security in this case – you must use these definitions:

"Instrumentality of interstate commerce" means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or a facility of a national securities exchange such as the New York Stock Exchange or NASDAQ] [, or an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market]. It's not necessary that the misrepresentation or omission of material fact was transmitted using an instrumentality of interstate-commerce. It is enough if the interstate-commerce instrumentality was used in some phase of the transaction.

[A “facility of a national securities exchange” may include a computer-trading program or an on-line discount-brokerage service.]

[If there is a genuine question whether the case involves a “security,” additional instructions will be needed here.]

For the second element, [name of plaintiff] must prove that [name of defendant] used a device, scheme, or artifice to defraud in connection with the purchase or sale of a security. [Name of plaintiff] alleges that the “device, scheme, or artifice” that [name of defendant] used in this case is known as “insider trading.”

[Instructions regarding the second element must be tailored to the specific insider-trading theory alleged in the particular case. Instructions are provided below for the four distinct theories of insider trading: classical insider, misappropriation, tipper, and tippee].

[Classical Insider Theory

A person engages in insider trading when [he/she] is a corporate insider and trades in the securities of their corporation on the basis of material, nonpublic information about that security. The law considers corporate officers, directors, and controlling shareholders to be “insiders.” Because corporate insiders have a relationship of trust and confidence with the corporation and its shareholders, they have a duty not to trade the corporation’s securities based on material, nonpublic information they received because of their positions with the corporation.

When a person is aware of “inside information” and the person’s position of trust or confidence prevents [him/her] from disclosing that information, the law forbids [him/her] from using that information in buying or selling the securities in question. So any person who, through a special confidential relationship, gains access to material, confidential information intended for only a corporate purpose must not use that information to buy or sell securities. It’s the relationship’s confidential nature that determines whether a person is an insider — not

just [his/her] title within the corporation.

[In this case, which involves a defendant who is a[n] [accountant/lawyer/consultant], if you find that [name of defendant] became involved in the business operations of [name of corporation] and gained access to material, confidential information while acting in that capacity, you may find that [he/she] was an insider, and therefore owed a duty to the corporation and its shareholders (or [his/her] firm or client) not to benefit by using the information.]]

[Misappropriation Theory

Insider trading may occur when a person misappropriates material, confidential information and then trades securities on the basis of that information. This breaches the duties of confidentiality and loyalty that the person owes to the source of the information. The person's self-serving use of the confidential information defrauds the source of the exclusive use of that information.

So [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] misappropriated information from someone to whom [he/she] owed a duty of confidentiality, and that [name of defendant] then either used the material, confidential information to trade securities, or traded securities while [he/she] knew that material, confidential information.

You must decide whether a fiduciary duty, or a similar duty of trust and confidence, existed between [name of corporation] and [name of defendant] so that [name of defendant] was obliged to keep [name of corporation]'s nonpublic, material, confidential information private.

A person cannot impose a fiduciary duty or similar duty of trust and confidence on another unilaterally by entrusting the other person with confidential information.

The term "fiduciary duty" means the duty one person owes to another in special relationships of trust and confidence, in which one

person justifiably expects the person who owes the duty (the fiduciary) to act in the best interests of the person to whom the duty is owed. The duties a financial advisor, an accountant, and an attorney owe to their clients are types of fiduciary duties.

There are no hard-and-fast rules for determining whether a duty to keep a confidence exists. But there is a confidential relationship when a person agrees to keep information in confidence. It may also arise if the person communicating the material, non-public information and the person receiving it have a history, pattern, or practice of sharing confidences, and the person receiving the information knows, or reasonably should know, that the other person expects the information to remain confidential. For example, the previous disclosures of business secrets between two people may establish a duty to keep business secrets confidential.

[In this case, the recipient of the information was the source's [spouse/parent/child/sibling]. A duty of loyalty or confidence usually arises in such situations. But [name of defendant] claims that, because of the facts and circumstances surrounding the relationship between [him/her] and [his/her] [spouse/parent/child/sibling], [he/she] neither knew, nor reasonably should have known, that [his/her] [spouse/parent/child/sibling] expected [him/her] to keep the information confidential.]

You must decide whether a duty of loyalty or confidence actually existed.]

[Tipper Theory

The law also prohibits violating Exchange Act Section 10(b) and Rule 10b-5 through another person. A person who receives material, confidential information [as an insider/through a duty of loyalty or confidence] can't give that information to another person, or "tip" the other person — which is breaching a duty owed directly or indirectly to a security's issuer, the issuer's shareholders, or the information's source

— and expect that [he/she] will personally benefit, directly or indirectly, from the tip.

To prove that [name of defendant] violated Exchange Act § 10(b) and Rule 10b-5 as a tipper of material, confidential information, [name of plaintiff] must prove each of these elements by a preponderance of the evidence:

First, you must find that [name of defendant] provided material, confidential information to another person — a tippee.

Second, you must find that [name of defendant] breached a fiduciary duty, or a duty of loyalty or confidence.

Third, you must find that [name of defendant] expected to receive a personal benefit.

And fourth, you must find that the tippee traded securities on the basis of the information.

The personal benefit to the tipper doesn't always have to involve money. [Name of plaintiff] can prove that [name of defendant] personally benefited from the disclosure by showing that [he/she] received some tangible benefit, [he/she] would gain some future advantage, or the disclosure enhanced [his/her] reputation. [Name of defendant]'s intention to make a gift of the material, confidential information to a friend or relative of the tipper, or someone in the tippee's family, can be enough to show that [name of defendant] personally benefited from the disclosure.]

[Tippee Theory

[Name of plaintiff] claims that [name of defendant] received inside information and used it for [his/her] own benefit even though [he/she] didn't personally owe anyone a duty of trust or confidence that would prevent [him/her] from buying or selling the securities in question.

The basis for this allegation is that [name of defendant] was a "tippee" of inside information when [he/she] received a "tip" of material, confidential information from [name of tipper] about [name of issuer/security]. The law forbids a tippee from trading the securities because the tippee stands in the same shoes as the tipper.

To find that [name of defendant] was forbidden to buy or sell the securities in question because [he/she] was a tippee, you must find that [he/she] knowingly participated in someone else's breach of trust and confidence. [Name of plaintiff] must prove that the person from whom [name of defendant] received material, confidential information — the insider or tipper — violated a trust relationship by making disclosures to [name of defendant], and that [name of defendant] knew that [name of tipper] violated a trust relationship.

Also, [name of plaintiff] must prove by a preponderance of the evidence that [name of tipper] personally benefited in some way, directly or indirectly, from the disclosure.

The personal benefit to the tipper doesn't always have to involve money. [Name of plaintiff] can prove that [name of tipper] personally benefited from the disclosure by showing that [he/she] received some tangible benefit, [he/she] would gain some future advantage, or the disclosure enhanced [his/her] reputation. [Name of tipper]'s intention to make a gift of the material, confidential information to a friend or relative of the tipper, or someone in the tippee's family, can be enough to show that [name of defendant] personally benefited from the disclosure.]

If you decide that [name of defendant] [was an insider with a duty of trust and confidence and learned/misappropriated/tipped/was a tippee who received] inside information, then you must also decide whether the inside information that [name of defendant] possessed was material.

A misstatement or omission of fact is "material" if there is a substantial likelihood that a reasonable investor would attach importance to the misrepresented or omitted fact in determining his

course of action. Put another way, there must be a substantial likelihood that a reasonable investor would view the misstated or omitted fact's disclosure as significantly altering the total mix of available information. A minor or trivial detail is not a "material fact."

Whether an uncertain future event, such as a corporate merger or acquisition, is material depends on balancing both the probability that the event will occur and the event's anticipated significance in light of all the company activity. For example, when the information concerns a merger or acquisition, the probability that a merger or acquisition will be finalized does not need to be very high for the information to be material because a merger or acquisition is an event of such magnitude that information can become material even at an early stage in the process.

In addition to deciding whether the information [name of defendant] possessed was material, you must decide whether that information was nonpublic. "Nonpublic" information is information that isn't generally available to the public through sources such as: a company's SEC filings, press releases, trade publications, or other publicly available sources. The law considers information "nonpublic" until the information is effectively disseminated in a manner that ensures its availability to the investing public.

[Name of plaintiff] must also prove that [name of defendant] traded the securities "on the basis of" material, nonpublic information. This requires proof by a preponderance of the evidence that [name of defendant] used material, nonpublic information in the purchase or sale of securities.

If you find that [name of defendant] was aware of the material, nonpublic information at the time [he/she] purchased or sold the securities, then a strong presumption arises that [name of defendant] traded "on the basis of" material, nonpublic information. [Name of defendant] may overcome that presumption if [he/she] proves by a preponderance of the evidence that [he/she] didn't use material, nonpublic information when [he/she] purchased or sold the securities.

For the third element, [name of plaintiff] must prove that [name of defendant] acted knowingly. The term "knowingly" means that [name of defendant] acted with severe recklessness or an intent to deceive, manipulate, or defraud. But [name of defendant] didn't act knowingly if [he/she] acted inadvertently, carelessly, or by mistake.

To act with "severe recklessness" means to engage in conduct that involves an extreme departure from the standard of ordinary care. A person acts with reckless disregard if it's obvious that an ordinary person under the circumstances would have realized the danger and taken care to avoid the harm likely to follow.

For the fourth element, [name of plaintiff] must prove that [he/she] [purchased] [or] [sold] the securities in question contemporaneously with [name of defendant]'s insider-trading [purchase] [or] [sale]. A purchase or sale is deemed to be "contemporaneous" when [describe standard].

For the fifth element, [name of plaintiff] must prove that the [purchase] [or] [sale] of the securities damaged [him/her].

If you find that [name of plaintiff] has proved [his/her] claim by a preponderance of the evidence under Rule 10b-5, you must consider the amount damages, if any, to award to [name of plaintiff]. Damages, if they exist, are generally the actual amount [name of plaintiff] lost because of [his/her] purchase or sale of the stock in question. But the total amount of damages can't exceed the profit [name of defendant] gained [or the loss [name of defendant] avoided] through insider trading.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] used an "instrumentality of interstate commerce" in connection with the purchase or sale of the securities involved in this case?

Answer Yes or No _____

2. That [name of defendant] used a "device, scheme, or artifice to defraud" in connection with the purchase or sale of a security?

Answer Yes or No _____

3. That [name of defendant] acted "knowingly?"

Answer Yes or No _____

[For the classical-insider theory, use the following:

4. That [name of defendant] was an insider of [name of company]?

Answer Yes or No _____

5. That [name of defendant] possessed inside information?

Answer Yes or No _____]

[For the misappropriation theory, use the following:

4. That [name of defendant] had a relationship with [_____] that gave rise to a duty to keep inside information learned from [_____] confidential?

Answer Yes or No _____]

[For the tipper theory, use the following:

4. That [name of defendant] provided inside information to [_____] in breach of [name of defendant]'s duty of loyalty and confidentiality to [_____]?

Answer Yes or No _____

5. That [name of defendant] expected a personal benefit in providing the inside information to [_____]?

Answer Yes or No _____]

[For the tippee theory, use the following:

4. That [name of defendant] received inside information from [_____] and that [_____] breached [his/her] duty of loyalty and confidentiality to [_____] in providing that inside information to [name of defendant]?

Answer Yes or No _____

5. That [_____] had an expectation of a personal benefit in providing the inside information to [name of defendant]?

Answer Yes or No _____]

[For all theories, include the following:]

6. That [name of defendant] [, the tippee,] traded securities on the basis of inside information?

Answer Yes or No _____

7. That the inside information was material?

Answer Yes or No _____

8. That the inside information was nonpublic?

Answer Yes or No _____

9. That [name of plaintiff] traded contemporaneously with [name of

defendant]?

Answer Yes or No _____

10. That [name of plaintiff] suffered actual damages?

Answer Yes or No _____

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

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

Insider Trading, Classical Theory: The language of this charge comes directly from the leading cases on insider trading, *United States v. O'Hagan*, 521 U.S. 642 (1997) and *Chiarella v. United States*, 445 U.S. 222, 228 (1980). In *O'Hagan* the Supreme Court held that trading on material non-public information is a "device" within the meaning of § 10(b) of the Securities Exchange Act and Rule 10b-5. *O'Hagan*, 521 U.S. at 655-56. Additionally, the Eleventh Circuit has held that mere possession of material, non-public information is insufficient to establish a 10b-5 violation. Rather, the Plaintiff must show that the Defendant actually *used* that information in trading with an intent to defraud. *SEC v. Adler*, 137 F.3d 1325, 1337 (11th Cir. 1998). In a footnote in *Adler*, the Eleventh Circuit noted that the SEC could adopt a different standard by rule. *Id.* at 1337 n.33. Subsequent to the Eleventh Circuit's decision in *Adler*, the SEC adopted Rule 10b5-1(b), quoted above, which establishes an "awareness" standard more closely analogous to the "knowing possession" standard adopted by the Second Circuit in *United States v. Teicher*, 987 F.2d 112, 120-21 (2d Cir. 1993), and rejected by the Eleventh Circuit in *Adler*. In adopting Rule 10b5-1(b), the SEC explained that, "The awareness standard reflects the common sense notion that a trader who is aware of inside information when making a trading decision inevitably makes use of the information." 65 Fed. Reg. 51716-01, 51727 (Aug. 24, 2000) (codified at C.F.R. pts. 240, 243, 249). Answering commentators' criticisms regarding the

imprecision of the awareness standard, the SEC stated, "'Aware' is a commonly used and well-defined English word, meaning 'having knowledge; conscious; cognizant.'" *Id.* at 51727 n.105. Since the amendment of Rule 10b-5 in 2000, the Eleventh Circuit has reaffirmed the "use" requirement previously set forth in *Adler*. *SEC v. Ginsburg*, 362 F.3d 1292, 1297-98 (11th Cir. 2004). Thus, despite Rule 10b-5's "awareness" standard, the Eleventh Circuit continues to interpret Rule 10b-5 as requiring the plaintiff to prove that the defendant not only possessed the material, non-public information, but also that the defendant <u>used</u> the information in trading. However, "[p]roof of knowledge of such information at the time of a trade 'gives rise to a strong inference of use.'" *Ginsburg*, 362 F.3d at 1298, *quoting Adler*, 137 F.3d at 1340.

Insider Trading, Misappropriation Theory: *O'Hagan* answered the question of whether someone in possession of inside information can violate 10b-5 when he trades in another company's stock. Traditional insider trading occurs when the insider trades in his own company's stock and is derived from breach of fiduciary duty concepts. The Court held that trading in any securities based upon information as a result of a fiduciary duty violates Rule 10b-5. Under *O'Hagan*, a person violates Rule 10b-5 when that person trades on any information obtained in violation of a fiduciary duty. Probably the most common application of the misappropriation theory occurs where corporate insiders know that their company is about to launch a takeover of another company. Under the classical theory, they cannot trade in shares of their own company and under the misappropriation theory they cannot trade in the target's shares.

In August of 2000, the SEC adopted Rule 10b5-2 [17 C.F.R. § 240.10b5-2] to clarify when a duty of trust or confidence arises between a source and recipient of material nonpublic information. Such a duty arises in three circumstances: (1) where the person agrees to maintain the information in confidence; (2) where the source and recipient have a history, pattern, or practice of sharing confidences such that the recipient knew or reasonably should have known the source expected the information to be kept in confidence; and (3) where the source is the parent, child, spouse, or sibling of the recipient. In the latter case, Rule 10b5-2(b)(3) establishes a presumption that a duty of trust or confidence arises, which may be rebutted by showing that, based on the circumstances surrounding the relationship, the source reasonably would not have expected the recipient to keep the information confidential. In a case whose events occurred prior to the adoption of Rule 10b5-2 (to which the new rule was inapplicable), *SEC v. Yun*, 327 F.3d 1263, 1273 (11th Cir. 2003), the Eleventh Circuit held that a duty of trust or confidence arises between spouses only where there was "a history or practice of sharing business confidences." The *Yun* court conceded that the Rule 10b5-2 "goes farther than we do in finding a relationship of trust and confidence." *Id.* at 1273 n. 23.

Tipper-Tippee Liability: In *Dirks v. SEC*, 463 U.S. 646, 662 (1983), the Supreme Court held that in order for a tippee to be liable, the tipper (in that case a corporate insider) must have intended to benefit personally from his or her disclosure of the confidential

information to the tippee. In *SEC v. Yun*, 327 F.3d 1263 (11th Cir. 2003), the Eleventh Circuit held that a tipper who is an outsider-misappropriator must also intend to benefit from the tip in order for the tippee to be liable. Thus, in a case seeking to hold a tippee liable, regardless of whether the source of the information is an insider or an outsider-misappropriator, the plaintiff must prove that the tipper intended to personally benefit from the disclosure.

Scienter: In order to establish liability under Section 10(b) and Rule 10b-5, the inside trader must have acted with "scienter," which is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S 680, 686 n.5 (1980). In the Eleventh Circuit, "scienter" may also consist of "severe recklessness" by the defendant, *see, e.g., Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 790 (11th Cir. 2010); however, the Supreme Court has left open the question whether recklessness may satisfy the scienter requirement. *See Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011) ("We have not decided whether recklessness suffices to fulfill the scienter requirement."); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007) (declining to decide issue because "whether and when recklessness satisfies the scienter requirement is not presented in this case")

Materiality: Information is considered material if there is a substantial likelihood that a reasonable investor would consider it important in making a decision to buy or sell a security. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Information relating to a potential merger may be material even before the final merger agreement has been reached. The materiality of information relating to a merger depends on the probability that the transaction will be consummated and its significance to the issuer of the securities. *Basic, Inc.*, 485 U.S. at 250. *See also, SEC v. Mayhew*, 121 F.3d 44, 51 (2nd Cir. 1997); *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 47-48 (2d Cir. 1976). In insider trading cases, materiality of the non-public information is frequently established by a substantial change in the company's stock upon the public disclosure of the information. *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 166 (2nd Cir. 1980) (reaction of investors to the information is an indication of materiality).

Non-Public: Information becomes public when disclosed to achieve a broad dissemination to the investing public generally and without favoring any special person or group, *Dirks*, 463 U.S. at 653 n. 12 , or when, although known only to a few persons, trading on it "has caused the information to be fully impounded into the price of the particular stock . . . ." *United States v. Libera*, 989 F.2d 596, 601 (2d Cir.1993); *Mayhew*, 121 F.3d at 50.

Definition of a "Security": For additional examples of what is a security, see Exchange Act Section 3(a)(10), 15 U.S.C. § 78c(a)(10). The issue of whether a particular investment is a "security" is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926,

928 (10th Cir. 1970). In those cases where the court determines that the investment at issue is a security, it should so instruct the jury.

Definition of "Contemporaneous Trading": *See Johnson v. Aljian*, 257 F.R.D. 587 (C.D. Cal. 2009). "There is no law binding on this Court as to what constitutes 'contemporaneous' trading." For decisions addressing the issue see *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F.Supp.2d 1132, 1204 (C.D.Cal. Dec. 1, 2008); *see also Neubronner v. Milken*, 6 F.3d 666, 670 (9th Cir. 1993) (leaving "[t]he delineation of how far apart in time trades may be without being too far apart to satisfy the contemporaneous trading requirement [to be] worked out in cases much closer to a probable borderline than this one[,]" which alleged a three-year period of contemporaneous trading). There are recent cases that restrict "contemporaneous" trading under Section 20A to one day. Defs' Opp'n at 9-10 (citing, inter alia, *In re AST Research Sec. Litig.*, 887 F.Supp. 231, 233, 234 (C.D. Cal. 1995) ("The same day standard is the only reasonable standard given the way the stock market functions."); and *In re Countrywide*, 588 F.Supp.2d 1132 (C.D. Cal. Dec. 1, 2008), for the same proposition).

6.3.2 Securities Exchange Act 15 USC § 10(b)— Rule 10b-5(a) — 17 C.F.R. §§ 240.10b-5 — Insider Trading — SEC Version

The Securities and Exchange Commission, also known as the SEC, asserts a claim under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that allows the SEC to enact rules and regulations prohibiting certain conduct in the purchase or sale of securities. Exchange Act § 10(b) and Rule 10b-5(a) make it unlawful for a person to employ any device, scheme, or artifice to defraud someone else in connection with the purchase or sale of any security.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

In this case, the SEC claims that [name of defendant] committed fraud by engaging in "insider trading." A person engages in insider trading when he/she purchases or sells a security on the basis of material, nonpublic information in breach of a duty of trust or confidence owed directly, indirectly, or derivatively to the corporation that issued the security, to the corporation's shareholders, or to the information's source.

To prove its claim that [name of defendant] engaged in insider trading in violation of Exchange Act § 10(b) and Rule 10b-5(a), the SEC must prove each of the following three elements by a preponderance of the evidence:

First, you must find that [name of defendant] used an

instrumentality of interstate commerce in connection with the purchase or sale of a security.

Second, you must find that [name of defendant] used a device, scheme, or artifice to defraud in connection with the purchase or sale of a security.

And third, you must find that [name of defendant] acted knowingly or with severe recklessness.

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you as you consider the facts the SEC must prove.

For the first element, the SEC must prove that an "instrumentality of interstate commerce" was used in some phase of the purchase or sale of any securities in this case.

"Instrumentality of interstate commerce" means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or a facility of a national securities exchange such as the New York Stock Exchange or NASDAQ [or] an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market]. It's not necessary that the facility of a national securities exchange was the means by which the defendant[s] used a device, scheme, or artifice to defraud someone. It's only necessary that the facility was used in some phase of the transaction.

[A "facility of a national securities exchange" may include a

computer-trading program or an online discount-brokerage service.]

[If there is a genuine question whether the case involves a "security," additional instructions will be needed here.]

For the second element, the SEC must prove that [name of defendant] used a device, scheme, or artifice to defraud in connection with the purchase or sale of a security. The SEC alleges that the "device, scheme, or artifice" [name of defendant] used in this case is known as "insider trading."

Instructions regarding the second element must be tailored to the specific insider-trading theory alleged in the particular case. Instructions are provided below for the four distinct theories of insider trading: classical insider, misappropriation, tipper, and tippee.
[Classical Insider Theory

A person engages in insider trading when the person is a corporate insider and trades in the securities of the person's corporation on the basis of material, nonpublic information about that security. The law considers corporate officers, directors, and controlling shareholders to be "insiders." Because corporate insiders have a relationship of trust and confidence with the corporation and its shareholders, they have a duty to not trade the corporation's securities based on material, nonpublic information they received because of their positions with the corporation.

When a person is aware of "inside information" and the person's position of trust or confidence prevents [him/her] from disclosing that information, the law forbids [him/her] from using that information in buying or selling the securities in question. So any person who, through a special confidential relationship, gains access to material,

confidential information intended for only a corporate purpose must not use that information to buy or sell securities. It's the relationship's confidential nature that determines whether a person is an insider — not just [his/her] title within the corporation.

[In this case, which involves a defendant who is a[n] [accountant/ lawyer/ consultant], if you find that [name of defendant] became involved in the business operations of [name of corporation] and gained access to material, confidential information while acting in that capacity, you may find that [he/she] was an insider, and therefore owed a duty to the corporation and its shareholders (or [his/her] firm or client) not to benefit by using the information.]]

[Misappropriation Theory

Insider trading may occur when a person misappropriates material, confidential information and then trades securities on the basis of that information. This breaches the duties of confidentiality and loyalty that the person owes to the source of the information. The person's self-serving use of the confidential information defrauds the source of the exclusive use of that information.

So the SEC must prove by a preponderance of the evidence that [name of defendant] misappropriated information from someone to whom [he/she] owed a duty of confidentiality, and that [name of defendant] then either used the material, confidential information to trade securities, or traded securities while [he/she] was aware of that material, confidential information.

You must decide whether a fiduciary duty, or a similar duty of trust and confidence, existed between [name of corporation] and [name of defendant] so that [name of defendant] was obliged to keep [name of corporation]'s nonpublic, material, confidential information private.

A person cannot impose a fiduciary duty or similar duty of trust and confidence on another unilaterally by entrusting the other person with confidential information.

The term “fiduciary duty” means the duty one person owes to another in special relationships of trust and confidence, in which one person justifiably expects the person who owes the duty (the fiduciary) to act in his or her best interests. The duties a financial advisor, an accountant, and an attorney owe to their clients are types of fiduciary duties.

There are no hard-and-fast rules for determining whether a duty to keep a confidence exists. But there is a confidential relationship when a person agrees to keep information in confidence. It may also arise if the person communicating the material, nonpublic information and the person receiving it have a history, pattern, or practice of sharing confidences, and the person receiving the information knows, or reasonably should know, that the other person expects the information to remain confidential. For example, the previous disclosures of business secrets between two people may establish a duty to keep business secrets confidential.

[In this case, the recipient of the information was the source’s [spouse/parent/child/sibling]. A duty of loyalty or confidence usually arises in such situations. But [name of defendant] claims that, because of the facts and circumstances surrounding the relationship between [him/her] and [his/her] [spouse/parent/child/sibling], [he/she] neither knew, nor reasonably should have known, that [his/her] [spouse/parent/child/sibling] expected [him/her] to keep the information confidential.]

You must decide whether a duty of loyalty or confidence actually existed.]

[Tipper Theory

The law also prohibits violating Exchange Act Section 10(b) and Rule 10b-5 through another person. A person who receives material, confidential information [as an insider/through a duty of loyalty or confidence] can't give that information to another person, or "tip" the other person — which is breaching a duty owed directly or indirectly to a security's issuer, the issuer's shareholders, or the information's source — and expect that [he/she] will personally benefit, directly or indirectly, from the tip.

To prove that [name of defendant] violated Exchange Act § 10(b) and Rule 10b-5 as a tipper of material, confidential information, the SEC must show by a preponderance of the evidence these elements:

First, you must find that [name of defendant] provided material, confidential information to another person — a tippee.

Second, you must find that, in providing the material, condfidential information, [name of defendant] breached a fiduciary duty, or a duty of loyalty or confidence to the source of that information.

Third, you must find that [name of defendant] expected to receive a personal benefit.

And fourth, you must find that the tippee traded securities on the basis of the information.

The personal benefit to the tipper doesn't always have to involve

money. The SEC can prove that [name of defendant] personally benefited from the disclosure by showing that [he/she] received some tangible benefit, [he/she] would gain some future advantage, or the disclosure enhanced [his/her] reputation. [Name of defendant]'s intention to make a gift of the material, confidential information to a friend or relative of the tipper, or someone in the tippee's family, can be enough to show that [name of defendant] personally benefited from the disclosure.]

[Tippee Theory

The SEC claims that [name of defendant] received inside information and used it for [his/her] own benefit even though [he/she] didn't personally owe anyone a duty of trust or confidence that would prevent [him/her] from buying or selling the securities in question.

The basis for this allegation is that [name of defendant] was a "tippee" of inside information when [he/she] received a "tip" of material, confidential information from [name of tipper] about [name of issuer/security]. The law forbids a tippee from trading the securities because the tippee stands in the same shoes as the tipper.

To find that [name of defendant] was forbidden to buy or sell the securities in question because [he/she] was a tippee, you must find that [he/she] knowingly participated in someone else's breach of trust and confidence. The SEC must prove that the person from whom [name of defendant] received material, confidential information — the insider or tipper — violated a trust relationship by making disclosures to [name of defendant], and that [name of defendant] knew that the tipper violated a trust relationship.

Also, the SEC must prove by a preponderance of the evidence

that the tipper personally benefited in some way, directly or indirectly, from the disclosure.

The personal benefit to the tipper doesn't always have to involve money. The SEC can prove that [name of tipper] personally benefited from the disclosure by showing that [he/she] received some tangible benefit, [he/she] would gain some future advantage, or the disclosure enhanced [his/her] reputation. [Name of tipper]'s intention to make a gift of the material, confidential information to a friend or relative of the tipper, or someone in the tippee's family, can be enough to show that [name of defendant] personally benefited from the disclosure.]

If you decide that [name of defendant] [was an insider with a duty of trust and confidence and] [learned/misappropriated/tipped/was a tippee who received] inside information, then you must also decide whether the inside information [name of defendant] possessed was "material."

A misstatement or omission of fact is "material" if there is a substantial likelihood that a reasonable investor would attach importance to the misrepresented or omitted fact in determining his course of action. Put another way, there must be a substantial likelihood that a reasonable investor would view the misstated or omitted fact's disclosure as significantly altering the total mix of available information. A minor or trivial detail is not a "material fact."

Whether an uncertain prospective event such as a corporate merger or acquisition is material depends on balancing both the probability that the event will occur, and also the anticipated magnitude of the event in light of all the company activity. When the information concerns a merger or acquisition, the probability that a merger or acquisition will be finalized does not need to be very high for the information to be material because a merger or acquisition is an event of such magnitude that information can become material even at an early stage of the process.

In addition to deciding whether the information [name of defendant] possessed was material, you must decide whether that information was "nonpublic." Nonpublic information is information that isn't generally available to the public through such sources as a company's SEC filings, press releases, trade publications, or other publicly available sources. The law considers information nonpublic until the information is effectively disseminated in a manner sufficient to ensure its availability to the investing public.

The SEC must also prove that [name of defendant] traded the securities "on the basis of" material, nonpublic information. This requires proof by a preponderance of the evidence that [name of defendant] used material, nonpublic information in the purchase or sale of securities.

If you find that [name of defendant] was aware of the material, nonpublic information when [he/she] made the purchase or sale of securities, then a strong presumption arises that [name of defendant] traded "on the basis of" material, nonpublic information. [Name of defendant] may overcome that presumption if [he/she] proves by a preponderance of the evidence that [he/she] didn't use material,

nonpublic information when [he/she] made the purchase or sale of securities.

For the third element, the SEC must prove that [name of defendant] acted knowingly or with severe recklessness. The term "knowingly" means that [name of defendant] acted with an intent to deceive, manipulate, or defraud. But [name of defendant] didn't act knowingly if [he/she] acted inadvertently, carelessly, or by mistake.

To act with "severe recklessness" means to engage in conduct that involves an extreme departure from the standard of ordinary care. A person acts with reckless disregard if it's obvious that an ordinary person under the circumstances would have realized the danger and taken care to avoid the harm likely to follow. But it's not necessary for the SEC to prove that [name of defendant] knew [he/she] was violating an SEC rule.

If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will determine the remedy or remedies to impose at a later date.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] used an "instrumentality of interstate commerce" in connection with the purchase or sale of the securities involved in this case?

Answer Yes or No _____

2. That [name of defendant] used a "device, scheme, or artifice to

defraud" in connection with the purchase or sale of the securities involved in this case?

Answer Yes or No _____

3. That [name of defendant] acted "knowingly or with severe recklessness?"

Answer Yes or No _____

[[For the classical-insider theory, use the following:]

4. That [name of defendant] was an insider of [name of company]?

Answer Yes or No _____

5. That [name of defendant] possessed inside information?

Answer Yes or No _____]

[[For the misappropriation theory, use the following:]

4. That [name of defendant] had a relationship with [_____] that gave rise to a duty to keep inside information learned from [_____] confidential?

Answer Yes or No _____]

[[For the tipper theory, use the following:]

4. That [name of defendant] provided inside information to

[_____] in breach of [name of defendant]'s duty of loyalty and confidentiality to [_____]?

Answer Yes or No _____

5. That [name of defendant] had an expectation of a personal benefit in providing the inside information to [_____]?

Answer Yes or No _____]

[[For the tippee theory, use the following:]

4. That [name of defendant] received inside information from [_____] and that [_____] breached [his/her] duty of loyalty and confidentiality to [_____] in providing that inside information to [name of defendant]?

Answer Yes or No _____

5. That [_____] had an expectation of a personal benefit in providing the inside information to [name of defendant]?

Answer Yes or No _____]

[For all theories, include the following:]

6. That [name of defendant] [, the tippee,] traded securities on the basis of inside information?

Answer Yes or No _____

7. That the inside information was material?

Answer Yes or No _____

8. That the inside information was nonpublic?

Answer Yes or No _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

Insider Trading, Classical Theory: The language of this charge comes directly from the leading cases on insider trading, *United States v. O'Hagan*, 521 U.S. 642 (1997) and *Chiarella v. United States*, 445 U.S. 222, 228 (1980). In *O'Hagan* the Supreme Court held that trading on material non-public information is a "device" within the meaning of § 10(b) of the Securities Exchange Act and Rule 10b-5. *O'Hagan*, 521 U.S. at 655-56. Additionally, the Eleventh Circuit has held that mere possession of material, non-public information is insufficient to establish a 10b-5 violation. Rather, the Plaintiff must show that the Defendant actually *used* that information in trading with an intent to defraud. *SEC v. Adler*, 137 F.3d 1325, 1337 (11th Cir. 1998). In a footnote in *Adler*, the Eleventh Circuit noted that the SEC could adopt a different standard by rule. *Id.* at 1337 n.33. Subsequent to the Eleventh Circuit's decision in *Adler*, the SEC adopted Rule 10b5-1(b), quoted above, which establishes an "awareness" standard more closely analogous to the "knowing possession" standard adopted by the Second Circuit in *United States v. Teicher*, 987 F.2d 112, 120-21 (2d Cir. 1993), and rejected by the Eleventh Circuit in *Adler*. In adopting Rule 10b5-1(b), the SEC explained that, "The awareness standard reflects the common sense notion that a trader who is aware of inside information when making a trading decision inevitably makes use of the information." 65 Fed. Reg. 51716-01, 51727 (Aug. 24, 2000) (codified at C.F.R. pts. 240, 243, 249). Answering commentators' criticisms regarding the imprecision of the awareness standard, the SEC stated, "'Aware' is a commonly used and well-defined English word, meaning 'having knowledge; conscious; cognizant.'" *Id.* at 51727 n.105. Since the amendment of Rule 10b-5 in 2000, the Eleventh Circuit has

reaffirmed the "use" requirement previously set forth in *Adler*. *SEC v. Ginsburg*, 362 F.3d 1292, 1297-98 (11th Cir. 2004). Thus, despite Rule 10b-5's "awareness" standard, the Eleventh Circuit continues to interpret Rule 10b-5 as requiring the plaintiff to prove that the defendant not only possessed the material, non-public information, but also that the defendant used the information in trading. However, "[p]roof of knowledge of such information at the time of a trade 'gives rise to a strong inference of use.'" Ginsburg, 362 F.3d at 1298, *quoting Adler*, 137 F.3d at 1340.

Insider Trading, Misappropriation Theory: *O'Hagan* answered the question of whether someone in possession of inside information can violate 10b-5 when he trades in another company's stock. Traditional insider trading occurs when the insider trades in his own company's stock and is derived from breach of fiduciary duty concepts. The Court held that trading in any securities based upon information as a result of a fiduciary duty violates Rule 10b-5. Under *O'Hagan*, a person violates Rule 10b-5 when that person trades on any information obtained in violation of a fiduciary duty. Probably the most common application of the misappropriation theory occurs where corporate insiders know that their company is about to launch a takeover of another company. Under the classical theory, they cannot trade in shares of their own company and under the misappropriation theory they cannot trade in the target's shares.

In August of 2000, the SEC adopted Rule 10b5-2 [17 C.F.R. § 240.10b5-2] to clarify when a duty of trust or confidence arises between a source and recipient of material nonpublic information. Such a duty arises in three circumstances: (1) where the person agrees to maintain the information in confidence; (2) where the source and recipient have a history, pattern, or practice of sharing confidences such that the recipient knew or reasonably should have known the source expected the information to be kept in confidence; and (3) where the source is the parent, child, spouse, or sibling of the recipient. In the latter case, Rule 10b5-2(b)(3) establishes a presumption that a duty of trust or confidence arises, which may be rebutted by showing that, based on the circumstances surrounding the relationship, the source reasonably would not have expected the recipient to keep the information confidential. In a case whose events occurred prior to the adoption of Rule 10b5-2 (to which the new rule was inapplicable), *SEC v. Yun*, 327 F.3d 1263, 1273 (11th Cir. 2003), the Eleventh Circuit held that a duty of trust or confidence arises between spouses only where there was "a history or practice of sharing business confidences." The *Yun* court conceded that the Rule 10b5-2 "goes farther than we do in finding a relationship of trust and confidence." *Id.* at 1273 n. 23.

Tipper-Tippee Liability: In *Dirks v. SEC*, 463 U.S. 646, 662 (1983), the Supreme Court held that in order for a tippee to be liable, the tipper (in that case a corporate insider) must have intended to benefit personally from his or her disclosure of the confidential information to the tippee. In *SEC v. Yun*, 327 F.3d 1263 (11th Cir. 2003), the Eleventh Circuit held that a tipper who is an outsider-misappropriator must also intend to benefit from the tip in order for the tippee to be liable. Thus, in a case seeking to hold a tippee liable,

regardless of whether the source of the information is an insider or an outsider-misappropriator, the plaintiff must prove that the tipper intended to personally benefit from the disclosure.

Scienter: In order to establish liability under Section 10(b) and Rule 10b-5, the inside trader must have acted with "scienter," which is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S 680, 686 n.5 (1980). In the Eleventh Circuit, "scienter" may also consist of "severe recklessness" by the defendant, *see, e.g., Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 790 (11th Cir. 2010); however, the Supreme Court has left open the question whether recklessness may satisfy the scienter requirement. *See Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011) ("We have not decided whether recklessness suffices to fulfill the scienter requirement."); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007) (declining to decide issue because "whether and when recklessness satisfies the scienter requirement is not presented in this case")

Materiality: Information is considered material if there is a substantial likelihood that a reasonable investor would consider it important in making a decision to buy or sell a security. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Information relating to a potential merger may be material even before the final merger agreement has been reached. The materiality of information relating to a merger depends on the probability that the transaction will be consummated and its significance to the issuer of the securities. *Basic, Inc.*, 485 U.S. at 250. *See also, SEC v. Mayhew*, 121 F.3d 44, 51 (2nd Cir. 1997); *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 47-48 (2d Cir. 1976). In insider trading cases, materiality of the non-public information is frequently established by a substantial change in the company's stock upon the public disclosure of the information. *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 166 (2nd Cir. 1980) (reaction of investors to the information is an indication of materiality).

Non-Public: Information becomes public when disclosed to achieve a broad dissemination to the investing public generally and without favoring any special person or group, *Dirks*, 463 U.S. at 653 n. 12 , or when, although known only to a few persons, trading on it "has caused the information to be fully impounded into the price of the particular stock . . . ." *United States v. Libera*, 989 F.2d 596, 601 (2d Cir.1993); *Mayhew*, 121 F.3d at 50.

Definition of a "Security": For additional examples of what is a security, see Exchange Act Section 3(a)(10), 15 U.S.C. § 78c(a)(10). The issue of whether a particular investment is a "security" is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). In those cases where the court determines that the investment at issue is a security, it should so instruct the jury.

Affirmative Defenses: Note that 17 C.F.R § 240.10b5-1(c) provides for certain

affirmative defenses where the purchase or sale of securities was made pursuant to the terms of a contract, instruction to another person, or written plan that was made or given prior to the person's becoming aware of the material nonpublic information. Where such an affirmative defense is raised, these instructions should be modified to incorporate the asserted defense.

6.4 Securities Exchange Act 15 USC § 78j(b) — Rule 10b-5(c) — 17 C.F.R. § 240.10b-5(c)

[Name of plaintiff/The Securities and Exchange Commission, also known as the SEC] asserts a claim under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that allows [the Securities and Exchange Commission, also known as the SEC/the SEC], to enact rules and regulations prohibiting certain conduct in the purchase or sale of securities. Rule 10b-5(c) makes it unlawful for a person to engage in any practice or course of dealing that would operate as a fraud in connection with the purchase or sale of any security.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

A person who claims that someone violated Rule 10b-5(c) may bring a civil action for damages [he/she/it] suffered as a result of the violation. [The SEC may bring a civil action because of the Rule 10b-5(c) violation claimed.]

To prove a claim under Rule 10b-5(c), [name of plaintiff/the SEC] must prove each of the following facts by a preponderance of the evidence:

First, you must find that [name of defendant] used an "instrumentality of interstate commerce" in connection with the purchase or sale of a security.

Second, you must find that [name of defendant] engaged in an act, practice, or course of business — in connection with the purchase or sale of a security — that operated or would operate as a fraud or deceit on any person.

[And third/Third], you must find that [name of defendant] acted knowingly or with severe recklessness.

[The fourth and fifth elements are not required in cases brought by the SEC.]

[Fourth, you must find that [name of plaintiff] justifiably relied on [name of defendant]'s conduct.

And fifth, you must find that [name of plaintiff] suffered actual damages as a proximate result of [name of defendant]'s wrongful conduct.]

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you as you consider the facts [name of plaintiff/the SEC] must prove.

"Instrumentality of interstate commerce" means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or a facility of a national securities exchange such as the New York Stock Exchange or NASDAQ [or] an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market]. It's not necessary that the facility of a national securities exchange was the means by which the defendant[s] used a device, scheme, or artifice to defraud someone. It's only necessary that the facility was used in some phase of the transaction.

[A "facility of a national securities exchange" may include a computer-trading program or an online discount-brokerage service. Again, it's not necessary that the facility of a national securities exchange was how someone engaged in a fraudulent practice or course of dealing. It's only necessary that the facility was used in some phase of the transaction.]

[If there is a genuine question whether the case involves a "security," additional instructions will be needed here.]

For the second element, [name of plaintiff/the SEC] must prove that [name of defendant] engaged in any act, practice, or course of business, in connection with the purchase or sale of a security, that operated or would operate as a fraud or deceit on any person. [If the SEC brings the case, add the following: The SEC does not need to identify any particular purchase or sale of securities by a specific person, including [name of defendant]. Rather, it's enough if the SEC proves that the act, practice, or course of business that [name of defendant] engaged in involved, or touched in any way, the purchase or sale of securities.]

[Name of plaintiff/The SEC] claims that the act, practice, or course of business [name of defendant] engaged in [describe the alleged act, practice, or course of business].

A "fraud or deceit" means a lie or a trick. A fraud or deceit doesn't have to relate to an investment's quality or actually result in the purchase or sale of any security. It's not necessary that [name of defendant], who was allegedly involved in the fraud or deceit, sold or purchased securities personally if the fraudulent or deceitful conduct defrauded some person.

The term "would" in the phrase "would operate as a fraud or deceit" means that the act, practice, or course of business had the capacity to defraud a purchaser or seller. It's not necessary that the act, practice, or course of business actually defrauded someone.

For the third element, [name of plaintiff] must prove that [name of defendant] acted knowingly or with severe recklessness. The term "knowingly" means that [name of defendant] acted with an intent to deceive, manipulate, or defraud. But [name of defendant] didn't act knowingly if [he/she] acted inadvertently, carelessly, or by mistake.

To act with "severe recklessness" means to engage in conduct that involves an extreme departure from the standard of ordinary care. A person acts with reckless disregard if it's obvious that an ordinary person under the circumstances would have realized the danger and taken care to avoid the harm likely to follow.

[The following instructions on the fourth and fifth facts are not required to be given in SEC cases. The instruction in SEC cases concludes with the bracketed instruction that is provided at the end of this instruction.]

[For the fourth element, [name of plaintiff] must prove that [he/she/it] "relied" on the alleged misrepresentations [or omissions] and was "justified" in doing so.]

[Use when fraud-on-the-market theory is not involved: If you find that the act, practice, or course of business didn't affect [name of plaintiff]'s investment decision, then [name of plaintiff] didn't "rely" on it and can't recover on the claim. Also, [name of plaintiff] must prove that [his/her/its] reliance on [name of defendant] was justified. Reliance isn't "justified" if [name of plaintiff] intentionally ignored or refused to investigate suspicious circumstances — by disregarding a risk that [name of plaintiff] knew about, or was so obvious that [name of plaintiff] should have been aware of it, and the risk was so great as to make it highly probable that harm would follow.

To decide whether [name of plaintiff] justifiably relied on [name of defendant]'s alleged misrepresentations, you should consider:

- [name of plaintiff]'s sophistication and expertise in matters involving finance and securities;

- the existence of a long-standing business or personal relationship between [name of plaintiff] and [name of defendant];

- [name of plaintiff]'s access to relevant information;

- whether [name of defendant] owed a fiduciary duty to [name of plaintiff];

- whether [name of defendant] concealed fraud;

- whether [name of plaintiff] initiated the stock transaction or sought to expedite it; and

- whether [name of defendant]'s misrepresentations were general or specific.

The term "fiduciary duty" means the duty one person owes to another in special relationships of trust and confidence, in which one person justifiably expects the person who owes the duty (the fiduciary) to act in the best interests of the person to whom the duty is owed. The duties a financial advisor, an accountant, and an attorney owe to their clients are types of fiduciary duties.

You must consider all these factors to decide whether [name of plaintiff]'s reliance was justified. No single factor is enough.]

[Use when fraud-on-the-market theory is involved: If you find that [name of plaintiff] didn't rely directly on [name of defendant]'s alleged deception, manipulation, or fraud, you may find that [name of plaintiff] instead relied on the integrity and regularity of the market in which the securities were traded. In that case, if you also find that [name of defendant]'s alleged deception, manipulation, or fraud affected the security's price in the market — consequently affecting the price at which [name of plaintiff] bought or sold the security — those findings would satisfy [name of plaintiff]'s obligation of proving justifiable reliance on [name of defendant]'s conduct.]

[For the fifth element, [name of plaintiff] must prove that [he/she/it] suffered damage as a proximate result of [name of defendant]'s alleged

deception, manipulation, or fraud. For damage to be the "proximate result" of a deception, manipulation, or fraud, [name of plaintiff] must prove that the deception, manipulation, or fraud was a substantial or significant contributing cause of [his/her/its] damages. Ask yourself: If [name of defendant] had not engaged in deception, manipulation, or fraud, would these damages have occurred? [Name of plaintiff] doesn't have to prove that the deception, manipulation, or fraud was the sole cause of the damage, only that it was a substantial or significant contributing cause.]

[If you find that [name of plaintiff] has proved [his/her/its] claim under 10b-5(c) by a preponderance of the evidence, you must then consider [name of plaintiff]'s damages.

[Name of plaintiff] is entitled to recover damages to compensate [him/her/it] for damages suffered as a proximate result of [name of defendant]'s conduct. You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork because [name of plaintiff] can recover only [his/her] actual damages.

Actual damages are calculated as the decrease in [name of plaintiff]'s stock value that [name of defendant]'s misrepresentation [or omission] caused. The amount of damages may be expressed in the evidence on a "per-share" basis. Put another way, [name of plaintiff] may demonstrate damages by offering evidence of a dollar amount per share.

Here, [name of plaintiff]'s theory of recoverable compensatory or economic damages is: [describe theory].]

[To be given in SEC cases: If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will determine the remedy or remedies to be imposed later.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] used an "instrumentality of interstate commerce" in connection [for private parties: the purchase or sale of the securities involved in this case] [for SEC cases: the purchase or sale of any securities]?

Answer Yes or No _____

2. That [name of defendant] engaged in an act, practice, or course of dealing in connection with [for private parties: the purchase or sale of the securities involved in this case] [for SEC cases: the purchase or sale of any securities] that operated, or would operate, as a fraud or deceit on any person?

Answer Yes or No _____

3. That [name of defendant] acted "knowingly or with severe recklessness?"

Answer Yes or No _____

[Exclude interrogatories 4, 5, and 6 in cases brought by the SEC.]

4. That [name of plaintiff] "justifiably relied" upon [name of defendant]'s conduct?

Answer Yes or No _____

5. That [name of plaintiff] suffered damages as a proximate result of [name of defendant]'s wrongful conduct?

Answer Yes or No _____

[Note: If you answered "No" to any of the preceding questions, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you answered "Yes" to each question, go to the next question.]

6. That [name of plaintiff] suffered damages?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

This pattern instruction is drafted for use in cases brought by private plaintiffs and the SEC. Particular attention should be paid to material in brackets because certain of the bracketed material will or will not be included in the instruction depending on whether the plaintiff is a private party of the SEC. Bracketed material in other instances is provided to consider for inclusion depending on the facts and claims in a particular case. The instruction is drafted for general application to all cases under Rule 10b-5(c), which broadly prohibits the use of "any act practice or course of business that operates or would operate as a fraud . . . in connection with the purchase or sale of any security."

Section 10(b) of the Securities Exchange Act of 1934 [15 USC § 78j(b)] provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate

> commerce or of the mails, or of any facility of any national securities exchange . . . [to] use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

With respect to the definition of "security," *see SEC v. Edwards*, 540 U.S. 389, 124 S. Ct. 892, 157 L.Ed.2d 813 (2004) and Exchange Act Section 3(a)(10), 15 U.S.C. § 78c(a)(10). The issue of whether a particular investment is a security will depend largely on how the investment was portrayed to investors. *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) ("[I]t is the representations made by the promoters, not their actual conduct, that determine whether an interest is an investment contract (or other security).") The issue of whether a particular investment is a "security" is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). In those cases where the court determines that the investment at issue is a security, it should so instruct the jury.

In *Gower v. Cohn*, 643 F.2d 1146, 1151 (5th Cir. Unit B, May 1981), the former Fifth Circuit held that a single interstate telephone call satisfied the jurisdictional requirement of use of any means or instrumentality of interstate commerce as long as the telephone call was made in connection with the fraudulent scheme and was an important step in the scheme.

SEC Manipulative and Deceptive Devices and Contrivances Rule, 17 C.F.R. § 240.10b-5 (2004):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> - To employ any device, scheme, or artifice to defraud,
> - To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

- To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

6.5 Securities Exchange Act § 14(a) — 15 U.S.C. § 77n — Rule 14a-9 — 17 C.F.R. § 14a-9

[Name of plaintiff/The Securities and Exchange Commission, also known as the SEC] asserts a claim under Section 14(a) of the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that allows [the Securities and Exchange Commission, also known as the SEC/the SEC], to enact rules and regulations prohibiting certain conduct in the purchase or sale of securities. Section 14(a) of the Act makes it "unlawful for any person . . . in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security."

Rule 14a-9 forbids a person from soliciting proxies, consents, or authorizations from security holders by any written or oral communication that, at the time and in light of the circumstances under which the person makes it, is false or misleading about any material fact, or which omits any material fact that is necessary to make the communication not false or misleading.

For the purposes of Rule 14a-9, a "security" is generally a share of stock that has the right to cast a vote in connection with the election of directors or approval of corporate actions or transactions. A "proxy" is simply an authorization the holder of stock grants to vote that stock. Because shareholders usually can't attend shareholder meetings in person, most votes cast at those meetings are cast through proxies that have been acquired from shareholders through a proxy solicitation. A "proxy solicitation" is a communication to shareholders under circumstances reasonably calculated to procure [, withhold, or revoke] a proxy. A "proxy statement" is a document that must be sent to security holders whenever their votes are solicited.

To prove a claim under Exchange Act § 14(a) and Rule 14a-9,

[name of plaintiff/the SEC] must prove each of the following elements by a preponderance of the evidence:

First, you must find that in soliciting proxies, either through a proxy statement or other written or oral communication, [name of defendant] misstated or omitted material information necessary to prevent the proxy solicitation from being misleading.

Second, you must find that [name of defendant] was negligent in making the material misstatement or omission.

[And third/Third], you must find that the proxy materials were an essential link in the accomplishment of a corporate action or transaction.

[The fourth element is not required in cases brought by the SEC.]

[And fourth, you must find that [name of plaintiff] suffered actual damages as a proximate result of [name of defendant]'s wrongful conduct.]

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you as you consider the facts [name of plaintiff] must prove.

The first element that [name of plaintiff/the SEC] must prove is that the proxy solicitations at issue misrepresented or omitted material information necessary to prevent the proxy solicitation from being misleading.

A "misrepresentation" is a statement that is not true. An "omission" is the failure to state facts that would be necessary to make the statements not misleading. In particular, the information [name of plaintiff/the SEC] claims was wrongfully misrepresented or omitted from the proxy statement was [describe the specific information claimed to

have been misrepresented or omitted].

A misstatement or omission of fact is "material" if there is a substantial likelihood that a reasonable shareholder would have considered the misrepresented or omitted fact important in deciding how to vote.

[Name of plaintiff/The SEC] doesn't have to show that knowing the correct or omitted fact would cause a reasonable shareholder to change [his/her] vote. It's enough if [name of plaintiff] shows that those facts would have been significant in a reasonable shareholder's decision. Put another way, there must be a substantial likelihood that a reasonable investor would view the misstated or omitted fact's disclosure as significantly altering the total mix of available information. A minor or trivial detail is not a material fact.

You must base a finding of materiality on the facts that existed when the statement was made. You can't consider events occurring after the statement or omission to determine whether the statement or omission was material when it was made, except to the extent that those facts help you understand the facts that existed at the time of the proxy statement.

[Predictions, opinions, and other projections (if they aren't expressed as guarantees) aren't representations of material facts — unless the person or entity communicating them doesn't believe, or have a reasonable basis for believing, they're true. But if the person or entity making the predictions, opinions, or projections actually believed them at the time or had a reasonable basis for making them, then the statements are not materially misleading statements of fact. The focus is on whether the statements were false or misleading when they were made. Later events proving that the predictions, expressions of opinion, or projections were wrong don't create a violation of Rule 14a-9.]

If [name of defendant] has made false or inaccurate statements before in the proxy solicitation regarding material facts, [he/she/it] has a duty to correct those statements if it is discovered later that those

statements weren't true when made and they remain material to a shareholder's investment decision.

For the second element, [name of plaintiff] must prove that [name of defendant] was negligent in making the misrepresentation or omission. "Negligence" is the failure to exercise the due diligence, care, or competence that a reasonable person would when making representations, or deciding what facts to disclose, in the proxy solicitation. Ask yourself: Would a reasonable person have made or omitted the statements in the proxy solicitation?

For the third element, [name of plaintiff/the SEC] must prove that the proxy solicitation was an essential link in the accomplishment of a corporate action or transaction. [Name of plaintiff/the SEC] must prove that the votes of shareholders who were solicited were required at the time to accomplish the corporate action or transaction, and that without the proxy solicitation, the proposed corporate action or transaction couldn't have been accomplished.

[The fourth element and the following damages instruction is not given in cases brought by the SEC. The instruction bracketed at the end of this instruction is given in SEC cases.]

[For the fourth element, [name of plaintiff] must prove that [he/she/it] suffered damage as a proximate result of [name of defendant]'s alleged misstatement or omission. That is, [name of plaintiff] must prove that the misrepresentation or omission was a substantial or significant contributing cause for the loss so that — except for the misrepresentation or omission — the loss wouldn't have occurred. Ask yourself: If [name of defendant] had not misrepresented [or omitted] the facts, would these damages have occurred?]

[If you find that [name of plaintiff] has proved [his/her/its] claim by a preponderance of the evidence, you must then consider [name of plaintiff]'s damages. [Name of plaintiff] is entitled to recover damages to compensate [him/her/it] for the damages suffered because of [name of defendant]'s conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork because [name of plaintiff] can recover only [his/her] actual damages.

Here, [name of plaintiff]'s theory of recoverable compensatory or economic damages is: [describe theory].]

[To be given in SEC cases: If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will determine the remedy or remedies to be imposed later.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant], in soliciting proxies, misstated or omitted material information necessary to prevent the proxy from being misleading?

Answer Yes or No _____

2. That [name of defendant] was negligent in making the misstatement or omission?

Answer Yes or No _____

3. That the proxy solicitation was an "essential link" in the accomplishment of a corporate action or transaction?"

Answer Yes or No _____

[Exclude interrogatories 4 and 5 in cases brought by the SEC.]

4. That [name of plaintiff] suffered damages as a proximate result of [name of defendant]'s wrongful conduct?

Answer Yes or No _____]

[Note: If you answered "No" to any of the preceding questions, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you answered "Yes" to each question, go to the next question.]

5. That [name of plaintiff] suffered damages?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATED: _____

ANNOTATIONS AND COMMENTS

This pattern instruction is drafted for use in cases brought by private plaintiffs and the SEC. Particular attention should be paid to material in brackets because certain of the bracketed material will or will not be included in the instruction depending on whether the plaintiff is a private party or the SEC. Bracketed material in other instances is provided to

consider for inclusion depending on the facts and claims in a particular case. The instruction is drafted for general application to all cases under Rule 14a-9, which broadly prohibits the solicitation of proxies using any "communication, written or oral, that contains a misleading statement or omission of material fact.

Among the primary objectives of the Securities Exchange Act of 1934 were the elimination of manipulative and deceptive practices, and the promotion of fair corporate suffrage." *See United States v. Charnay*, 537 F.2d 341, 347 (9th Cir.), *cert. denied*, 429 U.S. 1000, 97 S. Ct. 527 (1976) ("Congress enacted the Securities Exchange Act of 1934 to outlaw deceptive and inequitable practices in the securities business."). *See also* 4-82 MODERN FEDERAL JURY INSTRUCTIONS - CIVIL "The statutes and rules are designed to prevent a wide variety of devices and schemes that are contrary to a climate of fair dealing, including deceptive and unfair practices in connection with the solicitation of votes of security holders." *See Borak*, 377 U.S. at 431-32, 84 S. Ct. at 1559.

Section 14(a)(1) of the Securities Exchange Act of 1934 [15 USC § 78j(b)] provides that:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

With respect to the definition of "security," *see SEC v. Edwards*, 540 U.S. 389, 124 S. Ct. 892, 157 L.Ed.2d 813 (2004) and Exchange Act Section 3(a)(10), 15 U.S.C. § 78c(a)(10). The issue of whether a particular investment is a "security" is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). In those cases where the court determines that the investment at issue is a security, it should so instruct the jury.

In *Gower v. Cohn*, 643 F.2d 1146, 1151 (5th Cir., Unit B, May 1981), the former Fifth Circuit held that a single interstate telephone call satisfied the jurisdictional requirement of use of any means or instrumentality of interstate commerce as long as the telephone call was made in connection with the fraudulent scheme and was an important step in the scheme.

Pursuant to the authority granted to it in Section 14(a)(1), the SEC adopted Regulation 14A: Solicitation of Proxies. Rule 14A-9, False and Misleading Statements, 17 C.F.R. § 240.14a-9(a), provides as follows:

> No solicitation subject to this regulation shall be made by means of any proxy

> statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

The SEC's proxy rules in turn define a "proxy" as including every proxy, consent or authorization within the meaning of section 14(a) of the Act." , 17 C.F.R. § 240.14a-1(f). While the term "proxy" is not itself defined, Rule 14a-4(b)(1) sets forth the items that any proxy must include and makes clear that a proxy is an authorization to vote on particular identified matters:

> Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon, other than elections to office and votes to determine the frequency of shareholder votes on executive compensation pursuant to § 240.14a–21(b) of this chapter. A proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the security holder provided that the form of proxy states in bold-face type how it is intended to vote the shares represented by the proxy in each such case.

The proxy rules, 17 C.F.R. § 240.14a-1(l), also define "solicitation" broadly as:

> (i) Any request for a proxy whether or not accompanied by or included in a form of proxy:
>
> (ii) Any request to execute or not to execute, or to revoke, a proxy; or
>
> (iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

Finally, the proxy rules generally require persons who solicit proxies to provide a proxy statement to security holders: "The term "proxy statement" means the statement required by § 240.14a–3(a) whether or not contained in a single document." 17 C.F.R. § 240.14a-1(g).

To prevail on a claim pursuant to Section 14, the Plaintiff must show that a person solicited a proxy by use of a proxy statement or other solicitation that contained a material misrepresentation or omitted material facts, which caused the plaintiff injury, and that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an

essential link in the accomplishment of the transaction. *Mills v. Elec. Auto-Lite Co*., 396 U.S. 375, 385 (1970).

Materiality was defined in the context of a proxy claim by the Supreme Court in *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976), as follows:

The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with *Mills* general description of materiality as a requirement that "the defect have a significant propensity to affect the voting process." It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

The Eleventh Circuit has not yet addressed the standard of care required in a Section 14(a) case, the Second, Third and Seventh Circuits have held that a showing of negligence is sufficient to establish liability. Moreover, where corporate insiders know of the falsity of the misrepresented facts or know of material facts that are omitted from the soliciting materials, negligence is established as a matter of law. "Use of a solicitation that is materially misleading is itself a violation of law." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 382 (1970); *Seinfeld v. Barrett*, 2006 U.S. Dist. LEXIS 14827 (D. Del. Mar. 31, 2006) ("[I]f Section 14(a) and Rule 14a-9 were violated, they were violated by the making of the allegedly false and misleading statements in order to solicit shareholder approval. There is no additional requirement that a defendant do anything beyond making the false statement."); *Wilson v. Great American Industries, Inc.*, 855 F. 2d 987, 995 (2d Cir. 1988) (finding all defendants liable under section 14(a), court found that "[a]s a matter of law, the preparation of a proxy statement by corporate insiders containing materially false or misleading statements or omitting a material fact is sufficient".

The essential link requirement was set forth in *Mills v. Electric Auto-Lite*, 396 U.S. 375, 385 (1970). *Mills* rejected the lower court's requirement that plaintiff show that the misrepresentation or omission had a decisive effect on the voting:

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of

> those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions.

An essential link is established only if the votes of the solicited shareholders are legally required in order for the transaction to be approved. *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1090 (1991).

A court considering a proxy claim has the power to provide a wide range of equitable remedies. *Mills*, 396 U.S. at 386. A damage remedy, however, is subject to jury trial. The Private Securities Litigation Reform Act, to which a Section 14(a) claim is subject, also requires that in any claim for damages in a class action claim, "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). This language has resulted in two-alternative interpretations as to what a private plaintiff must allege in order to satisfactorily allege causation.

The first school of thought - the "causal connection" theory- has not as yet been adopted by any circuit thus far. Under this theory, a plaintiff is not required to prove that the outcome of the vote which the plaintiff claims was solicited by a defective proxy solicitation would have been different. The argument is that Section 14(a) does not impose this causation standard and that all that must be shown is an improper solicitation and a "casual connection" with a resulting loss. In other words, a plaintiff is not required to show the loss would not have been incurred "but for" the particular misrepresentation or omission alleged. That is, a plaintiff is not required to show that the vote would have been different if the misrepresentation or omission had not been made. These lawyers further believe that since equitable remedies are decided by the court it is not necessary to address equitable claims in jury instructions—that a Court will decide if a loss was caused by the alleged misrepresentation or omission.

The second school of thought is the "but for" theory of causation which is based on the long-standing negligence principal that a plaintiff is ordinarily required to establish that he or she suffered actual damages as a proximate result of a defendant's wrongful conduct. This theory derives from the Ninth Circuit's decision in *NYCERS v. Jobs*, 593 F.3d 1018 (9th Cir. 2010). In *NYCERS*, the court found that a "but for" theory of causation is consistent with causation analysis set forth by the Supreme Court case of *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), wherein the Court held that "private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentations action[s]. . . . [and that the] common law has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted but also that he 'suffered damage' and that the 'damage followed proximately the deception'" *Dura*, 544 U.S. at 343-44 (internal citations omitted).

Additionally supporting this theory is the fact that "[t]he PSLRA does not differentiate between plaintiffs seeking legal and equitable remedies, and thus, without an allegation of economic loss, no remedy, equitable or otherwise, is available." *NYCERS v. Jobs*, 593 F.3d at 1024. *See also, Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1207 (9th Cir. 2012) ("[seeking] rescission does not alleviate [a securities plaintiff from] the burden of producing evidence of economic loss"). Supporters of the *NYCERS* "but for" approach contend that after *Dura,* claims that were previously considered equitable claims for the Court's consideration may be more appropriately considered legal claims that must be resolved by the jury. Proponents of the "causal connection" theory oppose this interpreation and note that: (1) *Dura* did not concern equitable remedies and did not use the term "actual damages," but instead referred to "actual economic loss;" and (2) *Dura*, because it concerned a Section 10(b) claim, did not alter the loss causation principles under Section 14(a).

The Eleventh Circuit has not addressed the causation issue presented here, however, the Committee finds that the Ninth Circuit *NYCERS* reasoning to be consistent with Eleventh Circuit principals, and accordingly has drafted the causation element to be consistent with that decision. We note, however, that should the Eleventh Circuit determine that the "causal connection" theory to be more appropriate, the fourth element of this jury instruction (along with its related special interrogatory) should be appropriately amended to reflect such determination.

6.6 Section 12(a)(1) of the Securities Act of 1933 — 15 U.S.C. § 77l —Sale of an Unregistered Security in Violation of § 5

[Name of plaintiff] asserts a claim under § 12(a)(1) of the Securities Act of 1933 for the sale of an unregistered security to [him/her/it] in violation of § 5 of the Securities Act.

Sections 5(a) and 5(c) of the Securities Act of 1933 require the offer or sale of certain securities to be registered. Registering securities ensures that companies file essential facts with the Securities and Exchange Commission, also known as the SEC, which then makes these facts public. Without an exemption from the Securities Act's registration requirements, it's unlawful for any person to use an instrumentality of interstate commerce to sell an unregistered security.

A person who claims that someone violated § 12(a)(1) may bring a civil action for damages [he/she/it] suffered as a result.

To prove a claim under § 12(a)(1), [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First, you must find that [name of defendant] directly or indirectly sold securities to [name of plaintiff].

Second, you must find that [name of defendant] used an instrument of transportation or communication in interstate commerce in connection with the offer or sale of a security.

Third, you must find that a registration statement for the securities was not in effect as Securities Act § 5 requires.

And fourth, you must find that [name of plaintiff] suffered damages.

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you

as you consider the facts [name of plaintiff] must prove.

For the first element — that [name of defendant] directly or indirectly sold securities to [name of plaintiff] — you must use these definitions:

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

[If there is a genuine question about whether the case involves a security, additional instructions will be needed here.]

The terms "sale" or "sell" mean the transfer of a security for value. This includes the transfer of a contract of sale for value or any other disposition for value of a security or interest in a security.

To "directly or indirectly" sell securities means [name of defendant] was a necessary participant, or substantial factor, in the sale or offer to sell that [name of plaintiff] claims is in violation of Securities Act § 5.

[Name of defendant] may be a "necessary participant" or "substantial factor" in the sale of securities if, for example, [he/she/it] employs or directs others to sell or offer securities, or plans the process by which unregistered securities are offered or sold.

To satisfy this element, [name of plaintiff] isn't required to show that [name of defendant] had direct contact with any of the investors, including [name of plaintiff], who purchased the securities at issue.

A person who sells unregistered securities violates Securities Act § 5 regardless of whether the violation was committed knowingly, intentionally, recklessly, or negligently. [Name of defendant]'s good-faith belief that the sale was legal, and [his/her/its] reliance on the advice of counsel, aren't defenses to a violation of Securities Act § 5.

For the second element, [name of plaintiff] must prove that [name of defendant] used an instrument of transportation or communication in interstate commerce in connection with the sale or offer of sale of the securities.

"Instrument of transportation or communication in interstate commerce" means to the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market].

[A "facility of a national securities exchange" may include a computer-trading program or an online discount brokerage service.]

For the third element, [name of plaintiff] must prove that the securities at issue weren't registered. [In this case, the securities weren't registered.]

If you find that [name of plaintiff] has proved these three elements by a preponderance of the evidence, the burden shifts to [name of defendant] to prove by a preponderance of the evidence that the offer or sale of the securities at issue were exempt from the Securities Act's registration requirements. I'll determine how to proceed on the exemption [name of defendant] claims.

If you find that [name of plaintiff] has proved one or more of its claims against [name of defendant], [name of plaintiff] must prove that [he/she/it] suffered damage.

In a claim under § 12(a)(1), a plaintiff who has established a violation of § 5 is entitled to recover [the amount [name of plaintiff] paid for the security, with interest, minus the amount of any income received upon tender of such security or] for damages equal to [name of plaintiff]'s actual loss if [name of plaintiff] no longer owns the security.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] directly or indirectly sold [or offered to sell] securities to [name of plaintiff]?

Answer Yes or No _____

2. That [name of defendant] used an "instrument of transportation or communication in interstate commerce" in connection with the sale of [or offer to sell] securities?

Answer Yes or No _____

3. That a registration statement for the securities was not in effect?

Answer Yes or No _____

[4. That [name of defendant] has established that an exemption from registration applied to the sale of [or offer to sell] the securities?

Answer Yes or No _____

[Note: If your answer is "Yes," your foreperson should sign and date the last page of this verdict form. You are not required to answer Question No. 5. If your answer is "No," go to the next question.]

5. That [name of plaintiff] suffered damages?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? $ _____

SO SAY WE ALL.

_____

Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

Section 12(a)(1) of the Securities Act of 1933 [15 USC § 77*l*] provides that:

> Any person who offers or sells a security in violation of section 5 . . . shall be liable, subject to subsection (b) to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

The registration requirements under Section 5(a) and (c) of the Securities Act, 15 U.S.C. §§ 77e(a), 77e(c), are transaction-specific; each offer or sale of a security must either be registered or qualify for a particular exemption. *SEC v. Cavanaugh*, 155 F.3d 129, 133 (2d Cir. 1998) Thus, a particular offer or sale of a security may qualify for an exemption, but the subsequent resale of that same security may not qualify for any exemption.

SEC v. Continental Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972); *SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *SEC v. Holschuh*, 694, F.2d 130, 139-40 (7th Cir. 1982) ("Defendants have been held liable [under Section 5] where they have been a 'necessary participant' and 'substantial factor' in the offer and sale of unregistered securities"); *SEC v. Murphy*, 626 F.2d 633, 649-52 (9th Cir. 1980) (same); *SEC v. Friendly Power Co., LLC*, 49 F. Supp.2d 1363, 1371-72 (S.D. Fla. 1999) (defendant "has indirectly offered or sold that security to the public if he or it has employed or directed others to sell or offer them, or has conceived of and planned the scheme by which the unregistered securities were offered or sold.")

United States v. Wolfson, 405 F.2d 779, 783-84 (2d Cir. 1968); *SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1348 (2d Cir. 1998). *SEC v. Tuchinsky*, 1992 WL 226302, at *2 (S.D. Fla. June 29, 1992).

With respect to the definition of "security," *see SEC v. Edwards*, 540 U.S. 389 (2004) and Securities Act Section 2(a)(10), 15 U.S.C. § 77b(a)(10). The issue of whether a particular investment is a security will depend largely on how the investment was portrayed to investors. *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) ("[I]t is the representations made by the promoters, not their actual conduct, that determine whether an interest is an investment contract (or other security).") The issue of whether a particular investment is a "security" is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). If the court determines that the investment at issue is a security, it should so instruct the jury.

[No advice of counsel defense; state of mind.] *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1047 (2d Cir. 1976); *SEC v. Zubkis*, 2000 U.S. Dist. LEXIS 1865, at *17; *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y.), *aff'd* 155 F.3d 129 (2d Cir. 1998); *Howard v. SEC*, 376 F.3d 1136, 1147-48 (D.C. Cir. 2004); *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961).

[No exemption available for scheme to evade.] *SEC v. Parnes*, 2001 WL 1658275, at *7 (S.D.N.Y. Dec. 26, 2001); Goodwin Properties, *LLC v. Acadia Group, Inc.*, 2001 WL 800064 at *6 fn 2 (D. Me. July 17, 2001); Rule 144, Preliminary Note (17 C.F.R. § 230.144).

[Burden of the Defendant to prove an exemption.] *Pennaluna & Co. v. SEC*, 410 F.2d 861, 865 (9th Cir. 1969) ("It is well recognized as a general proposition that one who claims an exemption from the broad registration requirement of Section 5 has the burden of proving that the exemption applies"); *SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998); *SEC v. Murphy*, 626 F.2d 633, 640-41 (9th Cir. 1980).

[Exemptions from registration] In cases where the Defendant contends that an exemption from registration applies, this instruction should be amended to address the particular exemption(s) at issue. While not an exhaustive compilation of potential exemptions, the following discusses some of the more commonly-asserted exemptions. Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1), exempts "transactions by any person other than an issuer, underwriter or dealer. " This exemption is intended to "exempt only trading transactions between individual investors with respect to securities already issued . . . ." *SEC v. Culpepper*, 270 F.2d 241, 247 (2d Cir. 1959). Generally, an "underwriter" is a person who purchases a security from an issuer, or a person controlled by the issuer, with a view towards distribution. 15 U.S.C. §77b(11). The SEC promulgated Rule 144, 17 C.F.R. § 230.144, to clarify the statutory definition of "underwriter" for purposes of Section 4(1). Preliminary Note to Rule 144. Rule 144 generally provides that an individual who is not affiliated with the issuer may sell securities without being considered to be an "underwriter," if certain conditions are met. The Rule 144 safe harbor is not the exclusive

means by which a seller of unregistered securities can establish that he or she is eligible for the Section 4(1) exemption. *SEC v. M&A West, Inc.*, 538 F.3d 1043, 1050 n.6 (9th Cir. 2008).

Another commonly-asserted exemption is Section 4(2) of the Securities Act, 15 U.S.C. § 77d(2), which applies to "transactions by an issuer not involving a public offering ." Although not defined in the Securities Act, a "non-public offering" is "[a]n offering to those who are shown to be able to fend for themselves * * * * The focus of inquiry should be on the need of the offerees for the protections afforded by registration." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953). Following *Ralston Purina*, courts have relied on four factors in determining whether an offering is a private placement: (1) the number of offerees and their relationship to the issuer; (2) the number of units offered; (3) the size of the offering; and (4) the manner of the offering. *See Doran v. Petroleum Management Corp.*, 545 F.2d 893, 900 (5th Cir.1977). A person invoking this exemption must demonstrate that the offers or sales at issue do not constitute a disguised public offering. *SEC v. Cavanaugh*, 1 F.Supp.2d 337, 368 (S.D.N.Y. 1998). Thus, the person invoking this exemption must, among other things, demonstrate that he or she took adequate precaution to ensure that the purchaser would not resell the security to the public, such as including a restrictive legend on the certificates for the securities. *Interpretative Releases Relating to the Securities Act of 1933 and General Rules and Regulations Thereunder*, Securities Act Release No. 5121, 1970 WL 116591 (Dec. 30, 1970) ("It is essential that the issuer of the securities take careful precautions to assure that a public offering does not result through resales of securities purchased in transactions [exempt under Section 4(2)]."); *Cavanaugh*, 1 F. Supp.2d at 369.

The SEC promulgated Regulation D to create a non-exclusive "safe harbor" within the Section 4(2) exemption by defining certain transactions as non-public offerings. *See* 17 C.F.R. § 230.501, *et seq.* Rules 501 through 503 of Regulation D contain definitions, conditions, and other provisions that apply generally throughout Regulation D. Rules 504, 505 and 506 detail specific exemptions from registration. Rule 504 provides exemptions for companies that are not required to file periodic reports with the SEC for the offer and sale of up to $1,000,000 of securities in a 12-month period. Rule 505 exempts offers by companies of up to $5,000,000 of securities in a 12-month period, so long as offers are made without general solicitation or advertising. In determining whether the maximum offer or sale amounts have been satisfied, all sales by the issuer within a certain time period must be "integrated" (that is, treated as one offering). *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 642 n.5 (11th Cir. 2010). Rule 506 provides an exemption without any limit on the amount offered or sold, so long as offers are made without general solicitation or advertising and sales are made only to investors that meet certain qualifications. *See generally, Revisions of Limited Offering Exemptions in Regulation D, Securities Act Rel. No. 8828*, 2007 WL 2239110 (Aug. 3, 2007). Each of these rules has additional specific requirements that must be satisfied before the exemption will apply. Because Regulation D provides a non-exclusive safe harbor, the failure to satisfy all the terms and conditions of any particular rule within Regulation D does not create a presumption that the exemption

provided by Section 4(2) of the Securities Act is not otherwise available. *See* Comment 3 to Regulation D.

Another frequently- claimed exemption from registration is Section 3(a)(11) of the Securities Act, *15 U.S.C. § 77c(a)(11)*, commonly referred to as the "intrastate offering exemption." This statute exempts from registration securities that are "part of an issue offered and sold only to persons resident within a single state or territory, where the issuer . . . is a person resident and doing business within . . . [that] State or Territory." Because the exemption requires the entire issue to be offered and sold exclusively to residents of the state in which the issuer is resident and doing business, an offer or sale of any part of the issue to a single non-resident will destroy the exemption for the entire issue.

The SEC promulgated Rule 147, *17 C.F.R. §230.147*, to provide a safe harbor under the intrastate exemption. Under that rule, the intrastate offering will be available for offers and sales of securities that meet all the terms and conditions of the Rule. Those conditions are: (1) the issuer must be resident and doing business within the state or territory in which the securities are offered and sold (Rule 147 (c)); (2) the offerees and purchasers must be resident within such state or territory (Rule 147(d)); resales for a period of 9 months after the last sale which is part of an issue must be limited as provided in Rule 147 (e) and (f). In addition, the Rule provides that certain offers and sales of securities by or for the issuer will be deemed not "part of an issue" for purposes of the rule only (Rule 147(b)). *Examination of the Effects of Rules and Regulations on the Ability of Small Businesses to Raise Capital and the Impact on Small Businesses of Disclosure Requirements under the Securities Acts*, Securities Act Rel. No. 5914, 1978 WL 197119 (Mar. 6, 1978). The Rule also provides objective standards for the statutory terms "doing business within," "resident within," and "part of the issue."

6.7 Sections 5(a) & 5(c) of the Securities Act of 1933 — 15 U.S.C. §§77e(a) and 77e(c) — Offer and Sale of Unregistered Securities — SEC Version

The Securities and Exchange Commission, also known as the SEC, asserts a claim under the Securities Act of 1933, a federal statute regulating the offer and sale of securities.

Sections 5(a) and 5(c) of the Securities Act of 1933 require the offer or sale of certain securities to be registered. Registering securities ensures that companies file essential facts with the SEC, which then makes these facts public. It's unlawful, without an exemption from the Securities Act's registration requirements, for any person to use an instrumentality of interstate commerce to buy or sell, offer to buy or sell, or transport or deliver after sale, an unregistered security.

To succeed on its claim that [name of defendant] violated Securities Act §§ 5(a) and 5(c), the SEC must prove each of the following three elements by a preponderance of the evidence:

First, you must find that [name of defendant] directly or indirectly sold, or offered to sell, securities.

Second, you must find that [name of defendant] used an instrument of transportation or communication in interstate commerce in connection with the offer to sell or sale of securities.

And third, you must find that a registration statement for the securities was not in effect.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

[If there is a genuine question about whether the case involves a

security, additional instructions will be needed here.]

The terms “sale” or “sell” mean the transfer of a security for value. This includes contracts for the sale for value or any other disposition for value of a security or interest in a security. An “offer,” “offer to sell,” or “offer for sale” means attempting to dispose of a security or an interest in a security for value by inviting buyers.

To “directly or indirectly” sell securities means [name of defendant] was a necessary participant, or substantial factor, in the sale or offer to sell that the SEC claims is in violation of Securities Act § 5.

[Name of defendant] may be a “necessary participant” or “substantial factor” in the sale of securities if, for example, [he/she/it] employs or directs others to sell or offer to sell securities, or plans the process by which unregistered securities are offered or sold.

To satisfy this element, the SEC isn’t required to show that [name of defendant] had direct contact with any of the investors who were offered or purchased the securities at issue.

[In this case, the securities weren’t registered.]

“Instrument of transportation or communication in interstate commerce” means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market].

[A “facility of a national securities exchange” may include a computer-trading program or an online discount brokerage service.]

A person who sells unregistered securities violates Securities Act § 5 regardless of whether the violation was committed knowingly, intentionally, recklessly, or negligently. [Name of defendant]’s good-faith belief that the sale or offer to sell was legal, and [his/her/its] reliance on

the advice of counsel, aren't defenses to a violation of Securities Act § 5.]

[If you find that the SEC has proved these three elements by a preponderance of the evidence, the burden shifts to [name of defendant] to prove, by a preponderance of the evidence, that the offer to sell or sale of the securities were exempt from the Securities Act's registration requirements.

[If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will determine the remedy or remedies to impose at a later date.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] directly or indirectly sold [or offered to sell] securities?

Answer Yes or No _____

2. That [name of defendant] used an "instrumentality of interstate commerce" in connection with the sale of [or offer to sell] securities?

Answer Yes or No _____

3. That a registration statement for the securities was not in effect?

Answer Yes or No _____

[4. That [name of defendant] has established that an exemption from registration applied to the sale of [or offer to sell] the securities?

Answer Yes or No _____]

SO SAY WE ALL.

_____

Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

The registration requirements under Section 5(a) and (c) of the Securities Act, 15 U.S.C. §§ 77e(a), 77e(c), are transaction-specific; each offer or sale of a security must either be registered or qualify for a particular exemption. *SEC v. Cavanaugh*, 155 F.3d 129, 133 (2d Cir. 1998) Thus, a particular offer or sale of a security may qualify for an exemption, but the subsequent resale of that same security may not qualify for any exemption.

SEC v. Continental Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972); *SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *SEC v. Holschuh*, 694, F.2d 130, 139-40 (7th Cir. 1982) ("Defendants have been held liable [under Section 5] where they have been a 'necessary participant' and 'substantial factor' in the offer and sale of unregistered securities"); *SEC v. Murphy*, 626 F.2d 633, 649-52 (9th Cir. 1980) (same); *SEC v. Friendly Power Co., LLC*, 49 F. Supp.2d 1363, 1371-72 (S.D. Fla. 1999) (defendant "has indirectly offered or sold that security to the public if he or it has employed or directed others to sell or offer them, or has conceived of and planned the scheme by which the unregistered securities were offered or sold.")

United States v. Wolfson, 405 F.2d 779, 783-84 (2d Cir. 1968); *SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998). *SEC v. Tuchinsky*, 1992 WL 226302, at *2 (S.D. Fla. June 29, 1992).

With respect to the definition of "security," see *SEC v. Edwards*, 540 U.S. 389 (2004) and Securities Act Section 2(a)(10), 15 U.S.C. § 77b(a)(10). The issue of whether a particular investment is a security will depend largely on how the investment was portrayed to investors. *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) ("[I]t is the representations made by the promoters, not their actual conduct, that determine whether an interest is an investment contract (or other security).") The issue of whether a particular investment is a "security" is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). If the court determines that the investment at issue is a security, it should so instruct the jury.

[No advice of counsel defense; state of mind.] *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1047 (2d Cir. 1976); *SEC v. Zubkis*, 2000 U.S. Dist. LEXIS 1865, at *17; *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y.), *aff'd* 155 F.3d 129 (2d Cir. 1998); *Howard v. SEC*, 376 F.3d 1136, 1147-48 (D.C. Cir. 2004); *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961).

[No exemption available for scheme to evade.] *SEC v. Parnes*, 2001 WL 1658275, at *7 (S.D.N.Y. Dec. 26, 2001); *Goodwin Properties, LLC v. Acadia Group, Inc.*, 2001 WL 800064 at *6 fn 2 (D. Me. July 17, 2001); Rule 144, Preliminary Note (17 C.F.R. § 230.144).

[Burden of the Defendant to prove an exemption.] *Pennaluna & Co. v. SEC*, 410 F.2d 861, 865 (9th Cir. 1969) ("It is well recognized as a general proposition that one who claims an exemption from the broad registration requirement of Section 5 has the burden of proving that the exemption applies"); *SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998); *SEC v. Murphy*, 626 F.2d 633, 640-41 (9th Cir. 1980).

[Exemptions from registration] In cases where the Defendant contends that an exemption from registration applies, this instruction should be amended to address the particular exemption(s) at issue. While not an exhaustive compilation of potential exemptions, the following discusses some of the more commonly-asserted exemptions. Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1), exempts "transactions by any person other than an issuer, underwriter or dealer. " This exemption is intended to "exempt only trading transactions between individual investors with respect to securities already issued . . . ." *SEC v. Culpepper*, 270 F.2d 241, 247 (2d Cir. 1959). Generally, an "underwriter" is a person who purchases a security from an issuer, or a person controlled by the issuer, with a view towards distribution. 15 U.S.C. §77b(11). The SEC promulgated Rule 144, 17 C.F.R. § 230.144, to clarify the statutory definition of "underwriter" for purposes of Section 4(1). Preliminary Note to Rule 144. Rule 144 generally provides that an individual who is not affiliated with the issuer may sell securities without being considered to be an "underwriter," if certain conditions are met. The Rule 144 safe harbor is not the exclusive means by which a seller of unregistered securities can establish that he or she is eligible for the Section 4(1) exemption. *SEC v. M&A West, Inc.*, 538 F.3d 1043, 1050 n.6 (9th Cir. 2008).

Another commonly-asserted exemption is Section 4(2) of the Securities Act, 15 U.S.C. § 77d(2), which applies to "transactions by an issuer not involving a public offering ." Although not defined in the Securities Act, a "non-public offering" is "[a]n offering to those who are shown to be able to fend for themselves * * * * The focus of inquiry should be on the need of the offerees for the protections afforded by registration." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953). Following *Ralston Purina*, courts have relied on four factors in determining whether an offering is a private placement: (1) the number of offerees and their relationship to the issuer; (2) the number of units offered; (3) the size of the offering; and (4) the manner of the offering. *See Doran v. Petroleum Management Corp.*, 545 F.2d 893, 900

(5th Cir.1977). A person invoking this exemption must demonstrate that the offers or sales at issue do not constitute a disguised public offering. *SEC v. Cavanaugh*, 1 F.Supp.2d 337, 368 (S.D.N.Y. 1998). Thus, the person invoking this exemption must, among other things, demonstrate that he or she took adequate precaution to ensure that the purchaser would not resell the security to the public, such as including a restrictive legend on the certificates for the securities. *Interpretative Releases Relating to the Securities Act of 1933 and General Rules and Regulations Thereunder*, Securities Act Release No. 5121, 1970 WL 116591 (Dec. 30, 1970) ("It is essential that the issuer of the securities take careful precautions to assure that a public offering does not result through resales of securities purchased in transactions [exempt under Section 4(2)]."); *Cavanaugh*, 1 F. Supp.2d at 369.

The SEC promulgated Regulation D to create a non-exclusive "safe harbor" within the Section 4(2) exemption by defining certain transactions as non-public offerings. See 17 C.F.R. § 230.501, et seq. Rules 501 through 503 of Regulation D contain definitions, conditions, and other provisions that apply generally throughout Regulation D. Rules 504, 505 and 506 detail specific exemptions from registration. Rule 504 provides exemptions for companies that are not required to file periodic reports with the SEC for the offer and sale of up to $1,000,000 of securities in a 12-month period. Rule 505 exempts offers by companies of up to $5,000,000 of securities in a 12-month period, so long as offers are made without general solicitation or advertising. In determining whether the maximum offer or sale amounts have been satisfied, all sales by the issuer within a certain time period must be "integrated" (that is, treated as one offering). *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 642 n.5 (11th Cir. 2010). Rule 506 provides an exemption without any limit on the amount offered or sold, so long as offers are made without general solicitation or advertising and sales are made only to investors that meet certain qualifications. *See generally, Revisions of Limited Offering Exemptions in Regulation D*, Securities Act Rel. No. 8828, 2007 WL 2239110 (Aug. 3, 2007). Each of these rules has additional specific requirements that must be satisfied before the exemption will apply. Because Regulation D provides a non-exclusive safe harbor, the failure to satisfy all the terms and conditions of any particular rule within Regulation D does not create a presumption that the exemption provided by Section 4(2) of the Securities Act is not otherwise available. *See* Comment 3 to Regulation D.

Another frequently- claimed exemption from registration is Section 3(a)(11) of the Securities Act, 15 U.S.C. § 77c(a)(11), commonly referred to as the "intrastate offering exemption." This statute exempts from registration securities that are "part of an issue offered and sold only to persons resident within a single state or territory, where the issuer . . . is a person resident and doing business within . . . [that] State or Territory." Because the exemption requires the entire issue to be offered and sold exclusively to residents of the state in which the issuer is resident and doing business, an offer or sale of any part of the issue to a single non-resident will destroy the exemption for the entire issue.

The SEC promulgated Rule 147, 17 C.F.R. §230.147, to provide a safe harbor under

the intrastate exemption. Under that rule, the intrastate offering will be available for offers and sales of securities that meet all the terms and conditions of the Rule. Those conditions are: (1) the issuer must be resident and doing business within the state or territory in which the securities are offered and sold (Rule 147 (c)); (2) the offerees and purchasers must be resident within such state or territory (Rule 147(d)); resales for a period of 9 months after the last sale which is part of an issue must be limited as provided in Rule 147 (e) and (f). In addition, the Rule provides that certain offers and sales of securities by or for the issuer will be deemed not "part of an issue" for purposes of the rule only (Rule 147(b)). *Examination of the Effects of Rules and Regulations on the Ability of Small Businesses to Raise Capital and the Impact on Small Businesses of Disclosure Requirements under the Securities Acts*, Securities Act Rel. No. 5914, 1978 WL 197119 (Mar. 6, 1978). The Rule also provides objective standards for the statutory terms "doing business within," "resident within," and "part of the issue."

6.8 Section 17(a)(1) of the Securities Act of 1933 — 15 U.S.C. § 77q(a)(1) — Fraud In the Offer and Sale of a Security Through A Device, Scheme, or Artifice to Defraud — SEC Version

The Securities and Exchange Commission, also known as the SEC, asserts a claim under the Securities Act of 1933.

The Securities Act is a federal statute prohibiting certain conduct in the offer or sale of securities. Section 17(a)(1) [, like Section 10(b) and Rule 10b-5,] makes it unlawful for a person to employ any device, scheme, or artifice to defraud in connection with the offer or sale of any security.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

To prove a claim under Section 17(a)(1) of the Securities Act, the SEC must prove each of the following facts by a preponderance of the evidence:

First, you must find that [name of defendant] used an instrumentality of interstate commerce in connection with the offer to sell or sale of a security.

Second, you must find that [name of defendant] used a device, scheme, or artifice to defraud someone in connection with the offer to sell or sale of a security.

And third, you must find that [name of defendant] acted knowingly or with severe recklessness.

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you as you consider the facts the SEC must prove.

For the first element — that an instrumentality of interstate commerce was used in connection with the offer to sell or sale of a security — you must use these definitions:

"Instrumentality of interstate commerce" means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or a facility of a national securities exchange such as the New York Stock Exchange or NASDAQ [or] an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market]. It's not necessary that the facility of a national securities exchange was the means by which the defendant[s] used a device, scheme, or artifice to defraud someone. It's only necessary that the facility was used in some phase of the transaction.

[A "facility of a national securities exchange" may include a computer-trading program or an online discount-brokerage service.]

[If there is a genuine question whether the case involves a "security," additional instructions will be needed here.]

The terms "sale" or "sell" mean the transfer of a security for value. This includes the contract for sale for value or any other disposition for value of a security or interest in a security. An "offer," "offer to sell," or "offer for sale" means attempting to dispose of a security or an interest in a security for value by inviting buyers.

For the second element, the SEC must prove that [name of defendant] used a device, scheme, or artifice to defraud in the offer to sell or sale of a security. The SEC does not need to identify any particular offer to sell or sale of securities by a specific person, including [name of defendant]. Rather, it's enough if the SEC proves that the device, scheme, or artifice to defraud [name of defendant] used or

employed involved, or touched in any way, the offer to sell or sale of securities.

The SEC has alleged that the scheme or device [name of defendant] employed [describe the alleged scheme or device].

A "scheme" is a design or plan formed to accomplish some purpose. A "device," when used in an unfavorable sense, is a "trick" or "fraud." Put another way, the term "device, scheme, or artifice to defraud" would refer to any plan or course of action that involves (1) false or fraudulent pretenses, (2) untrue statements of material facts, (3) omissions of material facts, or (4) representations, promises, and patterns of conduct calculated to deceive.

A "misrepresentation" is a statement that is not true. An "omission" is the failure to state facts that would be necessary to make the statements made by the Defendants not misleading to the Plaintiff.

A misstatement or omission of fact is "material" if there is a substantial likelihood that a reasonable investor would attach importance to the misrepresented or omitted fact in determining his course of action. Put another way, there must be a substantial likelihood that a reasonable investor would view the misstated or omitted fact's disclosure as significantly altering the total mix of available information. A minor or trivial detail is not a "material fact."

For the third element, [name of plaintiff] must prove that [name of defendant] acted knowingly or with severe recklessness. The term "knowingly" means that [name of defendant] acted with an intent to deceive, manipulate, or defraud. But [name of defendant] didn't act knowingly if [he/she/it] acted inadvertently, carelessly, or by mistake.

To act with "severe recklessness" means to engage in conduct that involves an extreme departure from the standard of ordinary care. A person acts with reckless disregard if it's obvious that an ordinary person under the circumstances would have realized the danger and taken care to avoid the harm likely to follow.

If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will determine the remedy or remedies to be imposed later.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] used an "instrumentality of interstate commerce" in connection with the offer to sell or sale of any securities?

Answer Yes or No _____

2. That [name of defendant] used a device, scheme, or artifice to defraud in connection with the offer to sell or sale of any securities?

Answer Yes or No _____

3. That [name of defendant] acted "knowingly" or with "severe recklessness?"

Answer Yes or No _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

Section 17(a) of the Securities Act provides, in pertinent part:

It shall be unlawful for any person in the offer or sale of any securities... directly or indirectly –

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q.*See SEC v. Jamie L. Solow*, 06-cv-81041 (S.D. FL), docket entry 118 at p.14; *In Re Bankatlantic Securities Litigation*, 07-cv-61542 (S.D. FL), docket entry 643 at p.21; *SEC v. Yun*, 99-cv-117 (M.D. FL), docket entry 360 at p.19; *see also SEC v. Grinsburg*, 362 F.3d 1292, 1298 (11th Cir. 2004) (preponderance of evidence standard and use of circumstantial evidence); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (materiality); *Aaron v. SEC*, 446 U.S. 680, 697 (1980) (scienter); *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766-67, 768, & 772 (11th Cir. 2007) (materiality and scienter); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1282 n.18 (11th Cir. 1999) (scienter); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982) (scienter); *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1010-11, n.9 (11th Cir. 1985) (scienter); *see generally* Sand's, Comments to Instruction 82-3, 82-4 & 82-8.

6.9 Section 17(a)(2) of the Securities Act of 1933 — 15 U.S.C. § 77q(a)(2) — Misrepresentation or Omission in the Offer or Sale of a Security — SEC Version

The Securities and Exchange Commission, also known as the SEC, asserts a claim under the Securities Act of 1933.

The Securities Act is a federal statute prohibiting certain conduct in the offer or sale of securities. Section 17(a)(2) [, like Section 10(b) and Rule 10b-5,] makes it unlawful for a person to obtain money or property using any untrue statement of a material fact or by omitting any material fact necessary to make statements, in light of the circumstances under which they were made, not misleading in connection with the offer to sell or sale of a security.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. [The [describe type of security] in this case is a security.]

To prove a claim under Securities Act § 17(a)(2), the SEC must prove each of the following facts by a preponderance of the evidence:

First, you must find that [name of defendant] used an instrumentality of interstate commerce in connection with the offer to sell or sale of a security.

Second, you must find that [name of defendant] directly or indirectly made one or more misrepresentations of material fact [or omissions of material fact] in the offer to sell or sale of a security.

And third, you must find that [name of defendant] was negligent in making the representation [or omission].

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

Now I'll provide you with some additional instructions to help you as you consider the facts the SEC must prove.

For the first element – that an instrumentality of interstate commerce was used in connection with the offer to sell or sale of a security – you must use these definitions:

"Instrumentality of interstate commerce" means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or a facility of a national securities exchange such as the New York Stock Exchange or NASDAQ [or] an inter-dealer electronic-quotation-and-trading system in the over-the counter-securities market]. It's not necessary that the misrepresentation or omission of material fact actually was transmitted using an instrumentality of interstate commerce. It is enough if the interstate-commerce instrumentality was used in some phase of the transaction.

[A "facility of a national securities exchange" may include a computer-trading program or an online discount-brokerage service. Again, it's not necessary that the facility of a national securities exchange was the means by which someone transmitted any misrepresentation or omission. It's only necessary that the facility was used in some phase of the transaction?]

[If there is a genuine question whether the case involves a "security," additional instructions will be needed here.]

The terms "sale" or "sell" mean the transfer of a security for value. This includes the transfer of a contract of sale for value or any other disposition for value of a security or interest in a security. An "offer," "offer to sell," or "offer for sale" means attempting to dispose of a security or an interest in a security for value by inviting buyers.

For the second element, the SEC must prove that someone made

a misrepresentation of material fact [or an omission of material fact]. The SEC claims that [name of defendant] is responsible for the following misrepresentations of fact [or omissions]: [Describe the alleged misrepresentations or omissions claimed to have been fraudulently made.]

A "misrepresentation" is a statement that is not true. An "omission" is the failure to state facts that would be necessary to make the statements made by the Defendants not misleading to the SEC.

A misstatement or omission of fact is "material" if there is a substantial likelihood that a reasonable investor would attach importance to the misrepresented or omitted fact in determining his course of action. Put another way, there must be a substantial likelihood that a reasonable investor would view the misstated or omitted fact's disclosure as significantly altering the total mix of available information. A minor or trivial detail is not a "material fact."

[Predictions, opinions, and other projections (if they aren't expressed as guarantees) aren't representations of material facts [, and don't require revision or amendment] — unless the person or entity communicating them doesn't believe, or have a reasonable basis for believing, they're true. But if the person or entity making the predictions, expressions of opinion, or projections actually believed them at the time or had a reasonable basis for making them, then the statements are not materially misleading statements of fact. The focus is on whether the statements were false or misleading at the time they were made. Subsequent events proving that the predictions, expressions of opinion, or projections were wrong don't create a violation of § 17(a)(2).]

If [name of defendant] has made false or inaccurate statements regarding material facts before, such as statements made in reports [he/she/it] filed with the Securities Exchange Commission, information [he/she/it] sent to investors, or statements [he/she/it] made in press releases, [he/she/it] has a duty to correct those statements if it is discovered later that those statements weren't true when made and they remain material to a shareholder's investment decision.

For the third element, the SEC must prove that [name of defendant] was negligent in making materially false or misleading statements or omissions in connection with the offer to sell or sale of a security. “Negligence” is the failure to exercise the due diligence, care, or competence that a reasonable person would when making representations, or failing to disclose facts, in the proxy solicitation. Ask yourself: Would a reasonable person have omitted or made the statements?

If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will determine the remedy or remedies to be imposed later.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] used an “instrumentality of interstate commerce” in connection with the offer to sell or sale of any securities?

Answer Yes or No _____

2. That [name of defendant] directly or indirectly made one or more misrepresentations of fact [or omissions of fact necessary to make other statements that were made not misleading] in connection with the offer to sell or sale of a security?

Answer Yes or No _____

3. That the misrepresentation [or omission] was material?

Answer Yes or No _____

4. That [name of defendant] was negligent in making the representations [or omission]?

Answer Yes or No _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

Section 17(a) of the Securities Act provides, in pertinent part:

It shall be unlawful for any person in the offer or sale of any securities... directly or indirectly

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q.

See SEC v. Jamie L. Solow, 06-cv-81041 (S.D. FL), docket entry 118 at p.14; *In Re Bankatlantic Securities Litigation*, 07-cv-61542 (S.D. FL), docket entry 643 at p.21; *SEC v. Yun*, 99-cv-117 (M.D. FL), docket entry 360 at p.19; *see also SEC v. Grinsburg*, 362 F.3d

1292, 1298 (11th Cir. 2004) (preponderance of evidence standard and use of circumstantial evidence); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (materiality); *Aaron v. SEC*, 446 U.S. 680, 697 (1980) (negligence standard); *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766-67, 768, & 772 (11th Cir. 2007) (materiality); *see generally* Sand's, Comments to Instruction 82-3, 82-4 & 82-8.

A duty to correct "applies when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not. The company then must correct the prior statement within a reasonable time." *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331 (7th Cir 1995), citing *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990). *See also, In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1430-32 (3d Cir. 1997) (noting that a duty to correct may also arise with forward-looking statements if they are based on assumptions that the speaker later learns were incorrect when made). The duty to update is a distinct doctrine; it may apply "when a company makes a forward-looking statement - a projection - that because of subsequent events becomes untrue." *Stransky*, 51 F.3d at 1332. *See also, In re Int'l. Bus. Mach. Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998).

There is a split among the courts whether there is a duty to update information disclosed to the public to insure the accuracy of statements and representations previously made in light of new information or developments. The Eleventh Circuit has not addressed whether there is a duty to update. In a case where the evidence suggests a change in information or other developments and a party determines there was a duty to update, the court will need to determine if, considering the current legal authority, a duty to update information instruction is required to be given and, if so, the form of instruction to be given. *See* Eric R. Smith, Thomas D. Washburne, Jr. & Uyen H. Pham, *Duty to Update Previously Disclosed Information*, Practical Law Company (2011),http://www.venable.com/files/Publication/d90ad0bd-0947-4956-aa70-1026f1ac03be/Presentation/PublicationAttachment/cf3d0d7f-ca04-4b19-96e1-1510529d9821/Duty_to_Update_Previously_Disclosed_Information.pdf. *Compare In Re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410 (3rd Cir. 1997) (duty triggered where representation remained alive) and *Ill. State Bd. of Inv. v. Authentidate Holding Corp., et al.*, 369 F. App'x 260 (2d Cir. 2010) (duty depends on significance of information and whether there were cautionary statements) with *Gallagher v. Abbott Laboratories*, 269 F.3d 806 (7th Cir. 2001) (no duty to update).

7 – Civil RICO

7.1 Racketeer Influenced and Corrupt Organization Act (RICO) — 18 U.S.C. § 1962(a) — Acquiring an Interest in an Enterprise by Use of Income

[Name of plaintiff] asserts a claim against [name of defendant] for allegedly violating the Racketeer Influenced and Corrupt Organizations Act, commonly known as RICO. [Name of plaintiff] specifically claims that [name of defendant] violated § 1962(a) of RICO.

To succeed on this claim, [name of plaintiff] must prove each of the following four facts by a preponderance of the evidence:

First, you must find that [name of defendant] derived income, either directly or indirectly, from a pattern of racketeering activity.

Second, you must find that [name of defendant] participated as a principal in the pattern of racketeering activity.

Third, you must find that some part of that income, or proceeds of that income, was used to acquire or maintain an interest in, or to operate, an enterprise.

And fourth, you must find that the enterprise engaged in, or had some effect on, interstate or foreign commerce.

Now I'll provide you with some additional instructions to apply as you consider the facts that [name of plaintiff] must prove.

For the first element, [name of plaintiff] must prove that [name of defendant] received or obtained money, either directly or indirectly from a pattern of racketeering activity.

"Racketeering activity" is an act that violates [the specific statute[s] alleged]. I'll explain the law about [this statute/these statutes] to help you determine whether [name of plaintiff] proved by a preponderance of the evidence that [name of defendant] violated [this

statute/these statutes]. An act of "racketeering activity" is also called a "predicate act."

[Name of plaintiff] must prove that [name of defendant] engaged in a pattern of racketeering activity. A "pattern of racketeering activity" means that [name of defendant] committed at least two distinct predicate acts. Distinct does not have to mean different types. But by itself, proof of two or more predicate acts doesn't establish a pattern under RICO.

To prove a pattern of predicate acts, [name of plaintiff] must show that the acts were related to one another. Two or more acts of racketeering activity that aren't related don't establish a pattern of racketeering activity under RICO. Predicate acts are "related" to one another if they have the same or similar purposes, results, participants, victims, or methods. Predicate acts are also related if they have common distinguishing characteristics and aren't isolated events.

To be related, the predicate acts don't have to be the same kind of acts. For example, the acts may comprise one act of [type of alleged predicate act (e.g., wire fraud)] and one act of [another type of alleged predicate act (e.g., interstate transportation of stolen property)].

A pattern of racketeering activity requires predicate acts showing continuity. This can be demonstrated in two ways. The first is to demonstrate related predicate acts extending over a substantial period of time. The second is to show conduct that doesn't occur over a substantial period of time but, by its nature, is likely to be repeated into the future.

Again, "racketeering activity" means an act that violates [the statute[s] at issue]. But you can't consider just any racketeering act [name of defendant] allegedly committed in violation of one of these statutes as bearing on whether [name of defendant] has committed two or more predicate acts as a pattern of racketeering activity. [To determine if there is a pattern of racketeering activity, you must consider only those specific racketeering acts [name of plaintiff] alleges against

[name of defendant.]] And you can't find that [name of defendant] engaged in a "pattern of racketeering activity" unless you unanimously agree on which of the alleged predicate acts, if any, make up the pattern.

So it's insufficient if you don't all agree to the finding of what two or more predicate acts [name of defendant] committed. Some of you can't find that the predicate acts are A, B, and C and the rest of you find that the predicate acts are X, Y, and B. Put another way, you can't find that [name of defendant] has engaged in a pattern of racketeering activity unless you find (1) a "pattern" of predicate acts, and (2) that [name of plaintiff] has proved by a preponderance of the evidence that [name of defendant] committed each of the two or more predicate acts that you find make up that pattern.

For the second element, [name of plaintiff] must prove that [name of defendant] "participated as a principal" in the pattern of racketeering activity. To prove this, [name of plaintiff] must show by a preponderance of the evidence that [name of defendant] either: (1) committed — or aided, abetted, counseled, commanded, induced, or procured the commission of — two or more alleged predicate acts that make up the alleged pattern of racketeering activity; or (2) willfully caused the commission of two or more alleged predicate acts that make up the alleged pattern of racketeering activity, which, if [name of defendant] directly performed, would make up the commission of two or more alleged predicate acts that comprise the alleged pattern of racketeering activity. To be a "principal," [name of defendant] must have acted with intent or knowledge, rather than by mistake or accident.

For the third element, [name of plaintiff] must prove that some part of the income or proceeds of that income derived from the racketeering activity was used to acquire, maintain an interest in, or operate an enterprise.

[Alternative #1: Individual or entity enterprise: An "enterprise" may consist of an individual, partnership, corporation, association, or other

legal entity. In this case, the enterprise is alleged to be [identify enterprise].]

[Alternative #2: Association-in-fact enterprise: An "enterprise" doesn't have to be a legal entity. It can be an association of persons or entities. In this case, the enterprise is alleged to be [identify enterprise]. The association between the enterprise's members might be loose or informal. But the enterprise must have at least a purpose, relationships among those associated with the enterprise, and a duration sufficient to permit those associates to pursue the enterprise's purpose. Also, an enterprise must have a property interest that [name of defendant] can acquire.]

For the fourth element, [name of plaintiff] must prove that the enterprise engaged in or had an effect on interstate or foreign commerce. "Engage in or have an effect on interstate or foreign commerce" means that the enterprise either engaged in, or had an effect on commerce between two or more states, or on commerce between a state and a foreign country.

If you find that [name of defendant] violated § 1962(a), you must decide whether that violation caused an injury to [name of plaintiff]. The damages that [name of plaintiff] may recover are those caused by the use or investment of racketeering income to injure [name of plaintiff] or [his/her/its] business or property. Put another way, [name of plaintiff]'s injury must flow from [name of defendant]'s use or investment of racketeering income.

NOTES AND ANNOTATIONS

The Eleventh Circuit held in *United States v. Pepe,* 747 F.2d 632, 675-76 (11th Cir. 1984) that "a plain reading of the statute indicates that RICO does not contain any separate *mens rea* or scienter elements beyond those encompassed in its predicate acts." As a result, in a § 1962(a) case, the only relevant mental state is that necessary to commit the predicate acts. *See, e.g., Edwards v. Prime, Inc.*, 602 F.3d 1276, 1292-97 (11th Cir. 2010) (analyzing different knowledge and intent requirements of specific categories of predicate offenses).

This is in contrast to a RICO conspiracy, which requires the additional element of agreement. *United States v. Martino*, 648 F.2d 367, 383 (5th Cir. 1981).

The Eleventh Circuit's treatment of this issue is, however, not completely consistent. For example, in *Pepe*, the court affirmed where a Defendant had been acquitted of RICO conspiracy but found guilty of a § 1962(c) violation, noting that the evidence was sufficient to permit the jury to find that the Defendant engaged in racketeering activity and was an active participant in the enterprise, which was characterized as "knowing participant in the enterprise." 747 F.2d at 665. As between these two, the requirement that the Defendant be an active participant seems to be more appropriate but this is not a completely settled area of law in this circuit. Accordingly, current case activity should be researched before this instruction is used to determine if more recent circuit authority on this issue is available.

This instruction assumes a single plaintiff suing a single defendant. It needs to be modified if there are multiple parties.

In *Beck v. Prupis*, 162 F.3d 1090, 1095 n.8 (11th Cir. 1998), the Eleventh Circuit noted that § 1962(a) of RICO prohibits the investment of income derived from a pattern of racketeering activity in any enterprise involving interstate commerce. *See also Pelletier v. Zweifel*, 921 F.2d 1465, 1489 (11th Cir. Ga. 1991) ("Section 1962(a) makes it a crime for anyone who has derived income from 'a pattern of racketeering activity . . . in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise . . . engaged in . . . interstate . . . commerce.") (quoting 18 U.S.C. § 1962(a)); *Club Car, Inc. v. Club Car* (Quebec) Import, Inc., 276 F. Supp. 2d 1276, 1288 (S.D. Ga. 2003) ("Section 1962(a) has two components: (1) receiving income from a pattern of racketeering activity, and (2) investing that income in an enterprise.") (quoting *Georgia v. Dairymen, Inc.*, 813 F. Supp. 1580, 1584 (S.D. Ga. 1991)).

The definition of "predicate act" comes from *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1283 (11th Cir. 2006) (quoting *Maiz v. Virani*, 253 F.3d 641, 671 (11th Cir. 2001)). "A 'pattern' of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts." *Id.* (quoting *Maiz v. Virani*, 253 F.3d at 671). In *Williams*, the Court affirmed denial of the defendant's Rule 12(b)(6) motion to dismiss the RICO claims, finding that the plaintiff's allegations that the defendant had "committed hundreds, even thousands, of violations of federal immigration laws" were sufficient to plead a "pattern of racketeering activity." *Id.*

The continuity and relationship elements are derived from *United States v. Browne*, 505 F.3d 1229, 1257 (11th Cir. 2007) (noting that to establish a pattern of predicate acts, the plaintiff must prove that the predicate acts relate to each other and have continuity). In defining how "the predicate acts must relate to each other," the Eleventh Circuit has stated this "the predicate acts must 'have the same or similar purposes, results, participants, victims,

or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and . . . not [be] isolated events.'") *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, n.14 (1985)); *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995) (same). In *Starrett*, the court found that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related. *Id.* at 1547. Specifically, the court found that "[f]our of the [defendant's] predicate acts shared the purpose of facilitating illegal prostitution, and the other four predicate acts share the purpose of furthering narcotics distribution." Id.

Starrett also discussed examples of how the two required predicate acts need not be the same type of acts to be related. *Id.* (finding that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related).

As for continuity, "[p]redicate acts demonstrate continuity if they are either 'a closed period of repeated conduct,' or 'past conduct that by its nature projects into the future with a threat of repetition.'" *Id.* at 1543 (quoting *H.J., Inc. v. NW Bell Tel. Co.*, 492 U.S. 229 (1989)). *See also, Browne,* 505 F.3d at 1257. The continuity of predicate acts was found to be satisfactorily alleged where defendants "had agreed to a scheme whereby [one] would supply [the other] with cocaine on an on-going basis." *Starrett*, 55 F.3d at 1547.

The second element requires a plaintiff to establish that the defendant "participated as a principal." Courts have interpreted 18 U.S.C. §2(a) and (b) as permitting plaintiff to satisfy this element by establishing that a defendant either: aided, abetted, counseled, commanded, induced, or procured the commission of two or more alleged predicate offenses that constitute the pattern of racketeering activity ; or willfully caused acts to be done which if directly performed by him would constitute the commission of two or more alleged predicate offenses that constitute the pattern of racketeering activity. *See, e.g., In re Sahlen &Assoc., Sec. Litig.*, 773 F. Supp. 342, 368 (S.D. Fla. 1991) (aiding and abetting); *Grimsley v. First Alabama Bank*, No. 88000113, 1988 U.S. Dist. LEXIS 16042, at *3 (S.D. Ala. 1988). Also premised on 18 U.S.C. §2 is that a defendant must have intent or knowledge in order to act as a principal. *Id.* ("One cannot aid, abet, counsel, command, induce, willfully cause or perform without knowledge or intent.").

An example of the third element - that "some part of the income or proceeds of that income derived from the racketeering activity was used to acquire, maintain an interest in, or operate and enterprise" - was discussed in *In re Sahlen*. 773 F. Supp at 366 (finding that the plaintiffs had sufficiently alleged a violation of 1962(a) by alleging that the defendants had derived income as officers and directors of a company through fraudulent securities offerings and sales of stock and then invested this income back into the company to continue

the scheme and guarantee the company's growth and increased value, to the detriment of the investing public).

18 U.S.C. 1961(4) provides the definition of enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." For discussion regarding the definitions of individual or entity enterprise or association-in-fact enterprise, *see Starrett*, 55 F.3d at 1541 (the South Florida Chapter of the Outlaw Motorcycle Club constituted an enterprise under 18 U.S.C. §1961(4)); *Williams*, 465 F.3d at 1284 ("[T]he definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity.") (quoting *United States v. Goldin Industries, Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000)). In *Williams*, the Court found that the plaintiff's allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant's benefit were sufficient to allege an "enterprise" under this section.

In *Boyle v. United States*, 556 U.S. 938, 946-47, 129 S. Ct. 2237, 2244 (2009), the Supreme Court held that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with an enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."). *See also Williams*, 465 F.3d at 1284-85 (allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant's benefit were sufficient to allege common purpose). In *Boyle*, the defendant was charged in connection with a series of bank thefts allegedly conducted by a group that was loosely organized and did not appear to have a leader or hierarchy. The Supreme Court ruled that although the three structural features set forth above were necessary for a finding of an association -in-fact enterprise, there are no additional structural features such as hierarchy or a chain of command required.

Section 1962(a) also requires that an enterprise have a property interest that can be acquired by the defendant. *See Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 259, 114 S. Ct. 798, 804 (1994) ("The 'enterprise' referred to in subsections (a) and (b) [of §1962] is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity and may very well be a 'profit-seeking' entity that represents a property interest and may be acquired. But the statutory language in subsections (a) and (b) does not mandate that the enterprise be a 'profit-seeking' entity; it simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity. By contrast, the 'enterprise' in subsection (c) [of § 1962] connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity. . . . Consequently, since the enterprise in subsection (c) is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging

in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity. Nothing in subsections (a) and (b) directs us to a contrary conclusion."); *Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350, 1368 (M.D. Fla. 2005) ("Unlike a §1962(c) enterprise, which 'generally connotes the vehicle through which the unlawful pattern of racketeering activity is committed,' a §1962(a) enterprise is something acquired through the use of illegal activities or by money obtained from illegal activities. A § 1962(a) enterprise is, in other words, the victim of unlawful activity, not the vehicle through which that activity is committed." (citations and quotations omitted).

Pursuant to 18 U.S.C. § 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . in any appropriate United States district court" and may recover treble damages and a reasonable attorney's fee. However, no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962. This exclusion concerning securities does not apply to an action against any person that is criminally convicted in connection with a securities fraud. 18 U.S.C. § 1964(c). "In contrast to the injury requirement under § 1962(c), which my be satisfied by harm alleged to be the result of racketeering activity,, a majority of courts that have addressed the issue have determined that a claimant under §1962(a) must plead an injury which stems not 'from the racketeering predicate acts themselves' but from the 'use or investment of . . . racketeering income.'"). *Id.* at 1369 (quoting *Fogie v. Thorn Ams., Inc.*, 190 F.3d 889, 895 (8th Cir. 1999) (adopting the majority position that limits 'standing only to plaintiffs who have suffered injury from the use or investment or racketeering income")); *Club Car, Inc.*, 276 F. Supp. 2d at 1288 ("The plain language of Federal RICO shows that injury by reason of investment of racketeering income – investment injury– is required.") (quoting *Dairymen, Inc.*, 813 F. Supp. at 1584)). In *Club Car*, the court dismissed the plaintiff's § 1962(a) claim for failure to allege "any injury resulting from the investment of racketeering income," as opposed to injury from the underlying predicate acts." 276 F. Supp. 2d at 1288. *See also, Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 291 U.S. App. D.C. 303, 941 F.2d 1220, 1229 (D.C. Cir. 1991) (holding that injury to a plaintiff must flow from a Defendant's use or investment of racketeering income.)

7.2 Racketeer Influenced and Corrupt Organization Act (RICO) — 18 U.S.C. § 1962(b) — Acquiring or Maintaining an Interest in orControl of an Enterprise

[Name of plaintiff] asserts a claim against [name of defendant] for allegedly violating the Racketeer Influenced and Corrupt Organizations Act, commonly known as RICO. [Name of plaintiff] specifically claims that [name of defendant] violated § 1962(b) of RICO.

To succeed on this claim, [name of plaintiff] must prove each of the following four facts by a preponderance of the evidence:

First, you must find that [name of defendant] engaged in a pattern of racketeering activity.

Second, you must find that through the pattern of racketeering activity, [name of defendant] acquired or maintained, directly or indirectly, an interest in or control of an enterprise.

And third, you must find that the enterprise engaged in, or had some effect on, interstate or foreign commerce.

Now I'll provide you with some additional instructions to apply as you consider the facts that [name of plaintiff] must prove.

First, [name of plaintiff] must prove that [name of defendant] engaged in a pattern of racketeering activity. "Racketeering activity" is an act that violates [the specific statute[s] alleged]. I'll explain the law about [this statute/these statutes] to help you determine whether [name of plaintiff] proved by a preponderance of the evidence that [name of defendant] violated [this statute/these statutes]. An act of "racketeering activity" is sometimes referred to as a "predicate act."

A "pattern of racketeering activity" means that [name of defendant] committed at least two distinct predicate acts. Distinct does not have to mean different types. But by itself, proof of two or more predicate acts doesn't establish a pattern under RICO.

To prove a pattern of predicate acts, [name of plaintiff] must show that the acts were related to one another. Two or more acts of racketeering activity that aren't related don't establish a pattern of racketeering activity under RICO. Predicate acts are "related" to one another if they have the same or similar purposes, results, participants, victims, or methods. Predicate acts are also related if they have common distinguishing characteristics and aren't isolated events.

To be related, the predicate acts don't have to be the same kind of acts. For example, the acts may comprise one act of [type of alleged predicate act (e.g., wire fraud)] and one act of [another type of alleged predicate act (e.g., interstate transportation of stolen property)].

A pattern of racketeering activity requires predicate acts showing continuity. This can be demonstrated in two basic ways. The first is to demonstrate related predicate acts extending over a substantial period of time. The second is to show conduct that doesn't occur over a substantial period of time but, by its nature, is likely to be repeated into the future.

Again, "racketeering activity" means an act that violates [the statute[s] at issue]. But you can't consider just any racketeering act [name of defendant] allegedly committed in violation of one of these statutes as bearing on whether [name of defendant] has committed two or more predicate acts as a pattern of racketeering activity. [To determine if there is a pattern of racketeering activity, you must consider only those specific racketeering acts [name of plaintiff] alleges against [name of defendant.]] And you can't find that [name of defendant] engaged in a "pattern of racketeering activity" unless you unanimously agree on which of the alleged predicate acts, if any, make up the pattern.

So it's insufficient if you don't all agree to the finding of what two or more predicate acts [name of defendant] committed. Some of you can't find that the predicate acts are A, B, and C and the rest of you find that the predicate acts are X, Y, and B. Put another way, you can't find that

[name of defendant] has engaged in a pattern of racketeering activity unless you find (1) a "pattern" of predicate acts, and (2) that [name of plaintiff] has proved by a preponderance of the evidence that [name of defendant] committed each of the two or more predicate acts that you find make up that pattern.

For the second element, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant], through the pattern of racketeering activity, acquired or maintained an interest in, or control of, an enterprise. To find that [name of plaintiff] has established this element, you must find by a preponderance of the evidence not only that [name of defendant] had some interest in or control over an enterprise, but also that this interest or control was connected to the pattern of racketeering activity. It isn't sufficient that [name of defendant] engaged in racketeering activities if [he/she/it] acquired an interest in, or control of, the enterprise through legitimate activities.

[Alternative #1: Individual or entity enterprise: An "enterprise" may consist of an individual, partnership, corporation, association, or other legal entity. In this case, the enterprise is alleged to be [identify enterprise].]

[Alternative #2: Association-in-fact enterprise: An "enterprise" doesn't have to be a legal entity. It can be an association of persons or entities. In this case, the enterprise is alleged to be [identify enterprise]. The association between the enterprise's members might be loose or informal. But the enterprise must have at least a purpose, relationships among those associated with the enterprise, and a duration sufficient to permit those associates to pursue the enterprise's purpose.]

For the third element, [name of plaintiff] must prove that the enterprise engaged in or had an effect on interstate or foreign commerce. "Engage in or have an effect on interstate or foreign commerce" means that the enterprise either engaged in, or had an effect on commerce between two or more states, or on commerce between a state and a foreign country.

If you find that [name of defendant] violated § 1962(b), you must decide whether that violation caused an injury to [name of plaintiff]. The damages that [name of plaintiff] may recover are those caused by [name of defendant]'s acquisition or control of the alleged enterprise through a pattern of racketeering activity. It's not enough that [name of plaintiff] suffered injuries from [name of defendant]'s commission of predicate acts. Rather, [name of plaintiff]'s injury must flow from [name of defendant]'s acquisition or control of the alleged enterprise.

NOTES AND ANNOTATIONS

The Eleventh Circuit held in *United States v. Pepe*, 747 F.2d 632, 675-76 (11th Cir. 1984) that "a plain reading of the statute indicates that RICO does not contain any separate *mens rea* or scienter elements beyond those encompassed in its predicate acts." As a result, in a § 1962(a) case, the only relevant mental state is that necessary to commit the predicate acts. *See, e.g.*, *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1292-97 (11th Cir. 2010) (analyzing different knowledge and intent requirements of specific categories of predicate offenses). This is in contrast to a RICO conspiracy, which requires the additional element of agreement. *United States v. Martino*, 648 F.2d 367, 383 (5th Cir. 1981).

The Eleventh Circuit's treatment of this issue is, however, not completely consistent. For example, in *Pepe*, the court affirmed where a Defendant had been acquitted of RICO conspiracy but found guilty of a § 1962(c) violation, noting that the evidence was sufficient to permit the jury to find that the Defendant engaged in racketeering activity and was an active participant in the enterprise, which was characterized as "knowing participant in the enterprise." 747 F.2d at 665. As between these two, the requirement that the Defendant be an active participant seems to be more appropriate but this is not a completely settled area of law in this circuit. Accordingly, current case activity should be researched before this instruction is used to determine if more recent circuit authority on this issue is available.

This instruction assumes a single plaintiff suing a single defendant. It needs to be modified if there are multiple parties.

In *Beck v. Prupis*, 162 F.3d 1090, 1095 n.8 (11th Cir. 1998), the Eleventh Circuit noted that § 1962(b) of RICO prohibits acquisition through a pattern of racketeering activity of interest in an enterprise involving interstate commerce. *See also Pelletier v. Zweifel*, 921 F.2d 1465, 1489 (11th Cir. Ga. 1991) ("Section 1962(b) imposes criminal liability on anyone, who 'through a pattern of racketeering activity acquire[s] or maintain[s], directly or indirectly, any interest in or control of any enterprise . . . engaged in . . . interstate . . . commerce.'") (quoting 18 U.S.C. § 1962(b); *Avirgan v. Hull*, 691 F. Supp. 1357, 1361 (S.D. Fla. 1988) ("A defendant violates § 1962(b) by acquiring or maintaining through a

pattern of racketeering activity any interest in or control of any enterprise which is engaged in or the activities of which affect interstate commerce.”).

The definition of “predicate act” comes from *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1283 (11th Cir. 2006) (quoting *Maiz v. Virani*, 253 F.3d 641, 671 (11th Cir. 2001)). "A ‘pattern' of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts." *Id.* In *Williams*, the Court affirmed denial of the defendant's Rule 12(b)(6) motion to dismiss the RICO claims, finding that the plaintiff's allegations that the defendant had "committed hundreds, even thousands, of violations of federal immigration laws" were sufficient to plead a "pattern of racketeering activity." *Id.*

The continuity and relationship elements are derived from *United States v. Browne*, 505 F.3d 1229, 1257 (11th Cir. 2007) (noting that to establish a pattern of predicate acts, the plaintiff must prove that the predicate acts relate to each other and have continuity). In defining how “the predicate acts must relate to each other,” the Eleventh Circuit has stated this “the predicate acts must ‘have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and . . . not [be] isolated events.'") *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, n.14 (1985)); *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995) (same). In *Starrett*, the court found that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related. *Id.* at 1547. Specifically, the court found that "[f]our of the [defendant's] predicate acts shared the purpose of facilitating illegal prostitution, and the other four predicate acts share the purpose of furthering narcotics distribution." *Id.*

Starrett also discussed examples of how the two required predicate acts need not be the same type of acts to be related. *Id.* (finding that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related).

As for continuity, “[p]redicate acts demonstrate continuity if they are either ‘a closed period of repeated conduct,’ or ‘past conduct that by its nature projects into the future with a threat of repetition.’” *Id.* at 1543 (quoting *H.J., Inc. v. NW Bell Tel. Co.*, 492 U.S. 229 (1989)). *See also, Browne*, 505 F.3d at 1257. The continuity of predicate acts was found to be satisfactorily alleged where defendants “had agreed to a scheme whereby [one] would supply [the other] with cocaine on an on-going basis.” *Starrett*, 55 F.3d at 1547.

This instruction differs from the instruction for § 1962(a) in that it requires a plaintiff to establish that a defendant acquired, maintained an interest in, or obtained control over an enterprise, through a pattern of racketeering activity. *See Pelletier*, 921 F.2d at 1518

(discussing necessity of nexus between racketeering activities and acquisition of interest in or control of enterprise and finding that the plaintiff's complaint failed to indicate how the defendant acquired or maintained a partnership interest in the enterprise at issue through a pattern of racketeering activity); *Johnson Enters. of Jacksonville v. FPL Group*, 162 F.3d 1290, 1317 (11th Cir. 1998) (finding "no evidence that any of the defendants 'acquired or maintained, directly, or indirectly, an interest in or control of [the enterprise at issue] through a pattern of racketeering activity.'") (quoting U.S.C. § 1962(b)).

18 U.S.C. 1961(4) provides the definition of enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." For discussion regarding the definitions of individual or entity enterprise or association-in-fact enterprise, *see Starrett*, 55 F.3d at 1541 (the South Florida Chapter of the Outlaw Motorcycle Club constituted an enterprise under 18 U.S.C. §1961(4)); *Williams*, 465 F.3d at 1284 ("[T]he definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity.") (quoting *United States v. Goldin Industries, Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000)). In *Williams*, the Court found that the plaintiff's allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant's benefit were sufficient to allege an "enterprise" under this section.

In *Boyle v. United States*, 556 U.S. 938, 946-47, 129 S. Ct. 2237, 2244 (2009), the Supreme Court held that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with an enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."). *See also Williams*, 465 F.3d at 1284-85 (allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant's benefit were sufficient to allege common purpose). In *Boyle*, the defendant was charged in connection with a series of bank thefts allegedly conducted by a group that was loosely organized and did not appear to have a leader or hierarchy. The Supreme Court ruled that although the three structural features set forth above were necessary for a finding of an association -in-fact enterprise, there are no additional structural features such as hierarchy or a chain of command required.

Pursuant to 18 U.S.C. § 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . in any appropriate United States district court" and may recover treble damages and a reasonable attorney's fee. *See, Fuller v. Home Depot Servs., LLC*, 512 F. Supp. 2d 1289, 1294 (N.D. Ga. 2007) ("Just as § 1962(a) requires and investment injury, § 1962(b) requires an acquisition injury."). However, no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962. This exclusion concerning securities

does not apply to an action against any person that is criminally convicted in connection with a securities fraud. 18 U.S.C. § 1964(c).

There is a split within the circuit regarding this injury causation issue. However, the prevailing (and more recent) authority establishes that the plaintiff's injury must have resulted from the acquisition itself. *Compare*: *Fuller*, 512 F. Supp. 2d (finding injury from predicate acts insufficient when injury did not result from alleged acquisition); *Smart Sci. Labs., Inc. v. Promotional Mktg. Servs.*, No. 8:07-CV-1554-T-24EAJ, 2008 U.S. Dist. LEXIS 118270, at *20 (M.D. Fla. June 27, 2008) ("[Plaintiff] fails to allege injury by reason of [Defendant's] acquisition or control of an enterprise through a pattern of racketeering activity."); *Design Pallets, Inc. v. Grayrobinson, P.A.*, 515 F. Supp. 2d 1246, 1255 & n.2 (M.D. Fla. 2007) (dismissing § 1962(b) as duplicative of § 1962(c) claim when plaintiff failed to explain what additional injury resulted from defendant's interest or control of enterprise) (citing *Lightning Lube v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993)); and *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 276 F. Supp. 2d 1276, 1288 (S.D. Ga. 2003) (concluding § 1962(b) claim fails when injury did not result from acquisition of enterprise) with: *In re Sahlen & Assoc., Sec. Litig.*, 773 F. Supp. 342, 369 (S.D. Fla. 1991) ("[Defendants] contend that Plaintiffs' claims are deficient in that they fail to allege an injury caused by either the use of income derived from racketeering activity or by the acquisition or maintenance of an interest in a RICO enterprise. Unlike the additional causation connection necessary to state a cause of action under § 1962(a), however, § 1962((b) does not require such a nexus."); *Avirgan*, 691 F. Supp. at 1362 ("The causation link of § 1962(b) is direct. The plaintiff must be injured by the defendant's pattern of racketeering activity, that was used to either acquire or maintain any interest in or control of, any enterprise. Accordingly, the plaintiff must be injured by the pattern of racketeering activity committed by the defendant."); *Marshall v. City of Atlanta (In re Air Terminal Enters.)*, 1995 Bankr. LEXIS 1248, at *18 (Bankr. N.D. Ga. June 20, 1995) ("Unlike Section 1962(a), a claim may be made under Section 1962(b) by alleging that the injury occurred as a result of the pattern or racketeering activity that was used to acquire an interest in or control of such an enterprise, as opposed to the acquisition itself.").

The majority position in other jurisdictions accords with the conclusion that an "acquisition injury" is required. *See, e.g., Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 330 (6th Cir. 1999) ("[I]njury from the racketeering acts themselves is not sufficient; rather, a plaintiff must plead facts tending to show that the acquisition or control of an interest injured plaintiff."); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1062-63 (2d Cir. 1996) *rev'd on other grounds*, 525 U.S. 128 (1998); *Compagnie De Reassurance D'Ile De Fr. v. New Eng. Reinsurance Corp.*, 57 F. 3d 56, 92 (1st Cir. 1995); *Old Time Enters. V. Int'l Coffee Corp.*, 862 F. 2d 1213, 1218 (5th Cir. 1989); *In re Nat'l Western Life Ins. Deferred Annuities Litig.*, 467 F. Supp. 2d 1071, 1084 (S.D. Cal. 2006); *NL Industries, Inc. v. Gulf & Western Industries, Inc.*, 650 F. Supp. 1115, 1127-28 (D. Kan. 1986).

7.3 Racketeer Influenced and Corrupt Organization Act (RICO) — 18 U.S.C. § 1962(c) — Conduct the Affairs of the Enterprise

[Name of plaintiff] asserts a claim against [name of defendant] for allegedly violating the Racketeer Influenced and Corrupt Organizations Act, commonly known as RICO. [Name of plaintiff] specifically claims that [name of defendant] violated § 1962(c) of RICO.

To succeed on this claim, [name of plaintiff] must prove each of the following five facts by a preponderance of the evidence:

First, you must find the existence of an enterprise.

Second, you must find that the enterprise engaged in, or had some effect on, interstate or foreign commerce.

Third, you must find that [name of defendant] was employed by or associated with the alleged enterprise.

Fourth, you must find that [name of defendant] participated, either directly or indirectly, in the conduct of the affairs of the enterprise.

And fifth, you must find that [name of defendant] participated through a pattern of racketeering activity.

Now I'll provide you with some additional instructions to apply as you consider the facts that [name of plaintiff] must prove.

For the first element, [name of plaintiff] must prove the existence of an enterprise.

[Alternative #1: Individual or entity enterprise: An "enterprise" may consist of an individual, partnership, corporation, association, or other legal entity. In this case, the enterprise is alleged to be [identify enterprise].]

[Alternative #2: Association-in-fact enterprise: An "enterprise" doesn't have to be a legal entity. It can be an association of persons or entities. In this case, the enterprise is alleged to be [identify enterprise]. The association between the enterprise's members might be loose or informal. But the enterprise must have at least a purpose, relationships among those associated with the enterprise, and a duration sufficient to permit those associates to pursue the enterprise's purpose.]

For the second element, [name of plaintiff] must prove that the enterprise engaged in or had an effect on interstate or foreign commerce. "Engage in or have an effect on interstate or foreign commerce" means that the enterprise either engaged in, or had an effect on commerce between two or more states, or on commerce between a state and a foreign country.

For the third element, [name of plaintiff] must prove that [name of defendant] was employed by or associated with the alleged enterprise. The requirement that [name of defendant] be "employed by or associated with" the enterprise means [he/she/it] must have some minimal association with the alleged enterprise. [Name of defendant] must know something about the alleged enterprise's activities as the relate to the racketeering activities.

For the fourth element, [name of plaintiff] must also prove by a preponderance of the evidence that [name of defendant] "participated, directly or indirectly, in the conduct of the affairs of the enterprise." To prove this, [name of plaintiff] must show that [name of defendant] actively conducted or participated in conducting the affairs of the alleged enterprise through a pattern of racketeering activity. [Name of defendant] doesn't need to participate in, or be aware of, all of the enterprise's activities. It's sufficient if [name of defendant] conducted or participated in the conduct of some of the enterprise's activities through a pattern of racketeering activity.

For the fifth element, [name of plaintiff] must prove that [name of defendant] participated in the conduct of the enterprise's affairs through a pattern of racketeering activity.

"Racketeering activity" is an act that violates [the specific statute[s] alleged]. I'll explain the law about [this statute/these statutes] to help you determine whether [name of plaintiff] proved by a preponderance of the evidence that [name of defendant] violated [this statute/these statutes]. An act of "racketeering activity" is also called a "predicate act."

A "pattern of racketeering activity" means that [name of defendant] committed at least two distinct predicate acts. Distinct does not have to mean different types. But by itself, proof of two or more predicate acts doesn't establish a pattern under RICO.

To prove a pattern of predicate acts, [name of plaintiff] must show that the acts were related to one another and to the enterprise. Two or more acts of racketeering activity that aren't related don't establish a pattern of racketeering activity under RICO. Predicate acts are "related" to one another if they have the same or similar purposes, results, participants, victims, or methods. Predicate acts are also related if they have common distinguishing characteristics and aren't isolated events.

To be related, the predicate acts don't have to be the same kind of acts. For example, the acts may comprise one act of [type of alleged predicate act (e.g., wire fraud)] and one act of [another type of alleged predicate act (e.g., interstate transportation of stolen property)].

To make up a pattern of racketeering activity, predicate acts must demonstrate continuity. Continuity can be demonstrated in two basic ways. The first is to demonstrate related predicate acts extending over a substantial period of time. The second is to show conduct that doesn't occur over a substantial period of time but, by its nature, is likely to be repeated into the future.

Again, "racketeering activity" means an act that violates [the statute[s] at issue]. But you can't consider just any racketeering act [name of defendant] allegedly committed in violation of one of these statutes as bearing on whether [name of defendant] has committed two or more predicate acts as a pattern of racketeering activity. [To determine if there is a pattern of racketeering activity, you must consider only those specific racketeering acts [name of plaintiff] alleges against [name of defendant.]] And you can't find that [name of defendant] engaged in a "pattern of racketeering activity" unless you unanimously agree on which of the alleged predicate acts, if any, make up the pattern.

So it's insufficient if you don't all agree to the finding of what two or more predicate acts [name of defendant] committed. Some of you can't find that the predicate acts are A, B, and C and the rest of you find that the predicate acts are X, Y, and B. Put another way, you can't find that [name of defendant] has engaged in a pattern of racketeering activity unless you find (1) a "pattern" of predicate acts, and (2) that [name of plaintiff] has proved by a preponderance of the evidence that [name of defendant] committed each of the two or more predicate acts that you find make up that pattern.

A person doesn't violate RICO just by associating with or being employed by an otherwise lawful enterprise if others conduct the

enterprise's affairs through a pattern of racketeering activity in which the person isn't personally engaged.

If you find that [name of defendant] violated § 1962(c), you must decide whether that violation caused an injury to [name of plaintiff]. The damages that [name of plaintiff] may recover are those caused by the predicate acts constituting the pattern of racketeering activity if they injure [name of plaintiff] or [his/her/its] business or property. It isn't necessary that every predicate act caused damage to [name of plaintiff]. But [he/she/it] can only recover damages caused by predicate acts that are part of the pattern of racketeering activity.

NOTES AND ANNOTATIONS

The Eleventh Circuit held in *United States v. Pepe*, 747 F.2d 632, 675-76 (11th Cir. 1984) that "a plain reading of the statute indicates that RICO does not contain any separate *mens rea* or scienter elements beyond those encompassed in its predicate acts." As a result, in a § 1962(a) case, the only relevant mental state is that necessary to commit the predicate acts. *See, e.g.*, *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1292-97 (11th Cir. 2010) (analyzing different knowledge and intent requirements of specific categories of predicate offenses). This is in contrast to a RICO conspiracy, which requires the additional element of agreement. *United States v. Martino*, 648 F.2d 367, 383 (5th Cir. 1981).

The Eleventh Circuit's treatment of this issue is, however, not completely consistent. For example, in *Pepe*, the court affirmed where a Defendant had been acquitted of RICO conspiracy but found guilty of a § 1962(c) violation, noting that the evidence was sufficient to permit the jury to find that the Defendant engaged in racketeering activity and was an active participant in the enterprise, which was characterized as "knowing participant in the enterprise." 747 F.2d at 665. As between these two, the requirement that the Defendant be an active participant seems to be more appropriate but this is not a completely settled area of law in this circuit. Accordingly, current case activity should be researched before this instruction is used to determine if more recent circuit authority on this issue is available.

This instruction assumes a single plaintiff suing a single defendant. It needs to be modified if there are multiple parties. It also assumes that a single enterprise is at issue, and will need to be modified if multiple enterprises are at issue.

Pursuant to 18 U.S.C. § 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . in any appropriate United States district court" and may recover treble damages and a reasonable attorney's fee. *See, Sedima,*

S.P.R.L., 173 U.S. at 496. However, no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962. This exclusion concerning securities does not apply to an action against any person that is criminally convicted in connection with a securities fraud. 18 U.S.C. § 1964(c).

"To establish a violation of 18 U.S.C. § 1962(c), [a plaintiff] must prove: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendants were employed by or associated with the enterprise; (4) that the defendants participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendants participated through a pattern of racketeering activity." *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995) (citing *United States v. Kotvas*, 941 F. 2d 1141, 1143-44 (11th Cir. 1991); *United States v. Young*, 906 F. 2d 615, 618-29 (11th Cir. 1990); *United States v. Russo*, 769 F. 2d 1443, 1455 (11th Cir. 1986)).

The definition of "predicate act" comes from *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1283 (11th Cir. 2006) (quoting *Maiz v. Virani*, 253 F.3d 641, 671 (11th Cir. 2001)). "A 'pattern' of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts." *Id.* In *Williams*, the Court affirmed denial of the defendant's Rule 12(b)(6) motion to dismiss the RICO claims, finding that the plaintiff's allegations that the defendant had "committed hundreds, even thousands, of violations of federal immigration laws" were sufficient to plead a "pattern of racketeering activity." *Id.*

The continuity and relationship elements are derived from *United States v. Browne*, 505 F.3d 1229, 1257 (11th Cir. 2007) (noting that to establish a pattern of predicate acts, the plaintiff must prove that the predicate acts relate to each other and have continuity). In defining how "the predicate acts must relate to each other," the Eleventh Circuit has stated this "the predicate acts must 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and . . . not [be] isolated events.'") *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, n.14 (1985)); *United States v. Starrett*, 55 F.3d at 1543(same). In *Starrett*, the court found that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related. *Id.* at 1547. Specifically, the court found that "[f]our of the [defendant's] predicate acts shared the purpose of facilitating illegal prostitution, and the other four predicate acts share the purpose of furthering narcotics distribution." *Id.*

Starrett also discussed examples of how the two required predicate acts need not be the same type of acts to be related. *Id.* (finding that the evidence that the defendant used a communication facility in the perpetration of a felony, transported an individual across state lines for the purpose of prostitution, and intended to distribute cocaine and marijuana supported a finding that the defendant's predicate acts were related).

As for continuity, "[p]redicate acts demonstrate continuity if they are either 'a closed period of repeated conduct,' or 'past conduct that by its nature projects into the future with a threat of repetition.'" *Id.* at 1543 (quoting *H.J., Inc. v. NW Bell Tel. Co.*, 492 U.S. 229 (1989)). *See also, Browne*, 505 F.3d at 1257. The continuity of predicate acts was found to be satisfactorily alleged where defendants "had agreed to a scheme whereby [one] would supply [the other] with cocaine on an on-going basis." *Starrett*, 55 F.3d at 1547.

In *Boyle v. United States*, 556 U.S. 938, 946-47, 129 S. Ct. 2237, 2244 (2009), the Supreme Court held that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with an enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."). *See also Williams*, 465 F.3d at 1284-85 (allegations that the defendant corporation worked with third-party temp agencies/recruiters to bring illegal workers into this country for the defendant's benefit were sufficient to allege common purpose). In *Boyle*, the defendant was charged in connection with a series of bank thefts allegedly conducted by a group that was loosely organized and did not appear to have a leader or hierarchy. The Supreme Court ruled that although the three structural features set forth above were necessary for a finding of an association -in-fact enterprise, there are no additional structural features such as hierarchy or a chain of command required.

A claim under § 1962(c), requires a plaintiff to establish that the defendant[s] "conduct[ed] or participate[d], directly or indirectly, in the conduct of [an] enterprise's affairs though a pattern of racketeering activity." 18 U.S.C. 1962(c). The Supreme Court has defined this term as meaning that a defendant "participate in the operation or management of the enterprise itself." *Reeves v. Ernst & Young*, 507 U.S. 170, 184 (1993). In *Reeves*, the defendant accounting firm performed financial audits for a cooperative that issued notes to individuals. The defendant's audits indicated its doubt about whether a certain investment was recoverable, but the condensed financial statement distributed at the cooperative's annual meeting omitted this information. The Supreme Court held that the defendant's failure to tell the cooperative's board about the investment was insufficient to constitute participation in the operation or management of the cooperative to give rise to § 1962(c) liability.

7.4 Racketeer Influenced and Corrupt Organization Act (RICO) — 18 U.S.C. § 1962(

[Name of plaintiff] has brought a claim against [name of defendant] for allegedly violating the Racketeer Influenced and Corrupt Organizations Act, commonly known as RICO.

[Name of plaintiff] specifically claims that [name of defendant] violated RICO § 1962(d) by conspiring to violate RICO § 1962(c). I've already given you instructions on the elements of a violation of § 1962(c). Now you must decide if [name of plaintiff] has proved by a preponderance of the evidence whether two or more of the defendants engaged in a conspiracy to violate RICO § 1962(c).

Generally, a RICO "conspiracy" is an agreement by two or more people to commit an unlawful act. Put another way, it's a kind of partnership for illegal purposes. Every member of the conspiracy becomes the agent or partner of every other member. [Name of plaintiff] doesn't have to prove that all the people named in the complaint were members of the conspiracy — or that those who were members made any kind of formal agreement. The heart of the conspiracy is the making of the unlawful plan itself. And [name of plaintiff] doesn't have to prove that the conspirators were successful in carrying out the plan.

To prove a RICO conspiracy, [name of plaintiff] must prove each of the following three facts by a preponderance of evidence :

First, you must find that two or more people agreed to try to accomplish an unlawful plan to engage in a pattern of racketeering activity.

And second, you must find that a defendant agreed to the overall objective of the conspiracy.

Or, as an alternative to the second element, you must find that a defendant agreed with at least one other defendant to commit two predicate acts as part of the conspiracy.

[Name of plaintiff] may show an "agreement to the overall objective of the conspiracy" by circumstantial evidence that a defendant must have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity. If [name of plaintiff] proves agreement on an overall objective, then it isn't necessary that a defendant agree to personally commit two predicate acts.

A defendant can also engage in a RICO conspiracy even if [name of defendant] didn't agree to the conspiracy's overall objective. It's enough that [name of defendant] engaged in a part of the conspiracy with at least one other defendant by committing at least two predicate acts — alone or with someone else.

While the essence of a RICO conspiracy is an agreement to further an endeavor that, if completed, would satisfy all the elements of a substantive RICO violation, [name of plaintiff] doesn't have to offer direct evidence of an agreement. The conspiracy's existence can be inferred from the participants' conduct. But a defendant must objectively manifest, through words or actions, [name of defendant]'s agreement to participate in the enterprise's affairs.

[Name of plaintiff] doesn't have to show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated the details of the scheme, its object, or purpose, or the precise means by which the object or purpose was to be accomplished. [Name of plaintiff] also doesn't have to establish that all the means or methods alleged to carry out the alleged conspiracy were, in fact, agreed on, or that all the means or methods that were agreed on were actually used or put into operation. And [name of plaintiff] doesn't have to prove that all persons alleged to be conspiracy members were actually members or that alleged conspirators succeeded in accomplishing their unlawful objectives.

But it isn't enough if the evidence shows only that the alleged conspirators agreed to commit the acts of racketeering [name of plaintiff] alleges, without more, or that they agreed to participate in the affairs of the same alleged enterprise. It doesn't matter that the alleged

conspirators participated in the conduct of the affairs of the alleged enterprise through different or dissimilar acts of racketeering activity so long as the alleged racketeering acts would — if actually committed — create a "pattern of racketeering activity" as I've defined it.

A defendant can become a member of a conspiracy without knowing all the unlawful scheme's details or without knowing the names and identities of all the other alleged conspirators. If [name of plaintiff] proves by a preponderance of the evidence that a particular defendant has knowingly joined the alleged conspiracy, it doesn't matter that [name of defendant] may not have participated in the alleged conspiracy or scheme's earlier stages.

Mere presence at the scene of some transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, doesn't necessarily prove the existence of a conspiracy. A person who doesn't have knowledge of a conspiracy, but who happens to act in a way that advances some object or purpose of conspiracy, doesn't become a conspirator.

[Name of plaintiff] doesn't have to prove that a defendant actually committed any of the acts that [name of defendant] may have agreed to commit to establish [his/her] membership in the conspiracy.

To determine whether there was a conspiracy, you must consider all the evidence in the case. If you find that there was a conspiracy, then you can attribute the statements or acts of the [names of co-conspirators] to [name of defendant]. If you find that there was not a conspiracy, then you can't attribute the statements or acts of [names of co-conspirators] to [name of defendant].

If you find the conspiracy didn't exist, then you must find for [name of defendant]. But if you're satisfied that the conspiracy existed, you must determine who the members of the conspiracy were.

If you find that a particular defendant is a member of another conspiracy, but not the one [name of plaintiff] charged, then you can't

find that defendant liable in this case. Put another way, you can't find that a defendant violated § 1962(d) unless you find that [name of defendant] was a member of the conspiracy charged — not some other separate conspiracy.

If you decide that a defendant conspired to violate RICO, you must decide whether that conspiracy caused [name of plaintiff] injury. The damages [name of plaintiff] may recover are those caused by the predicate acts committed by members of the conspiracy that injured [name of plaintiff] in [his/her/its] business or property.

If you conclude that a defendant joined in a conspiracy to violate RICO, [name of defendant] is responsible for all damages caused by predicate acts committed by members of the conspiracy that caused injury to [name of plaintiff]. It isn't necessary that every predicate act caused damage to [name of plaintiff], but [he/she/it] can only recover for damages caused by a predicate act committed by a conspiracy member.

In your consideration of this conspiracy claim, you should first determine whether the alleged conspiracy existed. If you conclude that a conspiracy existed as alleged, you should next determine whether each defendant under consideration willfully became a member of that conspiracy.

NOTES AND ANNOTATIONS

Pursuant to 18 U.S.C. § 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . in any appropriate United States district court" and may recover treble damages and a reasonable attorney's fee. *See, Sedima, S.P.R.L.*, 173 U.S. at 496. However, no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962. This exclusion concerning securities does not apply to an action against any person that is criminally convicted in connection with a securities fraud. 18 U.S.C. § 1964(c).

This Instruction assumes a single plaintiff suing a single defendant. It will need to be appropriately modified if there are multiple defendants. Additionally, as the vast majority of RICO conspiracies allege claims under § 1962(c), this instruction is tailored to

allege a conspiracy under that subsection. If a conspiracy claim alleges violations of either § 1962(a) or (b), then the instruction will need to be amended accordingly.

"A plaintiff can establish a RICO conspiracy claim in one of two ways: (1) by showing that the defendant agreed to the overall objective of the conspiracy; or (2) by showing that the defendant agreed to commit two predicate acts." *American Dental Ass'n. v. Cigna Corp.*, 605 F. 3d 1283, 1293 (11th Cir. 2010) (quoting *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F. 3d 935, 950 (11th Cir. 1997). A plaintiff may establish an "agree[ment] to the overall objection" by "circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity." *United States v. Starrett*, 55 F.3d 1525, 1544 (11th Cir. 1995). In *Starrett*, the Court found that the jury could infer that the defendant manifested an agreement to participate in a national crime organization from evidence that the defendant had been the president of the regional and local chapters of the organization, had been one of the four original members of the Florida chapter of the organization, had initiated an aggressive membership recruitment drive to solidify the organizations position, and had personally committed thirty-four predicate acts related to the organization. *Id.* at 1547.

"A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion." *Salinas v. United States*, 522 U.S. 52, 65 (1997). In *Salinas*, the court found that the defendant conspired to violate the RICO statute by accepting numerous bribes while knowing about and agreeing to facilitate an ongoing criminal scheme.

A RICO conspiracy plaintiff is not required to "offer direct evidence of an agreement; the existence of [the] conspiracy 'may be inferred from the conduct of the participants.'" *American Dental Ass'n.*, 605 F.3d at 1283. In *American Dental*, the court found that because the plaintiff's allegations were "mere formulaic recitations" of a conspiracy claim, they were therefore insufficient to "support an inference of agreement to the overall objective of the conspiracy or an agreement to commit two predicate acts.

7.5 Racketeer Influenced and Corrupt Organization Act (RICO) — 18 U.S.C. § 1962(a)-(c) — Framework for Special Interrogatories to the Jury

Because special interrogatories will vary significantly in RICO cases, this format simply suggests a general framework and structure for use in drafting special-interrogatory-verdict forms.

Do you find from a preponderance of the evidence:

1. That [name of defendant] operated or managed an interest in an enterprise through a pattern of racketeering activity?

Answer Yes or No _____

2. State if you unanimously find that [name of plaintiff] proved by a preponderance of the evidence that [name of defendant] committed any of the following acts:

Category 1: Mail Fraud

As to Racketeering Act 1A:
(Example: Invoice dated A from Defendant to Plaintiff)

Answer Proved or Not Proved _____

As to Racketeering Act 1B:
(Example: Invoice dated B from Defendant to Plaintiff)

Answer Proved or Not Proved _____

As to Racketeering Act 1C:
(Example: Invoice dated C from Defendant to Plaintiff)

Answer Proved or Not Proved _____

Category 2: Wire Fraud

As to Racketeering Act 2A:
(Example: E-mail dated A from Defendant to X, copying Plaintiff)

Answer Proved or Not Proved _____

As to Racketeering Act 2B:
(Example: Fax dated B from Defendant to Plaintiff)

Answer Proved or Not Proved _____

As to Racketeering Act 2C:
(Example: Wire transfer dated C from Plaintiff to Defendant)

Answer Proved or Not Proved _____

Category 3: Interstate Transportation of Stolen Property

As to Racketeering Act 3A:
(Example: Transmission in interstate commerce of funds of $5,000 or more known to have been taken by fraud)

Answer Proved or Not Proved _____

If you found in paragraph 1 above that [name of defendant] is liable on Count 1, what is the amount of damages, if any, that you find was proximately caused by the violation?

$ _____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

8 – Jones Act - Unseaworthiness

8.1 Jones Act — Negligence and Unseaworthiness — General Instruction (Comparative Negligence Defense)

[Name of plaintiff] has brought a claim under a federal statute known as the Jones Act. The Jones Act provides a remedy to a seaman who, while employed as a crewmember of a vessel in navigation, suffers personal injuries because of the negligence of the seaman's employer, or the employer's officers, agents, or other employees.

Specifically, [name of plaintiff] claims that [name of defendant] [describe the specific act(s) or omission(s) asserted as the defendant's negligence].

To succeed on a claim under the Jones Act, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: you must find that at the time of the alleged injury, [name of plaintiff] was acting in the course of employment as a crewmember of a vessel in navigation.

Second, you must find that [name of defendant] was negligent.

And third, you must find that the negligence was a legal cause of the injury or damage [name of plaintiff] sustained.

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

[The parties have agreed that, at the time of the alleged injury, [name of plaintiff] was acting in the course of employment as a crewmember of a vessel in navigation so you should accept that as a proven fact.]

[A seaman is injured "in the course of employment" when, at the time of the injury, the seaman was doing the employer's work — working in the vessel's service as a crewmember.]

[For [name of plaintiff] to prove that [he/she] was a crewmember of a vessel, [he/she] must have a connection to a vessel in navigation (or to an identifiable group of vessels in navigation.) The duration and nature of the crewmember's connection must be so substantial that [his/her] employment regularly exposed [him/her] to the sea's perils. [Name of plaintiff] must also prove that the capacity in which [he/she] was employed, or the duties [he/she] performed, contributed to the vessel's regular operation or to accomplishing its mission.]

[The primary meaning of the term "vessel" is any watercraft or other structure used, or capable of being used, as a means of transportation on water. A structure that's buoyant and capable of being floated from one location to another may be a vessel even though it may have remained in one place for a long time, and even though there are no plans to move it in the foreseeable future. Mere flotation alone isn't sufficient to make a structure a vessel.]

[The term "vessel" can also include various special-purpose crafts (such as barges and dredges) that don't operate as vehicles for transportation. These crafts may serve as floating bases that may even be submerged so that they rest on the bottom and are used for stationary operations, such as drilling or dredging. In considering whether a special-purpose craft is a vessel, the defining factors are the purposes for which the craft was constructed and the business in which it is engaged — whether the craft was designed for and used in navigation and commerce. But a craft not designed for navigation and commerce can still be classified as a vessel if it had actually been engaged in navigation or commerce at the time of the accident.]

"In navigation" means that the vessel is voyaging, is at anchor, berthed, or at dockside ready for a voyage. [A vessel under repair in dry dock is "in navigation" if it spends a relatively short period of time there and the repairs aren't so extensive that they transform the vessel through a major overhaul or renovation. Repairs that change the vessel's status, significantly break from the usual pattern of repair, or

involve extensive work on the vessel take it out of navigation until it is ready to voyage again.]

[In considering whether a special-purpose craft is a vessel, the manner in which a party or parties may have referred to or denominated the craft in contracts or other documents doesn't necessarily determine its status as a vessel, but is simply a factor for you to consider along with all the other evidence.]

"Negligence" means the failure to use reasonable care. Reasonable care is the degree of care that a reasonably careful person would use under similar circumstances. Negligence can mean doing something that a reasonably careful person wouldn't do under like circumstances, or failing to do something that a reasonably careful person would do under like circumstances.

Negligence is a "legal cause" of injury or damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence that any of [name of defendant]'s negligence contributed in any way toward any injury or damage [name of plaintiff] suffered, you can find that [name of defendant]'s act or omission legally caused the injury or damage. Negligence can be a legal cause of injury or damage even if it operates in combination with the act of another person, some natural cause, or some other cause that occurs at the same time as the negligence as long as the negligence played a part in causing the injury or damage.

If a preponderance of the evidence doesn't support [name of plaintiff]'s Jones Act claim for negligence, then your verdict should be for [name of defendant]. But if a preponderance of the evidence supports [name of plaintiff]'s claim, you must next consider [name of defendant]'s defense.

[Name of defendant] claims that [name of plaintiff] was also negligent and that [name of plaintiff]'s negligence was a legal cause of [his/her] own injury or damage. This is a defensive claim, which requires

[name of defendant] to prove these two facts by a preponderance of the evidence:

First, you must find that [name of plaintiff] was also negligent.

And second, you must find that the negligence was a legal cause of [name of plaintiff]'s own injury or damage.

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about these factual issues.]

The law requires you to compare any negligence you find on the part of both parties because, in this case, [name of defendant] claims that [name of plaintiff]'s negligence contributed to [name of plaintiff]'s injuries. If you find in [name of defendant]'s favor on this defense, by finding that [name of plaintiff] was also negligent, that won't prevent [name of plaintiff] from recovering. But it will reduce [name of plaintiff]'s recovery amount by the degree of [his/her] negligence. This is a legal concept called "contributory negligence."

For example, if you find that [name of plaintiff] was 50% responsible for [his/her] own injury, then you must reduce [his/her] recovery amount by that percentage. By using the number 50% as an example, I don't mean to suggest that [name of plaintiff] was negligent, or if [he/she] was negligent, to what degree. That's a decision entrusted to you and it's up to you to determine the percentage, if any, of [name of plaintiff]'s negligence.

[Name of plaintiff]'s second claim is for unseaworthiness. Specifically, [he/she] claims that the vessel was unseaworthy because [describe the specific conditions asserted as the basis for the claim].

To succeed on a claim of unseaworthiness, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First, you must find that the vessel was unseaworthy.

And second, you must find that the unseaworthy condition was a legal cause of [name of plaintiff]'s injury or damage.

[In the verdict form that I'll explain in a moment, you'll be asked to answer questions about all these factual issues.]

A claim of "unseaworthiness" is a claim that the vessel owner didn't perform a legal duty owed to crewmembers to provide a vessel reasonably fit for its intended purpose. The duty to provide a seaworthy ship covers the vessel itself, and all of its parts, equipment, and gear. It also includes the responsibility of assigning an adequate crew.

An owner's duty to provide a seaworthy ship is absolute. The owner can't delegate that duty to anyone else. If the owner doesn't provide a seaworthy vessel, no amount of due care or prudence will excuse that fault, regardless of whether the owner knew, or could have known, of the deficiency.

So if you find that the vessel was unsafe or unfit in any manner and that the condition was a legal cause of [name of plaintiff]'s damage, then you can find that the vessel was unseaworthy and that the owner is liable, regardless of whether the owner was negligent.

But the vessel's owner doesn't have to furnish an accident-free ship. A vessel isn't required to have the best appliances and equipment, or the finest crew. Rather, it needs the gear that's reasonably proper and suitable for its intended use and a crew that is reasonably competent and adequate.

An unseaworthy condition is a "legal cause" of injury or damage only if the unseaworthy condition directly — and in a natural and continuous sequence — produces or contributes substantially to producing the injury or damage. Ask yourself: Would [name of plaintiff]'s damage have occurred without the unseaworthy condition?

Unseaworthiness may be a legal cause of injury or damage even if it operates in combination with another person's act, some natural

cause, or some other cause if the other cause occurs at the same time as the unseaworthiness as long as the unseaworthiness contributes substantially to producing the claimed injury or damage.

[Name of defendant] denies that the vessel was unseaworthy at the time of the incident and, alternatively, claims that if the vessel was unseaworthy, then the unseaworthiness didn't cause any injury or damage to [name of plaintiff].

[Name of defendant] further alleges that [name of plaintiff]'s negligence was a contributing cause of [name of plaintiff]'s injury or damage. Since I've already explained the meaning and effect of a finding that [name of plaintiff] was contributorily negligent, I won't do so again — except to remind you that [name of defendant] must prove this defense by a preponderance of the evidence.

You should also remember that [name of plaintiff] has asserted two separate claims. The first is for negligence under the Jones Act. And the second is for unseaworthiness. [Name of plaintiff] may be entitled to recover damages if [he/she] can establish either of those claims.

So if the evidence proves that negligence or unseaworthiness was a legal cause of [name of plaintiff]'s injury or damage, you must then consider the issue of [name of plaintiff]'s damages.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]'s damages — no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork because [name of plaintiff] can recover only [his/her] actual damages.

But the law doesn't restrict compensatory damages only to actual loss of time or money. Compensatory damages cover both the mental and physical aspects of injury — tangible and intangible. It's not value you're trying to determine, but an amount that fairly compensates [name

of plaintiff] for emotional pain and mental anguish. No evidence of these things has been, or need be, introduced. And there's no exact standard to apply, but any such award should be fair and just in light of the evidence.

If you find that damages have been proved by a preponderance of the evidence, you should consider only the following elements of damage:

- net lost wages and benefits to the date of trial;
- net lost wages and benefits in the future [reduced to present value];
- medical and hospital expenses incurred in the past [and likely to be incurred in the future]; and
- physical and emotional pain and anguish.

[Anyone who claims damages because of an alleged wrongful act by another has a duty to "mitigate" those damages — to take advantage of any reasonable opportunity under the circumstances to reduce losses or damages.

So if you find, by a preponderance of the evidence, that [name of plaintiff] failed to seek out, or take advantage of, a business or employment opportunity reasonably available to [him/her] under all the circumstances the evidence shows, you should reduce any damage award by the amount [name of plaintiff] could reasonably have received if [he/she] had taken advantage of such an opportunity.]

[[Name of plaintiff] also claims that [name of defendant] acted willfully, intentionally, or with callous and reckless indifference to [name of plaintiff]'s rights, which entitles [him/her] to an award of punitive damages in addition to compensatory damages.

If you find for [name of plaintiff], and if you further find that [name of defendant] acted with malice, willfulness, or callous and reckless indifference to [name of plaintiff]'s rights, the law allows you, in your discretion, to assess punitive damages against [name of defendant] as punishment and as a deterrent to others.

If you decide to assess punitive damages against [name of defendant], you may consider [name of defendant]'s financial resources to determine the amount [and you may assess punitive damages against one or more defendants — and not others — or against two or more defendants in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] was negligent in the manner [name of plaintiff] claimed, and that the negligence was a legal cause of damage to [name of plaintiff]?

Answer Yes or No _____

2. That the vessel was unseaworthy in the manner [name of plaintiff] claimed, and that the unseaworthiness was a legal cause of damage to [name of plaintiff]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

3. That [name of plaintiff] was also negligent in the manner [name of defendant] claimed, and that [name of plaintiff]'s negligence was a legal cause of [name of plaintiff]'s own damage?

Answer Yes or No _____

4. If you answered "Yes" to Question No. 3, what proportion or percentage of [name of plaintiff]'s damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

Answer in terms of percentages:

[name of defendant] _____%

[name of plaintiff] _____%

Note: The total of the percentages in your answer should equal 100%.

5. If you answered "Yes" to Question No. 1 or Question No. 2, what sum of money do you find to be the total amount of [name of plaintiff]'s damages (without applying any percentages you may have given in answer to Question No. 4)?

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

$_____

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

$_____

(c) Medical and hospital expenses, incurred in the past [and likely to be incurred in the future]:

$_____

(d) Physical and emotional pain and mental anguish:

$_____

[(e) Punitive damages, if any (as the Court's instructions explain):

$_____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

8.2 Jones Act — Unseaworthiness — Maintenance and Cure

[Name of plaintiff] claims that, as a seaman, [he/she] is entitled to recover what the law calls "maintenance and cure." This claim is completely separate from [name of plaintiff]'s Jones Act and unseaworthiness claims, and you must decide it entirely apart from your decision on those claims.

[The three claims' only common element is [name of plaintiff]'s seaman status. The test for seaman status is the same for all claims. So if [name of plaintiff] has proved [his/her] employment as a seaman on the accident's date for purposes of the other claims, then you must find that [he/she] is a seaman for purposes of maintenance and cure. But if you find that [name of plaintiff] was not a seaman for the other claims, you must also find that [name of plaintiff] isn't entitled to maintenance and cure.]

"Maintenance and cure" is provided to a seaman who is disabled by injury or illness while in the ship's service. It includes medical care and treatment and the means of maintaining one's self during the convalescence period.

A seaman is entitled to maintenance and cure even if the seaman is unable to establish that an injury was a result of any negligence by the employer or an unseaworthy condition on the vessel. Generally, to recover maintenance and cure, [name of plaintiff] must show only that an injury or illness occurred while [he/she] was in the service of the vessel on which [he/she] was employed as a seaman and that the injury or illness occurred without [his/her] willful misbehavior. The injury or illness doesn't have to be work-related. It need only occur while [name of plaintiff] is in the ship's service. Neither maintenance nor cure can be reduced because of any negligence on the part of the seaman. That [name of plaintiff] may have assumed a risk by serving on the ship is not a defense to a claim for maintenance and cure.

"Maintenance" means the cost of food, lodging, and transportation to and from a medical facility. But a seaman isn't entitled to maintenance

for any time the seaman is admitted as an inpatient in any hospital because the cure provided by the employer through hospitalization includes the seaman's food and lodging.

"Cure" includes the cost of medical attention, including hospitalization, medicines, medical apparatuses, and the services of physicians, nurses, and other medical professionals. But the employer doesn't have a duty to provide cure payments for any time during which a seaman is hospitalized in a United States Marine Hospital, or in any other hospital at the employer's expense.

A seaman is entitled to receive maintenance and cure from the date of departure from the vessel until the seaman reaches the point of "maximum possible cure" under the circumstances — that is, the point at which no further improvement in the seaman's medical condition is reasonably expected. The obligation usually ends when a qualified medical opinion states that the maximum possible cure has been achieved.

The owner doesn't ensure that a cure will be achieved. The date when a seaman resumes employment is one factor you can consider to decide when a seaman's entitlement to maintenance and cure ends. If the evidence supports a finding that the seaman was forced by economic necessity to return to work before reaching maximum possible cure, you can consider that fact when determining the date on which maintenance and cure should terminate.

It is important to note that if you find that [name of plaintiff] is entitled to an award of damages under either the Jones Act or the unseaworthiness claims, and if you include either loss of wages or medical expenses in the damage award, then you can't award maintenance and cure at all. Put another way, [name of plaintiff] isn't entitled to a double recovery. [Name of plaintiff] may recover for any willful or arbitrary failure on the employer's part to pay maintenance and cure when due.

When a defendant willfully and arbitrarily fails to pay maintenance or provide cure to a seaman up to the time that the seaman receives maximum cure, and the failure results in an aggravation of the seaman's injury, the seaman may recover damages for prolonging or aggravating [his/her] injury, pain and suffering, additional medical expenses incurred because of the failure to pay, punitive damages, and reasonable attorney's fees and costs.

To prove a ship owner's willful failure to provide maintenance and cure, which entitles [name of plaintiff] to an award of additional damages, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First, you must find that [name of plaintiff] was entitled to maintenance and cure.

Second, you must find that [name of defendant] didn't provide maintenance and cure.

Third, you must find that [name of defendant] willfully and arbitrarily failed to provide cure up to the time that [name of plaintiff] reached maximum cure.

And fourth, you must find that the failure resulted in injury to [name of plaintiff].

An employer has a duty to investigate a seaman's claim in good faith and with reasonable diligence. But an employer isn't obligated to pay maintenance and cure to a seaman simply because the seaman claims an injury. And the employer has a right to contest the claim in good faith. An employer acts "willfully and arbitrarily" only when the employer acts without reason, or with callous disregard for the seaman's claim.

You can award damages for any failure of the employer to pay maintenance and cure to [name of plaintiff] only if, on the basis of all the facts and opportunities known and available to [name of defendant]

during the time in question, the refusal to pay maintenance and cure was arbitrary and willful, or in callous disregard of [name of plaintiff]'s claim.

[Finally, it's important to remember that [name of plaintiff] can't recover attorney's fees for the prosecution of either the Jones Act or the unseaworthiness claims. [Name of plaintiff] can recover attorney's fees only for the prosecution of the maintenance-and-cure claim.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] was a seaman at the time of his [illness] [injury]?

Answer Yes or No _____

2. That [name of defendant] willfully and arbitrarily failed to provide maintenance and cure up to the time that [name of plaintiff] reached maximum care?

Answer Yes or No _____

3. That [name of plaintiff] should be awarded damages, if any, in the following amounts?

a) Maintenance and Cure: $_____

(b) Willful failure to pay Maintenance and Cure: $_____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

9 – Copyright

9.1 Copyright — Validity — General Charge

To establish infringement, [name of plaintiff] must prove two things:

First, you must find that [name of plaintiff] owned a valid copyright.

And second, you must find that [name of defendant] copied the work's original components.

I'll begin with instructions on validity and then explain ownership and infringement. After that I'll explain defenses and remedies.

ANNOTATIONS AND COMMENTS

It is for the individual judges to determine the order of the charges (burden of proof, etc., and charges for other claims). *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 1296; 113 L.Ed. 2d 358 (1991); *Calhoun v. Lillenas Publishing*, 298 F.3d 1228, 1232 (11th Cir. 2002).

9.2 Copyright — Validity — Originality

To qualify for copyright protection, the claimed work must be original to the author. "Original" means only that the author independently created the work — the author didn't copy it from other works — and it possesses at least a minimal degree of creativity.

SPECIAL INTERROGATORIES

1. Do you find the claimed work was original to its author?

Yes:___ No:___

2. Do you find the claimed work possesses at least a minimal degree of creativity?

Yes:___ No:___

If your answer to either of these questions is "No," don't continue with your analysis of [name of plaintiff]'s claim for infringement.

ANNOTATIONS AND COMMENTS

"Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345, 111 S. Ct. 1282, 1287, 113 L. Ed. 2d 358 (1991) (internal citations omitted).

9.3 Copyright — Validity — Copyright Notice — Pre-Berne Convention Implementation Act — Alternate Version

[Name of plaintiff] owns a valid copyright in the claimed work if (among other requirements) [he/she/it] proves by a preponderance of the evidence that [he/she/it] complied with copyright notice requirements by placing a copyright notice on publicly distributed copies of the claimed work.

If you find that [name of plaintiff] didn't comply with the copyright notice requirement by placing a copyright notice on publicly distributed copies of the claimed work, you may still find that [he/she/it] has a valid copyright, if you find that [he/she/it] has proved by a preponderance of the evidence that:

First, the notice was omitted from only a relatively small number of copies distributed to the public.

Second, registration for the work was made within five years after the publication without notice, and a reasonable effort was made to add notice to all publicly distributed copies in the United States after the omission of notice was discovered.

Or third, the notice was omitted in violation of an express written requirement that, as a condition of the copyright owner's authorization of the public distribution, copies of the work bear the prescribed notice.

SPECIAL INTERROGATORIES

1. Do you find that [name of plaintiff] attached a notice of copyright to the claimed work on all copies that were publicly distributed?

Yes:___ No:___

If your answer to this question is "Yes," there's no need to answer the following questions for this issue.

2. Do you find from a preponderance of the evidence that the notice was omitted from only a relatively small number of copies that were distributed to the public?

Yes:___ No:___

If your answer to this question is "Yes," there's no need to answer the following questions for this issue.

3. Do you find from a preponderance of the evidence that (a) registration for the work was made within five years after the publication without notice, and (b) reasonable effort was made to add notice to all publicly distributed copies in the United States after the omission of notice was discovered?

Yes:___ No:___

If your answer to this question is "Yes," there's no need to answer the following questions for this issue.

4. Do you find from a preponderance of the evidence that the notice was omitted in violation of an express written requirement that, as a condition of the copyright owner's authorization of the public distribution, copies of the work bear the prescribed notice.

Yes:___ No:___

If your answer to this question is "No," don't continue with your analysis of [name of plaintiff]'s claim for infringement. If the answer is "Yes," continue your consideration of the other issues in this case.

ANNOTATIONS AND COMMENTS

This jury charge is to be read only for works that have been published prior to the effective date of the Berne Convention (March 1, 1989). *See* 17 U.S.C. §405(a). This charge only addresses the "notice requirement" for pre-Berne Convention works.

Compliance with "the applicable statutory formalities" is a requirement for validity. *See Montgomery v. Noga*, 168 F.3d 1282,1289 (11th Cir. 1999). The notice

requirement for works distributed prior to 1989 is discussed in *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 823 n.1 (11th Cir. 1982) ("In order to protect his copyright, an author must attach a copyright notice to any copies of his work that are 'published' as that term is defined in § 101 of the Copyright Act, 17 U.S.C. § 101.").

17 U.S.C. § 405(a) provides an exception to the notice requirement. The omission of the copyright notice on copies or phonographs publicly distributed by authority of the copyright owner does not invalidate the copyright in the work if:

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or (2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or (3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

Id.

9.4 Copyright — Validity — Effect of Registration

For original works created after 1977, the work is automatically copyrighted at the moment of creation — even if the work is never registered with the United States Copyright Office. But generally, no suit for copyright infringement can be brought if the copyright hasn't been registered.

A certificate of registration made within five years after the first publication of the claimed work is evidence of the copyright's validity and the facts stated in the certificate. Specifically, the copyright registration creates a rebuttable presumption of validity. This means that the presumption shifts [name of plaintiff]'s burden of proving validity to [name of defendant] to prove that the claimed copyright is invalid.

SPECIAL INTERROGATORIES

1. Do you find from a preponderance of the evidence that [name of plaintiff] registered the claimed work with the United States Copyright Office?

Yes:___ No:___

If your answer to this question is "Yes," answer the next question.

2. If so, when do you find that the registration occurred?

Date: _____

ANNOTATIONS AND COMMENTS

"[N]o action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights." 17

U.S.C. § 411(a); *see also Montgomery v. Noga*, 1168 F3d. 1281, 1288 (11th Cir. 1999) (for works created after 1977, copyright automatically inheres in original works of authorship, but "[i]n order to bring an action for copyright infringement, . . . the author must first register the copyright.") (citing *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1488 & n.4 (11th Cir. 1990)); *see also Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 (11th Cir. 1996).

"In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court." 17 U.S.C. § 410(c).

This Special Interrogatory includes a request that the jury identify the date of the registration. It may be used in conjunction with a Special Interrogatory requesting the jury to identify the date(s) of infringement. Such requests may not be required if the information is not required in the case to analyze the application of statutory remedies or other matters. *See* 17 U.S.C. § 412 (registration is a prerequisite to certain remedies for infringement).

If Defendant is challenging the validity of Plaintiff's copyright registration on the basis that there has been a fraud on the Copyright Office, the jury should be instructed regarding that defense, and the Court may wish to add the following at the end of the instruction above: "In this case, Defendant has raised the affirmative defense of Fraud on the Copyright Office. I will separately instruct you on the law pertaining to that defense."

If Defendant is challenging Plaintiff's copyright on the ground that the claimed work is not original, this instruction should also include the following:

Defendant challenges the validity of Plaintiff's copyright in the claimed work on the ground that the work is not original. If you find that Plaintiff has a valid copyright registration made before or within five years after first publication of the claimed work, you may only find that Plaintiff's copyright is invalid if you find that Defendant has shown by a preponderance of the evidence that the work was not original to its author or that the work does not possess at least a minimum degree of creativity.

If the rebuttable presumption of validity applies and Defendant challenges Plaintiff's copyright on the ground that the claimed work is not original, additional questions may be included in the Special Interrogatory above as follows:

[3. Do you find that Defendant has shown by a preponderance of the evidence that the work was <u>not</u> original to its author?

Yes:___ No:___

4. Do you find that Defendant has shown by a preponderance of the evidence that the claimed work does not possess at least a minimum degree of creativity?

Yes:___ No:___

If the answer to either of the foregoing questions is "Yes," do not continue with your analysis of Plaintiff's claim for infringement.]

9.5 Copyright — Validity — Registration of a Derivative or Collective Work

To advance a copyright-infringement action, the work that [name of plaintiff] claims has been infringed must be registered (or preregistered). But a doctrine called "effective registration" allows a plaintiff to proceed with an infringement action without registration if a later-created derivative or collective work has been registered and the registration certificate specifically refers to the work that [name of plaintiff] has made the subject of the infringement action. Put another way, the earlier work is deemed effectively registered by its identification in the later registration.

[Name of defendant] asserts that [name of plaintiff] doesn't have a registration for the claimed work. If true, this would usually defeat a copyright-infringement action. But [name of plaintiff] can proceed with this infringement action if you find that [he/she/it] has effectively registered the work.

To establish that [name of plaintiff] effectively registered the work that is the subject of this action, you must review the "Preexisting Material" section of the registration certificate of the derivative or collective work (what you can think of as the later-created work). For the effective-registration doctrine to apply, that section must reference or identify the work that is the subject of this infringement action. If you review the registration certificate and don't find any reference to or identification of the claimed work, [name of plaintiff] can't advance this infringement action.

SPECIAL INTERROGATORIES

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] has a copyright registration for a derivative or collective work?

Yes:___ No:___

If your answer to this question is "Yes," also answer the next question.

2. That the work that is the subject of this action is identified in the "Preexisting Material" section of [name of plaintiff]'s derivative or collective registration certificate?

Yes:___ No:___

If your answer to either of these questions is "No," don't continue with your analysis of [name of plaintiff]'s claim for infringement.

ANNOTATIONS AND COMMENTS

This jury instruction applies when the Plaintiff does not have a registration for the work that is the subject of the copyright infringement claim (an earlier created work, or preexisting work), but has a registration for a derivative or collective work (a later created work) that references or identifies the preexisting work. The effective registration doctrine permits a plaintiff to advance an infringement suit if the Plaintiff owns both the preexisting work and a later created work and the certificate of registration for the later created work identifies the preexisting work. *See Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1229-31 (11th Cir. 2008).

A situation that is effectively the reverse of the "effective registration" doctrine may also occur; that is, where the alleged infringement is of a later, unregistered version of an earlier-registered work. The earlier registration may be effective to support an infringement action as to those portions of the earlier work incorporated into the later, unregistered version at issue in the suit. *See Montgomery v. Noga*, 168 F.3d 1282, 1292-93 (11th Cir. 1999).

9.6 Copyright — Validity — Registration — Supplemental Registration

Supplemental registration is available to correct an error or to expand the information given in a copyright registration. Correction is appropriate if information in the basic registration was incorrect when it was made, and the error is not one that the Copyright Office itself should have recognized. Information contained in a supplemental registration adds to — but doesn't supersede — information contained in the earlier registration. Supplemental registration can be made only if a basic copyright registration for the same work has already been completed.

The Copyright Office relies on the information in the "Nature of Authorship" space on Registration Form VA as the primary source for defining the registration's scope.

SPECIAL INTERROGATORIES

1. Has [name of plaintiff] shown that [he/she] had a copyright registration for the same work that is the subject of this lawsuit?

Yes:___ No:___

If your answer to this question is "Yes," go to the next jury charge.

NOTE: For use when an error or limited scope registration is at issue:

[2. Did [name of plaintiff] use a supplemental registration to correct an error or expand the information in the original registration?

Yes:___ No:___]

If your answer to this question is "Yes," go to the next jury charge.

ANNOTATIONS AND COMMENTS

17 U.S.C. § 408; 37 C.F.R. §201.5; Statement of Policy, 65 Fed. Reg. 41,508.

9.7 Copyright — Validity — How Obtained (For Use Where No Presumption of Validity Applies)

Copyright automatically exists in a work the moment it is created. The owner may register the copyright by depositing a copy of the copyrighted work in the Library of Congress's Copyright Office. After determining that the material is copyrightable and that legal and formal requirements have been satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner. There's no administrative investigation on the originality or uniqueness of the work or a determination of the claim's validity. A certificate of copyright registration is refused only if the work falls outside the broad category of matter eligible for copyright registration.

So while the existence of a copyright registration may create some presumption that a work is indeed entitled to copyright protection, the fact that a copyright registration has been issued doesn't conclusively establish whether the work is entitled to copyright protection.

In this case, [name of plaintiff]'s copyright isn't entitled to a presumption of validity. [He/She/It] has the burden of establishing by a preponderance of the evidence that [he/she/it] owns a valid copyright.

SPECIAL INTERROGATORIES

Do you find from a preponderance of the evidence that:

1. The claimed work is original to the author — not copied from other works — meaning that the author independently created the work?

Yes:___ No:___

If your answer to this question is "yes," answer the next question.

2. The claimed work possesses at least a minimal degree of creativity?

Yes:___ No:___

If your answer to either of these questions is "No," don't continue with your analysis of [name of plaintiff]'s claim for infringement.

ANNOTATIONS AND COMMENTS

This instruction should be used for works as to which no presumption of validity applies. 17 U.S.C. § 410(c) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court."); *see also M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1488 n.4 (11th Cir. 1990).

An author has a valid copyright in an original work at the moment it is created and fixed in a tangible medium of expression. *See* 17 U.S.C. § 102(a); *McCaskill v. Ray*, 279 Fed. Appx. 913, 916 (11th Cir. 2008) (citing *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 823 n.1 (11th Cir. 1982)). "Copyright registration is not a prerequisite to copyright protection. Moreover, registration of a copyright 'is not obligatory, although registration is a prerequisite to an infringement suit in certain circumstances and also is a prerequisite to certain infringement remedies.'" *Id.* (internal citation omitted); *see also* 17 U.S.C. §§ 408, 411, 412.

A certificate of copyright registration is refused only if it falls outside the broad category of matter eligible for copyright registration. *See* 17 U.S.C. § 410(a).

9.8 Copyright — Validity — Invalid Copyright Registration — Fraud on the Copyright Office

Ownership of a valid copyright and registration are prerequisites to claiming copyright infringement. [Name of defendant] claims, as an affirmative defense to [name of plaintiff]'s infringement claim, that [name of plaintiff]'s copyright registration is invalid because [he/she/it] engaged in fraud on the Copyright Office.

An invalid copyright registration precludes [name of plaintiff]'s claim of infringement. To determine that [name of plaintiff]'s copyright registration is invalid because of a fraud on the Copyright Office, you must find that [he/she/it] knowingly failed to advise the Copyright Office of facts that would have led the Copyright Office to refuse the application. Unintentional omissions, misstatements, or irregularities generally aren't enough for invalidation. Omissions, misstatements, or irregularities must have been made intentionally to mislead the Copyright Office.

If you find that [name of plaintiff]'s registration was invalid because of fraud on the Copyright Office, you must find for [name of defendant] on [name of plaintiff]'s copyright-infringement claim. While [name of plaintiff] must establish that [his/her/its] copyright is valid, [name of defendant] must establish by a preponderance of the evidence that the registration is invalid because of misconduct in the registration process.

SPECIAL INTERROGATORIES

1. Do you find that [name of plaintiff] knowingly, and with the intent to mislead the Copyright Office, concealed, failed to disclose, or misstated information in the copyright registration application?

Yes: ___ No: ___

If your answer to this questions is "No," don't continue with your analysis of [name of defendant]'s invalidity defense.

2. Do you find that the information that [name of plaintiff] concealed, failed to disclose, or misstated would have led the Copyright Office to refuse [his/her/its] copyright application?

Yes: ___ No: ___

If your answers to both of these questions are "Yes," don't continue with your analysis of [name of plaintiff]'s infringement claim.

ANNOTATIONS AND COMMENTS

This jury instruction applies when a defendant raises the affirmative defense that the plaintiff's copyright registration contained material inaccuracies, whether by omission or misrepresentation. A registration will not be invalidated unless the inaccuracy was material and the registrant acted with *scienter*, i.e. an intent to mislead the Copyright Office. *See* 17 U.S.C. §411(b)(1) (a certificate of registration satisfies the registration requirement "regardless of whether the certificate contains any inaccurate information, unless . . . (A) the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and (B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration"); *St. Luke's Cataract and Laser Institute P.A. v Sanderson*, 573 F.3d 1186, 1201-02 (11th Cir. 2009) (citing *Original Appalachian Artworks, Inc. v Toy Loft Inc.*, 684 F.2d 821, 828 (11th Cir. 1982)) ("omissions or misrepresentations in a copyright application can render the registration invalid" where there has been "intentional or purposeful concealment of relevant information"; there must be a showing of "scienter").

The Eleventh Circuit has not specifically addressed whether the burden of proof for fraud on the Copyright Office is anything other than preponderance of the evidence.

9.9 Copyright — Validity — Compilations and Collective Works

[Name of plaintiff] claims that [his/her/its] work is a compilation and that [his/her/its] selection, arrangement, and coordination of preexisting materials, rather than the materials themselves, are protectable.

The selection, arrangement, and coordination of preexisting materials or data in a compilation or collective work does not possess the required degree of creativity for copyright protection if that arrangement or coordination of pre-existing materials is typical, commonplace, or expected as a matter of course.

For example, the arrangement of last names in a telephone directory in alphabetical order isn't creative. Similarly, the arrangement of a business telephone directory in an alphabetized list of business types, with individual businesses listed in alphabetical order under the applicable headings, isn't original.

SPECIAL INTERROGATORIES

Do you find from a preponderance of the evidence that:

1. The selection, arrangement, and coordination of the preexisting materials or data comprising the claimed compilation or collective work was independently created by its author — not copied from another work?

Yes:___ No:___

If your answer to this question is "Yes," answer the next question.

2. The selection, arrangement, and coordination of the preexisting materials or data comprising the claimed compilation or collective work possesses at least some minimal degree of creativity?

Yes:___ No:___

If your answer to either of these questions is "No," don't continue with your analysis of [name of plaintiff]'s infringement claim.

ANNOTATIONS AND COMMENTS

As used in copyright law, "original" means that a work was independently created by its author and possesses at least some minimal degree of creativity. *See Utopia Provider Systems, Inc. v. Pro-Med Clinical Systems, LLC*, 596 F.3d 1313, 1319-20 (11th Cir. 2010) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345, 111 S. Ct. 1282, 1287, 113 L. Ed. 2d 358 (1991)).

The examples of insufficient creativity in the selection, arrangement, and coordination of preexisting materials or data comprising a compilation that are provided in this instruction come from *Bellsouth Adver. & Publ'g. Corp. v. Donnelly Info. Publ'g., Inc.*, 999 F.2d 1436, 1440 (11th Cir. 1993). *See Bellsouth Adver. & Publ'g*, 999 F.2d at 1440 ("[T]here is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an old-age practice, firmly rooted in tradition and so commonplace that is has come to be expected as a matter of course."); *see also Id.* at 1442 (stating that arrangement of business telephone directory in an alphabetized list of business types, with individual businesses listed in alphabetical order under the applicable headings, "is not only unoriginal, it is practically inevitable").

9.10 Copyright — Validity — Ideas and Expression

Copyright protection doesn't extend to all the elements of a copyrighted work. Elements covered by the copyright protection are called "protected matter," and non-covered elements are "unprotected matter." Because unprotected matter isn't entitled to copyright protection, another author may copy it.

There are various types of unprotected matter. They include:

- a portion of the work that isn't original to the author;
- a portion of the work that's in the public domain; and
- an idea, concept, principle, discovery, fact, actual event, process, or method contained in a work

A work that's "in the public domain" is one that does not have copyright protection, so anyone may use all or part of it in another work without charge.

In copyright law, it's important to distinguish between the ideas in a work and the author's expression of the ideas. The ideas in a work are unprotected matter. But an idea must be expressed in some way, and the expression or means of expression of an idea is protected matter.

For example, copyright law doesn't protect the idea of a determined captain hunting a giant whale. But copyright law does protect the particular expression of this idea in the book *Moby-Dick*.

Put another way, the author of a work has no exclusive right to the underlying ideas, concepts, principles, discoveries, facts, actual events, processes, or methods contained in a work. But the author's copyright does extend to the means by which those are expressed, described, depicted, implemented, or otherwise communicated in the work.

If you find that [name of plaintiff] is seeking copyright protection in:

- a portion of a work that isn't original to the author;
- a portion of the work that's in the public domain; or
- an idea, concept, principle, discovery, fact, actual event, process, or method expressed or described in a work,

you should exclude that material from the protected matter [name of plaintiff]'s copyright-infringement claim can be based on.

SPECIAL INTERROGATORIES

Do you find that Plaintiff is seeking copyright protection in:

1. A portion of a work that is not original to the author;

2. A portion of the work that is in the public domain; or

3. An idea, concept, principle, discovery, fact, actual event, process, or method expressed or described in a work?

Yes:___ No:___

If your answer to the above question is "Yes," as to any material in which [name of plaintiff] is claiming copyright protection, you should exclude that material from the material [name of plaintiff]'s copyright-infringement claim can be based on.

ANNOTATIONS AND COMMENTS

No author may copyright facts or ideas. The copyright is limited to those aspects of the work that display the stamp of the author's originality. *See* 17 U.S.C. §102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept,

principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349-50, 111 S. Ct. 1282, 1290, 113 L. Ed. 2d 358 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547-548, 105 S. Ct. 2218, 2223-24, 85 L. Ed. 2d 588 (1985)).

The example of Herman Melville's *Moby-Dick* is for the purpose of illustration only. That novel is in the public domain. *See BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1143 (11th Cir. 2007) (utilizing *Moby-Dick* in order to illustrate idea-expression dichotomy).

In addition to the statute and precedents discussed above, this charge is drawn from the American Bar Association, Section of Litigation's MODEL JURY INSTRUCTIONS, COPYRIGHT, TRADEMARK, AND TRADE DRESS LITIGATION. *See* MODEL JURY INSTRUCTIONS, COPYRIGHT, TRADEMARK AND TRADE DRESS LITIGATION §§ 1.4.2, 1.4.3, 1.4.4 (Todd S. Holbrook and Alan Nathan Harris eds., American Bar Association Section of Litigation, 2008).

9.11 Copyright — Validity — The Merger Doctrine

Copyright law provides that an author can usually copy unprotected matter but not copy the manner another author selected for expressing a particular matter. But there's an exception to this prohibition if there's only one way, or only a few ways, of expressing the ideas or other unprotected matter in a work. In such cases, an author may copy the expression in the work to the extent necessary to express the unprotected matter. [Name of defendant] claims that this exception applies in this case.

This exception is called the "merger doctrine" because when there is only one way of expressing unprotected matter, the expression is said to have "merged" with the unprotected matter. The merger doctrine can apply to any unprotected matter such as ideas, facts, or events. The doctrine can apply to literal text, such as when facts can be effectively expressed only by using specific words or a limited range of words. The merger doctrine can also apply to non-literal elements of a literary work, such as when it's necessary to recount factual events in the same order as another work to present historical facts accurately and intelligibly.

The merger doctrine also applies to pictorial, graphic, and sculptural works, such as when there are a limited number of ways of representing certain sorts of objects. For example, a sculpture that depicts a mermaid will necessarily have certain similarities to other sculptures of mermaids. It will have a female human's head, arms, and torso, and the tail of a fish. These necessary similarities among sculptures of mermaids can't, under the merger doctrine, be the basis for a finding of infringement because copyright law would then protect the idea of a mermaid.

SPECIAL INTERROGATORIES

1. Do you find that [name of plaintiff] is seeking copyright protection in matter that may only be expressed in so few ways

that to protect the expression would effectively grant [name of plaintiff] a monopoly over matter that isn't protectable by copyright?

Yes:___ No:___

If your answer to this question is "Yes" for any of the material in which [name of plaintiff] is claiming copyright protection, you should exclude that material from the material [name of plaintiff]'s copyright-infringement claim can be based on.

ANNOTATIONS AND COMMENTS

"The merger doctrine provides that 'expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.'" *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1142 (11th Cir. 2007). The merger doctrine operates as an exception to the idea-expression dichotomy. *See id.* at 1143.

This charge is based upon that provided by the American Bar Association, Section of Litigation's MODEL JURY INSTRUCTIONS, COPYRIGHT, TRADEMARK, AND TRADE DRESS LITIGATION. *See* MODEL JURY INSTRUCTIONS, COPYRIGHT, TRADEMARK AND TRADE DRESS LITIGATION §§ 1.4.7 (Todd S. Holbrook and Alan Nathan Harris eds., American Bar Association Section of Litigation, 2008).

9.12 Copyright — Ownership — General Charge

Now that I've explained validity, we'll move to the issue of ownership

.

[Name of plaintiff] must prove ownership of a copyright in [title of the asserted work] by a preponderance of the evidence. [Name of plaintiff] can prove ownership by evidence showing that [he/she/it]:

- is an author (or creator) of the work [and didn't transfer to another the exclusive rights being asserted], or
- acquired legal ownership by transfer of the copyright in the exclusive right[s] [name of defendant] allegedly infringed.

ANNOTATIONS AND COMMENTS

The legal or beneficial owner of an exclusive right under a copyright is entitled to institute an action for any infringement of that particular right committed while he or she is the owner of it. 17 U.S.C. § 501(b).

17 U.S.C. § 201(a) (Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.) "Authorship" as set forth in the charge above can include individual author, joint author and the employer as the "author" under the "work-for-hire" doctrine. Individual charges addressing each of these situations is set forth in other jury charges herein.

The term "creator" may be used in place of "author" to avoid confusion over the term author when dealing with non-literary works.

17 U.S.C. §101 definition of copyright owner reflects fact that exclusive licensees are treated as copyright owners for purpose of protection and remedy pursuant to 17 U.S.C. §201(d)(2). 17 U.S.C. § 101 ("Copyright owner," with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.). 17 U.S.C. §201(d) provides:

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as

personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. §201(d).

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202. Section 204 addresses transfers of copyright ownership:

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(b) A certificate of acknowledgement is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if--

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or

(2) in the case of a transfer executed in a foreign country, the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

17 U.S.C. § 204(a).

9.13 Copyright — Ownership — Individual Authorship

[Name of plaintiff] claims ownership of [title of the asserted work] as an author of the work — the creator of the original expression in a work that is entitled to copyright protection.

SPECIAL INTERROGATORY

Do you find that [name of plaintiff] is the person who actually created the work?

Yes _____ No _____

ANNOTATIONS AND COMMENTS

This charge is meant to incorporate by reference the validity (originality) and infringement (protectable expression) charges.

17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.").

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737, 109 S.Ct. 2166, 2170, 104 L.Ed.2d, 811 (1989).

9.14 Copyright — Ownership — Joint Authorship

[Plaintiff] claims co-ownership of [title of the asserted work] as an author of the work jointly with [name of alleged joint author]. To find that [Plaintiff] is the author of a joint work, [Plaintiff] must prove:

(a) the work was prepared by the contributions of [Plaintiff] and at least one other author; and

(b) each of the authors had the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

The contributions of each author do not need to be equal, but each author must contribute original expression.

An example of joint ownership is: where one author creates lyrics and another author creates music, each intending their works to be incorporated into the same song, that song is a joint work.

SPECIAL INTERROGATORIES

1. Did the Plaintiff and [name of alleged joint author(s)] each contribute original expression that was merged to form inseparable or interdependent parts of the work as a whole?

Yes ____ No _____

2. Did Plaintiff and [name of alleged joint author(s)] each have the intention that their contributions to [title of the asserted work] be merged into inseparable or interdependent parts of a unitary whole?

Yes ____ No _____

ANNOTATIONS AND COMMENTS

17 U.S.C. § 101 ("A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.").

17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work."). *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1492 (11th Cir. 1990).

9.15 Copyright — Ownership — Work Made for Hire

[Name of plaintiff] claims ownership of [title of the asserted work] based on the creation of the work for [him/her/it] as a work made for hire. If the work is a work made for hire, [name of plaintiff] is considered the author and the copyright's owner. To prove ownership of a work for hire, [name of plaintiff] must prove one of the following:

First, that [name of plaintiff]'s employee created [title of the asserted work] within the scope of the employee's employment [, and [name of plaintiff] didn't sign a written document giving the copyright to the employee].

Or second, that [name of plaintiff] specifically ordered or commissioned [title of the asserted work] for use [as a contribution to a collective work/as a part of a motion picture or other audiovisual work/as a translation/as a supplementary work/as a compilation/as an instructional text/as a test/as answer material for a test/as an atlas], and [name of plaintiff] and the person who created the work signed a written document confirming that the work was to be considered a work made for hire.

[Supplemental instruction for use when applicable: If the employment status of the individual who created the work is disputed, you should consider the following factors to determine whether the creator was an [name of plaintiff]'s employee or an independent contractor when [title of the asserted work] was created:

- [Name of plaintiff]'s right to control the way the work was accomplished. The less control [name of plaintiff] exercised, the more likely it is that the creator was an independent contractor.

- The skill required to create the work. The more skills required of the creator, the more likely it is that the creator was an independent contractor.

- The source of the instruments and tools. The more the creator was required to use his or her own tools and instruments to create the work, the more likely it is that the creator was an independent contractor.

- The location of the work. The more the creator worked at [[name of plaintiff]'s [offices/work site]], the more likely it is that the creator was an employee.

- The duration of the relationship between the parties. The longer the creator worked for [name of plaintiff], the more likely it is that the creator was an employee.

- Whether [name of plaintiff] has the right to assign additional projects to the creator. The more ability the creator had to refuse additional work from [name of plaintiff], the more likely it is that the creator was an independent contractor.

- The extent of the creator's discretion over when and how long to work. The more control the creator had over his or her working schedule, the more likely it is that the creator was an independent contractor.

- The method of payment. The more the creator worked for one-time project fees or on commission, the more likely it is that the creator was an independent contractor.

- The creator's role in hiring and paying assistants. The more the creator hired and paid for his or her own assistants, the more likely it is that the creator was an independent contractor.

- Whether the work is part of [name of plaintiff]'s regular business. The more the creation of the work was a regular part of [name of plaintiff]'s business, the more likely it is that the creator was an employee.

- Whether [name of plaintiff] is a business. If [name of plaintiff] was not a business, the creator was more likely an independent contractor

- The provision of employee benefits. The more the creator participated in benefit plans [name of plaintiff] provided (such as pensions or insurance), the more likely it is that the creator was an employee.

- The creator's tax treatment. If [name of plaintiff] didn't withhold taxes from payments to the creator or didn't issue a Form 1099 to the creator, the creator was more likely an independent contractor.

No single factor should be considered conclusive on its own. And some factors may not apply to the circumstances in this case.]

SPECIAL INTERROGATORIES

1. Do you find that [name of plaintiff]'s employee created [title of the asserted work] within the scope of his or her employment?

Yes: _____ No: _____

2. If you answered "Yes" to Question No. 1, did you find that [name of plaintiff] signed a written document giving the copyright to the employee?

Yes: _____ No: _____

3. If the creator of the work was not [name of plaintiff]'s employee, do you find that [title of the asserted work] was a work specially ordered or commissioned for use [as a contribution to a collective work/as a part of a motion picture or other audiovisual work/as a translation/as a

supplementary work/as a compilation/as an instructional text/as a test/as answer material for a test/as an atlas]?

Yes: _____ No: _____

4. Did [name of plaintiff] and the author of [title of the asserted work] expressly agree in a signed, written document that the work was to be considered a work made for hire?
Yes: _____ No: _____

ANNOTATIONS AND COMMENTS

17 U.S.C. § 101; 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.")

It is suggested that the instruction above be modified to include only those categories of specially ordered or commissioned works at issue in the case to avoid confusion.

A "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes.

An "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities. *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1492 (11th Cir. 1990). *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737, 109 S.Ct. 2166, 2170, 104 L.Ed 2d, 811 (1989) (discussing factors for determining whether person is an "employee" for purposes of work-made-for-hire doctrine).

9.16 Copyright– Ownership – Transfer

A transfer of copyright ownership, other than by operation of law, must be in writing and signed by the owner of the copyright or the owner's authorized agent. The writing may be an instrument of conveyance, such as a contract or assignment, or a note of memorandum of the transfer.

SPECIAL INTERROGATORIES

If you find that [Plaintiff] is not the author of [the claimed work], do you find by a preponderance of the evidence that:

1. [Plaintiff] received a transfer of the copyright in [the claimed work]?

Yes ____ No _____

If you answered "Yes" to Question No. 1, go on to Question No. 2.

2. The transfer was in writing?

Yes ____ No _____

If you answered "Yes" to Question No. 2, go on to Question No. 3.

3. The person transferring the copyright was the owner or the owner's authorized agent?

Yes ____ No _____

If you answered "No" to any of these Questions, then you must find that there was no valid transfer of copyright ownership.

ANNOTATIONS AND COMMENTS

17 U.S.C. §204(a) (transfer must be in writing). *See Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1532-3 (11th Cir. 1994).

9.17 Copyright — Infringement — Introduction to Elements

If you're persuaded that [name of plaintiff] owns a valid copyright, you can consider whether [name of defendant] improperly copied [name of plaintiff]'s copyrighted material. It is the burden of [name of plaintiff] to show that [name of defendant] infringed on his/her/its valid copyright. This is called "infringement" of a copyright. [Name of plaintiff] must show that [name of defendant] infringed on [his/her/its] valid copyright.

In this case, [name of plaintiff] claims that [name of defendant] infringed [his/her/its] copyright in [name of plaintiff's copyrighted work] by copying part[s] of it and including the copied material in [name of defendant]'s work, [name of defendant's copyrighted work]. To succeed on this claim, [name of plaintiff] must prove that [name of defendant] copied the part[s] of [name of plaintiff]'s copyrighted work that the law protects.

There are two ways in which [name of plaintiff] can prove a claim of copyright infringement.

First, [name of plaintiff] can show direct evidence that [name of defendant] actually copied the copyrighted material. For example, [name of plaintiff] could introduce believable eyewitness testimony or an admission by [name of defendant]. Such direct evidence is rare.

Or second, [name of plaintiff] can show indirect or circumstantial evidence that [name of defendant] copied [his/her/its] work. For example, indirect evidence of infringement may be proof that [name of defendant] tried to get a copy of [name of plaintiff]'s work and then published a [book, song, etc.] that is substantially similar to [name of plaintiff]'s [book, song, etc.]. In general, the two elements of infringement are (1) access and (2) substantial similarity.

9.18 Copyright — Infringement — Access

Remember, I described the two general elements of infringement as (1) access and (2) substantial similarity. I'll now discuss access in more detail.

[Name of plaintiff] can show that [name of defendant] had "access" to [his/her/its] work by showing that [name of defendant] had a reasonable opportunity to [see/hear] the work. It isn't necessary to show that [name of defendant] actually [saw/heard] [name of plaintiff]'s work before creating [name of defendant]'s own work if the evidence reasonably establishes that [name of defendant] could have [seen/heard] it and could have copied it.

But you can't base a finding that [name of defendant] had access to [name of plaintiff]'s work on mere speculation, conjecture, or a guess. To support a finding of access, there must be more than just a slight possibility of access. There must be a reasonable possibility of access.

Sometimes [name of plaintiff] can't show that [name of defendant] had access to [his/her/its] work before [name of defendant] created an alleged copy. In these cases, [name of plaintiff] can still establish a rebuttable presumption of copying by showing that the material [name of defendant] allegedly copied is so strikingly similar to [his/her/its] copyrighted material that the similarity is unlikely to have occurred unless there was copying.

Put another way, if [name of plaintiff]'s work and [name of defendant]'s work are so strikingly similar that a reasonable person would assume [name of defendant] copied from [name of plaintiff]'s work and that there is no possibility of independent creation, coincidence, or prior common source, then [name of plaintiff] is entitled to a rebuttable presumption that copying occurred. "Strikingly similar" is a greater degree of similarity than "substantially similar." An accused work is substantially similar to an original piece if an ordinary [observer/listener] would conclude that the accused work's creator unlawfully took protectable material of substance and value from the original piece. Even if there is little similarity between the pieces, the accused work can

still be substantially similar if the copied parts from the original piece are the important quality. A "rebuttable presumption" means that you assume that copying occurred unless [name of defendant] proves that it didn't happen.

If [name of plaintiff] shows (1) that [name of defendant] had access to the copyrighted material and that there is substantial similarity between the two works, or (2) that the works are strikingly similar, then the burden of proof shifts to [name of defendant] to prove that [his/her/its] work is an independent creation — not a copy. Proof that a work is an independent creation overcomes a presumption of copying.

SPECIAL INTERROGATORIES

Do you find from a preponderance of the evidence:

1. That [name of defendant] copied [name of plaintiff]'s work?

Yes: ____ No: ____

If you answered "Yes," don't answer Questions Nos. 2 through 4.

2. That [name of defendant] had access to [name of plaintiff]'s work — that is, that [name of defendant] had a reasonable opportunity to [view/hear] it?

Yes: ____ No: ____

And, that the allegedly copied portion of [name of plaintiff]'s work is substantially similar to [name of defendant]'s work?

Yes: ____ No: ____

If you answer "No" to either portion of this question, proceed to Question No. 3. If you answer "Yes" to both portions, you may skip Question No. 3 and proceed to No. 4.

3. That the allegedly copied part of [name of plaintiff]'s work is so strikingly similar to [name of defendant]'s work that the similarity is unlikely to have occurred unless there was copying?

Yes: ____ No: ____

4. That [name of defendant]'s work was independently created and was not copied from [name of plaintiff]'s work?

Yes: ____ No: ____

If you answered "No" to Question No. 4, you must find for [name of plaintiff] on [name of plaintiff]'s copyright-infringement claim.

ANNOTATIONS AND COMMENTS

This jury instruction applies when one party accuses another party of copyright infringement by means of copying from a copyrighted work and using the copied material in another later work. It can be used where printed materials are involved or in cases involving other copyrighted material.

Because direct evidence of copying is rare, the law provides for proof by circumstantial evidence as to all necessary elements. To the extent that Plaintiff relies on circumstantial evidence as to access or similarity, however, the presumption he creates is rebuttable. If the Defendant can prove independent creation, even if the two works appear to be copies, the Plaintiff cannot recover for copyright infringement.

Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 829 (11th Cir. 1982); *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1248 (11th Cir. 1999).

Baby Buddies, Inc. v. Toys "R" Us, Inc., 611 F. 3d 1308, 1315 (11th Cir. 2010) ("A plaintiff may prove copying directly, but because direct evidence of copying is rare a plaintiff may instead rely on indirect proof."); *Corwin v. Walt Disney World Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007) ("Striking similarity exists where the proof of similarity in appearance is so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.").

9.19 Copyright — Infringement — Substantial Similarity

Having discussed access, I'll now discuss the issue of substantial similarity. [Name of plaintiff] must prove that [name of defendant]'s accused work is substantially similar to [his/her/its] copyrightable expression in the copyrighted work. [Name of defendant]'s accused work is substantially similar in expression to [name of plaintiff]'s if an ordinary [observer/listener] would conclude that [name of defendant] unlawfully took [name of plaintiff]'s protectable expression by taking material of substance and value.

Even if the degree of similarity between [name of plaintiff]'s copyrighted work and [name of defendant]'s accused work is small in quantity, you can still find that there's substantial similarity if the copied portions of [name of plaintiff]'s copyrighted work are important in quality.

But if [name of defendant]'s copying is minimal or trivial, you shouldn't find infringement.

SPECIAL INTERROGATORIES

Do you find from a preponderance of the evidence:

1. That an ordinary observer, upon looking at both [name of defendant]'s accused work and [name of plaintiff]'s copyrighted work, would conclude that there are similarities.

Yes: ____ No: ____

If you answered "Yes," continue to the next question.

2. That the similarities are more than trivial?

Yes: ____ No: ____

If you answered "Yes," continue to the next question.

3. That, even if the similarities are small in quantity, they are substantial in quality?
Yes: ____ No: ____

If you answered "Yes," continue to the next question.

4. That the similarities are sufficiently substantial to cause an ordinary observer to conclude that [name of defendant] unlawfully took [name of plaintiff]'s protectable expression by taking material of substance and value?

Yes: ____ No: ____

On [name of plaintiff]'s claim that the copyrighted work and the accused work of [name of defendant] are substantially similar we find for (check one):

ANNOTATIONS AND COMMENTS

The Eleventh Circuit's general test for substantial similarity is the "lay observer" or "ordinary observer" test, and it applies to works that can be seen or heard. *See Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224 n.5 (11th Cir. 2008); *Bateman v. Mnemonics Inc.*, 37 USPQ2d 1225 (11th Cir.195), *vacated in part, reversed in part and remanded,* 38 USPQ2d 1225 (11th Cir. 1996); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 829 (11th Cir. 1982).

9.20 Copyright — Infringement — Contributory Infringement

In this case, [name of plaintiff] claims that [name of defendant] is a contributory infringer. A "contributory infringer" is one who, with knowledge of another's infringing conduct, induces, causes, or materially contributes to the infringing conduct. "Knowledge" means the alleged contributory infringer actually knew, or had reason to know, of the infringement. If you find that there has been a direct infringement of [name of plaintiff]'s copyrighted materials by one defendant, you can also consider whether there has been "contributory infringement" by another defendant (or a third party).

SPECIAL INTERROGATORIES

Do you find that from a preponderance of the evidence:

1. That there was a direct infringement of [name of plaintiff]'s copyright?

Yes: ____ No: ____

If you answered "No," you don't need to answer the remaining questions.

2. That [name of defendant] induced, caused, or materially contributed to the infringing conduct of this other defendant?

Yes: ____ No: ____

If you answered "No," you don't need to answer the remaining questions.

3. That [name of defendant] engaged in this contributory infringement with actual knowledge, or with reason to know, of the infringing activity relating to [name of plaintiff]'s copyright?

Yes: ____ No: ____

If you answered "No," you don't need to answer the remaining questions.

4. That [name of defendant] contributorily infringed [name of plaintiff]'s copyright(s)?

Yes: ____ No: ____

ANNOTATIONS AND COMMENTS

This jury instruction applies when there is a claim of contributory infringement. Before there can be contributory infringement by one Defendant, there must first be a direct or primary infringement by another. Further, before there can be contributory infringement, the Defendant must have acted with the requisite knowledge.

The above change does not include a requirement that the alleged contributory infringer have acted "intentionally." *See Cable/Home Communication Cooperation et al v. Network Productions, et al.*, 902 F.2d 829, 845 (11th Cir. 1990); *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987) ("The test for contributory infringement has been formulated as 'one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.' ")

However, after *Casella*, the United States Supreme Court included a specific reference to an "intentional" inducement. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930, 125 S.Ct. 2764, 2776, 162 L.Ed. 2d, 781 (2005) ("*Grokster*") ("One infringes contributorily by intentionally inducing or encouraging direct infringement ."). *See also, BUC Intern. Corp. v International Yacht Council*, 489 F.3d 1129, 1138 n.19 (11th Cir. 2007). ("Contributory infringement refers to the intentional inducement, causation or material contribution to another's infringing conduct.") Under the Eleventh Circuit's prior panel precedent rule, the *Casella* version of contributory infringement (rather than the *Grokster* language) was incorporated into this jury instruction. *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007) (quoting *NLRB v. Datapoint Corp*., 642 F.2d 123, 129 (5th Cir. 1981)); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000).

The Eleventh Circuit's standard for "knowledge" in a contributory infringement case is objective: "Knowledge or have reason to know." *Casella*, 820 F.2d at 365.

In *Grokster*, the Supreme Court held that intent can be found from "[e]vidence of active steps. . . taken to encourage direct infringement. . . such as advertising an infringing use or instructing how to engage in an infringing use..." *Id.* at 936. Nonetheless, where the claim for contributory infringement is based on sale of a copying device, "mere knowledge of

infringing potential or of actual infringing uses" of the defendant's device is not enough to support a finding of intent. 545 U.S. at 937. "Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, " the "staple-article rule" in *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 442, 104 S.Ct. 774, 788; 78 L.Ed.2d 574 (1984) "will not preclude liability."

The Supreme Court has looked to other intellectual property law for guidance as to contributory infringement copyright claims. For example, *Grokster* looked to patent infringement jurisprudence for guidance in determining the standard to be applied in a case claiming contributory infringement. *Id. See also, Global-Tech Appliances, Inc v. SEB S.A.*, U.S. __, 131 S.Ct. 2060, ____, 179 L. Ed. 2d 1167, 1175 (2011) (*Global-Tech* established a "willful blindness" standard for the knowledge element in a contributory infringement claim in a patent case.).

9.21 Copyright — Infringement — Vicarious Infringement

If you find that there is a direct infringement, you can then consider whether there has also been a vicarious infringement. A "vicarious infringer" is one who profits from a direct infringement while declining to exercise [his/her/its] right and ability to stop or limit the infringement.

Under this doctrine a party is responsible for the direct infringer's acts if the party controlled or supervised, or had the right and ability to control or supervise, the direct infringer's actions.

If you find that there has been a direct infringement of [name of plaintiff]'s copyrighted materials by one defendant (or third party), you can consider whether there has been "vicarious infringement" by another defendant.

To find that [name of defendant] is liable for another party's infringement, you must first find that [name of defendant] had the right and ability to control or supervise the other party's infringing action and either controlled the action, or failed to exercise [his/her/its] right and ability to prevent the infringement. Also, you must find that [name of defendant] directly profited from the other's infringement.

SPECIAL INTERROGATORIES

1. Was there a direct infringement by someone or some entity other than [name of defendant] (i.e., a third party)?

Yes: ___ No: ____

If the answer to the above question is "Yes," answer the next question. If not, you should stop here.

2. Did [name of defendant] directly profit from the third party's direct infringement?

Yes: ___ No: ____

If the answer to the above question is "Yes," answer the next question. If not, stop here.

3. Did [name of defendant] have the right to stop or limit the direct infringement?

Yes: ___ No: ____

If the answer to the above question is "Yes," proceed to the next question. If not, stop here.

4. Do you find that [name of defendant] vicariously infringed [name of plaintiff]'s copyright either by controlling or supervising the direct infringement, or by failing to exercise [his/her/its] right to stop or limit the infringement?

Yes: ___ No: ____

ANNOTATION AND COMMENTS

The United States Supreme Court has observed that "'the lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn . . .' [citation omitted]. The lack of clarity in this area may, in part, be attributable to the fact that an infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner." *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417, 435 n.17, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

This pattern instruction is based on the common law doctrine of vicarious infringement recognized in *Metro-Goldwyn-Mayer Studios Inc. Grokster, Ltd.*, 545 U.S. 913, 931 n.9, 125 S. Ct 2764, 2777, 162 L.Ed 2d 781, (2005) (vicarious liability was not at issue in *Grokster*; this statement of the law is dicta) and in *BUC Intern. Corp. v. International Yacht Council*, 489 F.3d 1129, 1138 n.19 (11th Cir. 2007)(quoting *Grokster* n.9; jury's finding with respect to vicarious liability was not an issue on appeal). *See also, Southern Bell Tel. and Tel. Co. v. Associated Tel Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985) ("An individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for the infringement [citations to district court cases omitted] even if they were ignorant of the infringement;" however, Court noted that "all appellants had actual knowledge of this solicitation.").

In *Grokster*, MGM had argued a vicarious liability theory seeking to impose liability "even if the defendant initially lacks knowledge of the infringement." 545 U.S. at 931 n.9. The *Grokster* court also announced the requirement that a defendant "profit directly." *Id*. The Supreme Court did not address MGM's vicarious liability theory in *Grokster*, and instead resolved the case based on an inducement theory. Nevertheless, the Supreme Court referred to the vicarious liability theory as articulated in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963), which is the test set forth in this instruction.

9.22 Copyright — Infringement — Software

For a claim of copyright infringement for software, you must apply the same elements as in any other copyright-infringement claim, which include proof of access to the copyrighted work and substantial similarity. But even if you find that [name of defendant]'s software is substantially similar to [name of plaintiff]'s software, not all similarity supports a claim of infringement. And even if [name of defendant]'s software is literally (or even nonliterally) similar to [name of plaintiff]'s software, that isn't necessarily enough to establish copyright infringement. You must determine whether there is "substantial similarity" between [name of defendant]'s allegedly infringing program and the original elements of [name of plaintiff]'s software that the law protects.

To do that, you'll need to filter [name of plaintiff]'s copyrighted computer program to decide what part of [his/her/its] copyrighted software program is protected by the law and what part is not protectable.

You'll need to break down the allegedly infringed program — [name of plaintiff]'s copyrighted work — into its structural parts so you can consider the individual elements of [name of plaintiff]'s copyrighted work. Then you'll need to determine which of the elements that [name of plaintiff] claims have been infringed are protected by the law. The law doesn't protect the following elements, and you should filter these out:

- elements that are only an idea;
- elements required based only on logic and efficiency;
- elements required because of hardware or software, computer- industry programming, and practices or elements taken from the public domain; or

- other elements of the program component under consideration that the law doesn't protect.

Once you've applied this filter to eliminate items from consideration that aren't legally protectable, you're entitled to include in your consideration for copyright infringement both those items in [name of defendant]'s software (if any) that are literally similar as well as those elements that aren't literally an exact copy of the copyrighted work.

But even if you find that [name of defendant] intentionally included literal and nonliteral copies of [name of plaintiff]'s copyrighted software, that similarity must relate to [name of plaintiff]'s copyrighted software or components of software that are legally protectable.

SPECIAL INTERROGATORIES

Do you find from a preponderance of the evidence:

1. That [name of defendant]'s software has elements that are literally or nonliterally similar to any portion of [name of plaintiff]'s copyrighted software?

Yes: ____ No: ____

If you answered "Yes," you don't need to answer the remaining questions.

2. That the law protects any of the allegedly infringed portions of [name of plaintiff]'s copyrighted software that are literally or nonliterally similar to [name of defendant]'s software?

Yes: ____ No: ____

If you answered "No," you don't need to answer the next question.

3. For those portions of copyrighted software that the law protects and that [name of plaintiff] claims were infringed, that [name of defendant] wrongfully copied any of

Yes: ____ No: ____

ANNOTATIONS AND COMMENTS

This jury instruction applies when the claim is that a copyrighted computer program has been infringed. It is meant to take into account that copyrighted software is functional and may incorporate wholly unprotectable elements relating to efficiency, hardware requirements, industry standards and the like. This analysis should be applied to all the components that the plaintiff claims were infringed whether the similarity is literal or non-literal. *Bateman v. Mnemonics, Inc*, 79 F.3d 1532, 1543-49 (11th Cir. 1996).

9.23 Copyright — Infringement — Software Compatibility

In alleged copyright infringement for software, some parts of the software are required because of external factors. These external factors include:

- the need for the computer program to perform certain functions in a specific computing environment;
- the mechanical specifications of the computer on which a program is intended to run; and
- compatibility requirements of other programs that the program is designed to perform in conjunction with.

So if you find that [name of defendant] has copied a portion of [name of plaintiff]'s software, but that [name of defendant] used those elements because of external factors such as compatibility, the external considerations may mean there's no infringement.

SPECIAL INTERROGATORIES

Do you find that from a preponderance of the evidence:

1. That [name of defendant] copied any portion of [name of plaintiff]'s copyrighted software?

Yes: ____ No: ____

[If you answer "No," you don't need to answer the following question.]

2. That [name of defendant]'s use of elements of [name of plaintiff]'s copyrighted software is a result of external factors such as the requirements of the specific computing environment, technical specifications, or compatibility?

Yes: ____ No: ____

ANNOTATIONS AND COMMENTS

This jury instruction applies when the claim is that a copyrighted computer program has been infringed. It is meant to take into account that external factors can dictate the composition of the software program and thereby may negate copyright infringement. *Bateman v. Mnemonics, Inc*, 79 F.3d 1532, 1547 n.33 (11th Cir. 1996).

9.24 Copyright — Defenses — Independent Creation

As a defense, [name of defendant] asserts that [he/she/it] created [his/her/its] work independently — without copying [name of plaintiff]'s copyrighted work.

If you find by a preponderance of the evidence that [name of defendant] created [his/her/its] work independently, you should find in [his/her/its] favor.

SPECIAL INTERROGATORIES

Do you find by a preponderance of the evidence that [name of defendant] created [his/her/its] work independently?

Yes: ____ No: ____

ANNOTATIONS AND COMMENTS

This jury instruction applies when a Defendant raises as a defense that his work's origin was of independent creation. A Defendant can fully negate any infringement claim if he can prove by a preponderance of the evidence that he independently created his work. *See Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1233 (11th Cir. 2002) (affirming district court's grant of summary judgment in favor of Defendant where Defendant presented uncontradicted evidence of independent creation, even though Plaintiff's and Defendant's works were "practically identical") (citing *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 (11th Cir. 1986) ("[U]ncontradicted evidence of independent creation . . . fully negat[es] any claim of infringement.)).

9.25 Copyright — Defenses — Affirmative Defense — Fair Use

[Name of defendant] claims, as an affirmative defense, that [his/her/its] use of [name of plaintiff]'s copyrighted work is a fair use. A fair use isn't an infringement of copyright. [Name of defendant] must prove fair use by a preponderance of the evidence.

To determine whether [name of defendant]'s use of [name of plaintiff]'s work qualifies as a "fair use," consider the following four factors:

1. The purpose and character of [name of defendant]'s use of the work;

2. The nature of [name of plaintiff]'s work;

3. The amount and importance of the portion of [name of plaintiff]'s copyrighted work that [name of defendant] used; and

4. the effect of the use upon the potential market for or value of [name of plaintiff]'s copyrighted work.

Certain uses recognized as favoring fair use include criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. These examples are illustrative.

1. The Purpose and Character of [Name of defendant]'s Use.

The first factor looks at whether [name of defendant]'s use supersedes the use of [name of plaintiff]'s copyrighted work or, instead, adds new meaning, expression, or otherwise uses [name of plaintiff]'s work for a different purpose. It asks whether, and to what extent, [name of defendant]'s use is transformative. One example of a transformative use is a parody, which uses the original copyrighted work to comment on or criticize it.

The first factor also looks at whether the use is commercial or noncommercial. The focus of this distinction isn't whether the motive of the use is monetary gain, but whether the user stands to profit from using the copyrighted work without paying the customary price.

Analysis of the first factor can affect the remaining factors. The more transformative the use, the less likelihood that the use substitutes for the copyrighted work, and thus the less significance is to be afforded other factors, such as the effect on the potential market for or value of [name of plaintiff]'s work.

2. The Nature of [Name of plaintiff]'s Copyrighted Work.

The second factor recognizes that some works may be used more freely, or more fairly, than others. Uses of factual, purely useful, or derivative works are more likely to amount to fair use than uses of works such as fiction. Similarly, uses of published works are more likely to amount to fair use than uses of unpublished works.

Also, out-of-print works that are no longer available for purchase through normal channels are more susceptible to fair use.

3. The Amount and Importance of the Portion Used.

The third factor considers whether the amount and importance of the portion taken was reasonable in light of the purpose of [name of defendant]'s use and the likelihood that [name of defendant]'s use will supersede the use of [name of plaintiff]'s copyrighted work.

Also, out-of-print works that are no longer available for purchase through normal channels are more susceptible to fair use.

4. The Effect on the Potential Market or Value of [Name of plaintiff]'s Copyrighted Work.

Under this factor, you should consider not only actual markets for [name of plaintiff]'s copyrighted work, but also markets likely to be developed. And you should consider not only the harm caused by [name

of defendant]'s use, but also whether widespread uses of the same sort by others would result in a substantial adverse effect on a market, or potential market, for [name of plaintiff]'s copyrighted work. Ask yourself: does [name of defendant]'s use supersede or impermissibly harm the market or potential market for [name of plaintiff]'s copyrighted work?

[Name of plaintiff] can't preclude some transformative uses — even if the use may result in some harm to [his/her/its] markets. For example, an effective parody may lower demand for the original copyrighted work, but this isn't the type of harm considered under this factor.

Balancing the Four Factors.

You should explore all four factors and weigh the results together. You should consider the purposes of copyright: first, to promote public access to knowledge and new ideas, and second, to give authors an incentive to create copyrighted works for the public's benefit.

SPECIAL INTERROGATORIES

Do you find from a preponderance of the evidence:

1. That [name of defendant]'s use is for the purpose of criticism, comment, news reporting, teaching, scholarship, or research?

Yes: ___ No: ___

2. That [name of defendant]'s use adds new meaning or expression to [name of plaintiff]'s copyrighted work or otherwise uses [name of plaintiff]'s work for a different purpose?

Yes: ___ No: ___

3. That [name of defendant]'s use of [name of plaintiff]'s copyrighted work is noncommercial?

Yes: ___ No: ___

4. That [name of plaintiff]'s copyrighted work is factual — not creative — in nature?

Yes: ___ No: ___

5. That [name of plaintiff]'s copyrighted work was previously published?

Yes: ___ No: ___

6. That the amount and importance of the portion taken by [name of defendant] is reasonable in light of the purpose of [his/her/its] use?

Yes: ___ No: ___

7. That [name of defendant]'s use doesn't affect a protected (nontransformative) market, or potential market, for [name of plaintiff]'s copyrighted work?

Yes: ___ No: ___

8. Balancing the factors and your responses to above questions, do you find that [name of defendant] has proved fair use by a preponderance of the evidence?

Yes: ___ No: ___

ANNOTATIONS AND COMMENTS

This jury instruction applies when a defendant raises as an affirmative defense that his use of a plaintiff's work should be excused as a "fair use." The affirmative defense of fair use is a mixed question of law and fact as to which the proponent carries the burden of proof. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1307 n.21 (11th Cir. 2008).

Section 107 of the Copyright Act lists the four factors to be considered to determine if the use of the copyright holder's work is a fair use. 17 U.S.C. § 107. Nevertheless, the fair use doctrine is an "equitable rule of reason," and neither the examples of possible fair uses nor the four factors recited in the statute are to be considered exclusive. *Peter Letterese & Assocs.*, 533 F.3d at 1308 (citing *Stewart v. Abend*, 495 U.S. 207, 236-37, 110 S. Ct. 1750, 1768, 109 L. Ed. 2d 184 (1990)). Moreover, the statutory factors are not to be treated in isolation, one from another—all four factors "are to be explored, and the results weighed together in light of the purposes of copyright." *Id*.

The first factor to be considered, the purpose and character of the use of the copyrighted work (17 U.S.C. § 107(1)), is a factor with several facets. *SunTrust Bank*, 268 F.3d at 1269. Two of these facets are "(1) whether the use serves a nonprofit educational purpose, as opposed to a commercial purpose; and (2) the degree to which the work is a 'transformative' use, as opposed to a merely superseding use, of the copyrighted work." *Peter Letterese & Assocs.*, 533 F.3d at 1309. These facets are not to be used to create hard evidentiary presumptions or categories of presumptively fair use. *Id*. at 1309. "Rather, the commercial or non-transformative uses of a work are to be regarded as separate factors that tend to weigh against a finding of fair use, and the force of that tendency will vary with the context." *Id*.

As to the first of these facets, the "Supreme Court has emphasized that '[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.' " *Id*. at 1310 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562, 105 S. Ct. 2218, 2231, 85 L. Ed. 2d 588 (1985)).

The second facet is the degree to which the defendant's use is "transformative," as opposed to a superseding use, of the copyrighted work. *Id*. A transformative work is "'one that adds something new, with a further purpose or different character, altering the first work with new expression, meaning or message.'" *Id*. at 1310 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 114 S. Ct. 1164, 1171, 127 L. Ed. 2d 500 (1994). The more transformative the new work, the less significance is to be afforded other factors, like commercialism, that may weigh against a finding of fair use. *Id*. at 1309-9.

Under the second factor, the nature of the copyrighted work (17 U.S.C. § 107(2)), there is a hierarchy of copyright protection, depending upon the nature of the copyrighted work. Original works merit greater protection than derivative works; creative works merit greater protection than factual works; and unpublished works merit greater protection than published works. *Peter Letterese & Assocs.*, 533 F.3d at 1312; *SunTrust Bank*, 268 F.3d at 1271.

The out-of-print nature of a work is also entitled to consideration under this second factor. The legislative history of Section 107 provides: "A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user.

If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case . . . ." S. Rep. No. 94-473, at 64 (1975) (1975 WL 370213). The Eleventh Circuit endorsed the relevance of the "out-of-print" nature of a work under the second factor in *Peter Latterese & Assocs., Inc. v. World Inst. Of Scientology Enters*., 533 F.3d 1287, 1313 (11th Cir. 2008).

The third factor to be considered is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. 17 U.S.C. §107(3). In order to come within a fair use, the portion of the copyrighted work that a defendant has taken must be reasonable in light of the purpose and character of the use. *Peter Letterese & Assocs.*, 533 F.3d at 1314. This factor is also "intertwined" with the fourth factor, and "partly functions as a heuristic to determine the impact on the market for the original." *Id*. The inquiry, therefore, is whether the amount taken is reasonable in light of the purpose of the use and the likelihood of market substitution. *Peter Letterese & Assocs.*, 533 F.3d at 1314 n.30.

Two points on this factor bear particular emphasis. First, the amount and substantiality of the portion used is measured with respect to the copyrighted work as a whole, and it is not measured with respect to the putatively infringing work. *Peter Letterese & Assocs.*, 533 F.3d at 1314-15. Second, in addition to evaluating the quantity of the work copied, what must be also considered is its quality and importance to the original work. Even if it is only a small amount of material that is copied, it may be substantial from a qualitative standpoint if the defendant has copied the heart of the copyrighted work. *Id*.

The fourth factor to be considered is the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §107(4). Here, two inquiries are to be made: "(1) the extent of the market harm caused by the particular actions of the alleged infringer, and (2) whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market." *Peter Letterese & Assocs.*, 533 F.3d at 1315 (quoting *Campbell*, 510 U.S. at 590, 114 S.Ct. at 1177) (internal quotation marks omitted).

The adverse effect with which fair use is primarily concerned is that of market substitution. Because the focus here is on uses "that most directly threaten the incentives for creativity which the copyright tries to protect," a court should be far less concerned if the user is profiting from an activity of which the copyright owner could not possibly take advantage for his own profit. *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984).

9.26 Copyright — Defenses — Affirmative Defense — First Sale

The exclusive right to distribute a particular copy of a copyrighted work under the Copyright Act extends only to the first sale (or other transfer of ownership) of the copy. Once title to a copy passes through a first sale (or other transfer of ownership) by the copyright holder, the owner of that copy may transfer it to another person, through sale or otherwise, without the copyright owner's permission.

To establish the "first sale" defense to infringement of [name of plaintiff]'s distribution right, [name of defendant] must prove each of the following elements by a preponderance of the evidence:

First, you must find that the copy that [name of defendant] transferred was lawfully made under the Copyright Act.

And second, you must find that [name of defendant] owned the copy or was authorized by the owner of the copy to transfer it to another person.

If you find that [name of defendant] has proved the above elements by a preponderance of the evidence, your verdict must be for [name of defendant] on the claim for infringement of [name of plaintiff]'s exclusive right to distribute the copyrighted work.

This defense doesn't apply to other copyright rights that [name of plaintiff] may own. For example, this defense doesn't permit [name of defendant] to make additional copies of the copyrighted work.

SPECIAL INTERROGATORIES

1. Was the copy that [name of defendant] sold or otherwise disposed of lawfully made under the Copyright Act?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

2. Did [name of defendant] own the copy?

Yes: ____ No: ____

If the answer to the above question "Yes," skip the next question; if not, answer the next question.

3. Was [name of defendant] authorized by the copy's owner to transfer it to another person?

Yes: ____ No: ____

4. If the answer to Question No. 2 or No. 3 is "Yes," do you find that [name of defendant]'s first-sale defense precludes [name of plaintiff]'s claim for infringement of [his/her/its] distribution right?

Yes: ___ No: ___

ANNOTATION AND COMMENTS

17 U.S.C. § 109; *Am. Int'l Pictures, Inc. v. Foreman*, 576 F.2d 661, 664 (5th Cir. 1978).

The Eleventh Circuit has not addressed whether a copy of a copyrighted work manufactured outside the United States is "lawfully made under the Copyright Act." The Second Circuit has held that Section 109 does not apply to copyrighted goods manufactured abroad. *See John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 222 (2d Cir. Aug. 15, 2011). The Ninth Circuit also has held that Section 109 does not apply in this situation, although it has adopted an exception for goods manufactured abroad but first sold in the United States with the consent of the copyright owner. *See Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 985-90 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 565, 178 L. Ed. 2d 470 (2010).

The Eleventh Circuit also has not addressed the circumstances under which a person acquires ownership of a copy of a copyrighted work. The Ninth Circuit has set forth a multi-factor test for determining whether a person is an owner of a copy or instead a mere licensee. *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010); *see also UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1180 (9th Cir. 2011). The Second Circuit and

Federal Circuit have adopted slightly different formulations for addressing the distinction between owners and licensees of copies, albeit under a separate provision of the Copyright Act. *See Krause v. Titleserv, Inc.*, 402 F.3d 119, 124 (2d Cir. 2005) ("[C]ourts should inquire into whether the party exercises sufficient incidents of ownership over a copy of the program to be sensibly considered the owner of the copy for purposes of § 117(a)."); *DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354, 1360-62 (Fed. Cir. 1999) (distinguishing the Ninth Circuit rule in the context of Section 117 of the Copyright Act).

Because the Eleventh Circuit has yet to weigh in and the case law is not yet settled, the model jury instruction for this defense is intentionally silent on these issues.

9.27 Copyright — Defenses — Affirmative Defense — Implied License

[Name of defendant] claims that [name of plaintiff] granted him a license to use [name of plaintiff]'s copyrighted work. A license is a contract giving someone permission to use the work. A license doesn't have to be in writing. Rather, as alleged here, a license can be implied from conduct. To establish this defense, [name of defendant] must prove each of the following by a preponderance of the evidence:

First, you must find that [name of plaintiff] created the work, or caused it to be created, at [name of defendant]'s request or the request of someone acting on [name of defendant]'s behalf.

Second, you must find that [name of plaintiff] delivered the work, or caused it to be delivered, to [name of defendant] or someone acting on [name of defendant]'s behalf.

And third, you must find that [name of plaintiff] intended that [name of defendant] [insert exclusive rights allegedly violated (i.e., copy, distribute, publicly display, publicly perform, or create derivative works based upon)] [his/her/its] copyrighted work. [Name of plaintiff]'s intent may be inferred from the work's nature or the circumstances surrounding the work's creation.

If you find that [name of defendant] has proved these elements by a preponderance of the evidence, your verdict must be for [name of defendant] on the claim of copyright infringement if [name of defendant]'s use doesn't exceed the scope of the [his/her/its] license. [Name of defendant] can still commit copyright infringement if [he/she/it] exceeded the scope of the license.

SPECIAL INTERROGATORIES

1. Did [name of plaintiff] create the copyrighted work at issue, or cause it to be created, at [name of defendant]'s request or the request of someone acting on [name of defendant]'s behalf?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

2. Did [name of plaintiff] deliver the copyrighted work at issue, or cause it to be delivered, to [name of defendant] or someone acting on [name of defendant]'s behalf?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

3. Did [name of plaintiff] intend that [name of defendant] [insert exclusive rights allegedly violated (i.e., copy, distribute, publicly display, publicly perform, or create derivative works based upon)] his copyrighted work?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

4. Was [name of defendant]'s use of the copyrighted work within the scope of the implied license?

Yes: ____ No: ____

5. If the answer to the above question is "Yes," do you find that [name of defendant] had an implied license to use [name of plaintiff]'s copyrighted work?

Yes: ___ No: ___

ANNOTATIONS AND COMMENTS

The Copyright Act requires an exclusive license to be in writing and signed by the owner of the rights conveyed. *See* 17 U.S.C. §§ 101 (defining "transfer of copyright ownership") & 204(a). However, non-exclusive licenses are exempt from the writing requirement and may be granted orally or implied from conduct. *See Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1235 (11th Cir. 2010) (citing *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 752 (11th Cir. 1997)). This instruction addresses the circumstances under which a non-exclusive license may be implied from conduct. Because an implied license is an affirmative defense to a claim of copyright infringement, the alleged infringer has the burden of establishing this defense. *See Latimer* 601 F.3d at 1235.

9.28 Copyright — Defenses — Affirmative Defense — Copyright Estoppel (Advisory Jury)

Name of defendant] claims that [name of plaintiff] is barred from asserting his copyright-infringement claim against [name of defendant] by the doctrine of estoppel. To establish estoppel, [name of defendant] must prove each of the following elements by a preponderance of the evidence:

First, you must find that [name of plaintiff] knew the facts of [name of defendant]'s infringing conduct.

Second, you must find that [name of plaintiff]'s statement or conduct (either action or inaction) caused [name of defendant] to believe that [name of plaintiff] wouldn't pursue a claim for copyright infringement against [him/her/it].

Third, you must find that [name of plaintiff] intended for [name of defendant] to act on [his/her/its] statement or conduct, or [name of defendant] had a right to believe [name of plaintiff] so intended.

Fourth, you must find that [name of defendant] didn't know that [name of plaintiff] would pursue a claim for copyright infringement against [him/her/it].

And fifth, you must find that [name of defendant] was injured as a result of his reliance on [name of plaintiff]'s statement or conduct.

If you find that [name of defendant] has proved these elements by a preponderance of the evidence, your verdict must be for [him/her/it] on the claim for copyright infringement.

SPECIAL INTERROGATORIES

1. Did [name of plaintiff] know the facts of [name of defendant]'s infringing conduct?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

2. Did [name of plaintiff] make a statement or act in a way that caused [name of defendant] to believe that [name of plaintiff] wouldn't pursue a claim of copyright infringement against [him/her/it]?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

3. Did [name of plaintiff] intend for [name of defendant] to act on his statement or conduct, or did [name of defendant] have a right to believe that [name of plaintiff] intended him to act on [his/her/its] statement or conduct?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

4. Did [name of defendant] know that [name of plaintiff] would pursue a claim for copyright infringement against him?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

5. Did [name of defendant] rely on [name of plaintiff]'s conduct?

Yes: ____ No: ____

If the answer to the above question is "Yes," answer the next question; if not, you should stop here.

6. Was [name of defendant] injured as a result of his reliance on [name of plaintiff]'s statement or conduct?

Yes: ____ No: ____

7. If the answer to the above question is "Yes," do you find that the doctrine of estoppel bars [name of plaintiff] from asserting his copyright-infringement claim against [name of defendant]?

Yes: ___ No: ___

ANNOTATIONS AND COMMENTS

HGI Assocs., Inc. v. Wetmore Printing Co., 427 F.3d 867, 875-76 (11th Cir. 2005). The doctrine of estoppel is an equitable defense. Thus, the judge and not the jury should decide whether estoppel applies, though the judge may have the jury consider the issue in an advisory capacity. *See* Fed. R. Civ. P. 3(c).

9.29 Copyright — Defenses — Affirmative Defense — Statute of Limitations

[Name of defendant] claims that [name of plaintiff]'s copyright claim is barred by the statute of limitations, which is a time limit for bringing a claim.

To establish that the statute of limitations bars [name of plaintiff]'s copyright claim, [name of defendant] must prove by a preponderance of the evidence that [name of plaintiff] failed to file [his/her/its] lawsuit within three years after [he/she/it] knew or, in the exercise of reasonable diligence, should have known about the infringement.

Each act of infringement is a separate harm that creates an independent claim for relief. The statute of limitations only prevents [name of plaintiff] from recovering remedies for infringing acts that occurred more than three years before [name of plaintiff] filed [his/her/its] lawsuit.

SPECIAL INTERROGATORIES

1. Did [name of plaintiff] fail to file [his/her/its] lawsuit within three years after [he/she/it] knew or, in the exercise of reasonable diligence, should have known about the infringement?

Yes: ____ No: ____

2. If the answer to the above question is "Yes," do you find that the statute of limitations bars [name of plaintiff]'s copyright-infringement claim?

Yes: ____ No: ____

ANNOTATIONS AND COMMENTS

17 U.S.C. § 507(b); *Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1236 (11th Cir. 2002) (Birch, J., specially concurring), *cert. denied*, 539 U.S. 903, 123 S. Ct. 2251 (2003).

9.30 Copyright — Damages — General Charge

If you find that [name of plaintiff] has failed to prove [his/her/its] copyright-infringement claim or that [name of defendant] has proved its affirmative defense[s] by a preponderance of the evidence, you won't consider the question of damages. If you find that [name of plaintiff] has proved by a preponderance of evidence that [name of defendant] has infringed [name of plaintiff]'s copyright, and [name of defendant] has not proved a defense, you must determine whether [name of plaintiff] is entitled to recover damages.

[Read one of the below, depending on [name of plaintiff]'s election of remedies. See Annotation.]

[Alternative 1. If [name of plaintiff] elects to recover only actual damages plus profits or elects to recover only statutory damages before the jury is instructed: In the next instruction, I'll define how you must determine the amount of damages, if any, to award to [name of plaintiff].]

[Alternative 2. If [name of plaintiff] seeks to have the jury make findings on both actual damages plus profits and statutory damages: [Name of plaintiff] may recover actual or statutory damages. I'll define these terms in the following instructions.]

SPECIAL INTERROGATORIES

Do you find by a preponderance of the evidence that [name of defendant] infringed [name of plaintiff]'s copyright?

Yes: ____ No: ____

If you answered "Yes," proceed to the next question. If you answered "No," sign the form and don't answer any additional questions.

ANNOTATIONS AND COMMENTS

This jury instruction provides a general statement of the circumstances under which a Plaintiff may recover damages from a Defendant. Upon finding by a preponderance of the evidence that a Defendant has infringed Plaintiff's copyright, the jury determines whether the Plaintiff can recover damages. *See Donald Frederick Evans & Assocs., Inc. . Cont'l Homes, Inc.*, 785 F.2d 897, 903 (11th Circ. 1986) (establishing a prima facie copyright infringement claim requires proof by a preponderance of the evidence). A prevailing Plaintiff is entitled to recover his actual damages plus the Defendant's profits or statutory damages. *See* 17 U.S.C. § 504 (a & b) (actual damages and profits); *id.* § 504 (c) (statutory damages); *Jordan v. Time, Inc.*, 111 F.3d 102, 104 (11th Cir. 1997). Though a Plaintiff may elect between these two forms of recovery before the jury is instructed, the statute allows a Plaintiff to elect statutory damages (at any time before a final judgment is rendered.) 17 U.S.C. § 504 (c); *Jordan*, 111 F.3d at 104. To cover all the possible permutations, the instruction provides two alternatives.

9.31 Copyright — Damages — Actual Damages

[Name of plaintiff] is entitled to recover any actual damages suffered because of the infringement. "Actual damages" means the amount of money adequate to compensate [name of plaintiff] for the injury to the market value of the copyrighted work caused by the infringement. In this case, [name of plaintiff] claims that the injury to the market value of [his/her/its] copyrighted work is measured by:

- licensing revenue lost because of the infringement; profits on sales lost because of the infringement; or

- other measure specific to the case.

[Name of plaintiff] has the burden of first proving to a reasonable probability a causal connection between the [name of defendant]'s alleged act(s) of infringement and any injury to the market value of the copyrighted work at the time of infringement. If the [name of plaintiff] does so, [name of defendant] must show that this injury to the market value of [name of plaintiff]'s copyrighted work would have occurred even if there had been no infringement by [name of defendant].

SPECIAL INTERROGATORIES

1. Do you find to a reasonable probability that [name of plaintiff] suffered an injury to the market value of the copyrighted work?

Yes: ____ No: ____

If you answered "No," you don't need to answer the remaining questions.

2. Do you find to a reasonable probability that the injury to the market value of the copyrighted work was caused by [name of defendant]'s alleged act[s] of infringement?

Yes: ____ No: ____

If you answered "No," you don't need to answer the remaining questions.

3. Do you find to a reasonable probability that this injury to the market value of [name of plaintiff]'s copyrighted work would have occurred even if there had been no infringement by [name of defendant]?

Yes: ____ No: ____

If you answered "Yes," you don't need to answer the following question.

4. What amount of money do you determine is adequate to compensate [name of plaintiff] for the injury to the market value of the copyrighted work caused by the infringement?

$_____

ANNOTATIONS AND COMMENTS

By statute, the "copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement." 17 U.S.C. 504(b). The damages suffered are to compensate of the copyright for any injury to the market value of the copyrighted work, and it "often is measured by the revenue that the plaintiff lost as a result of the infringement." Montgomery v. Noga, 168 F.3d 1282, 1294, 1295 n.19 (11th Cir. 1999). To collect actual damages, a copy right claimant must demonstrate a causal connection between the infringing party's activity and any injury to the market value of the copyrighted work at the time of infringement. Id. at 1294.

A plaintiff's statutory burden must also be read in conjunction with the well-established principle that any claim of damages may not be based on pure speculation. See e.g Telecom Tech. Servs. Inc. v. Rolm Co., 388 F.3d 820, 830 (11th Cir. 2004) (addressing claim that damages were too speculative); Univ. Computing Co. v. Lykes-YoungstownCorp., 504 F.2d 518, 536 (5th Cir. 1974) (noting that "the defendant is normally not assessed damages on wholly speculative expectations of profits"). "[O]nce a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and the loss of revenue, the burden shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression."

Harper & Row Publishers v. National Enterprises, 471 U.S. 539, 567 105 S.Ct. 2218, 2233, 85L.Ed. 2d 588 (1985).

Such a claim for actual damages may include a retroactive license fee measured by what the Plaintiff would have earned by licensing the infringing use to the Defendant. See e.g., Montgomery, 168 F.3d at 1295-96 (affirming jury award of actual damages based on retroactive license fee).

9.32 Copyright — Damages — Statutory Damages

[Name of plaintiff] seeks a statutory damage award. "Statutory damages" are damages that are established by Congress in the Copyright Act. The purposes are to compensate the copyright owner, penalize the infringer, and deter future copyright-law violations. The amount awarded must be between $750 and $30,000 for each copyrighted work that you found to be infringed, unless one of the exceptions applies, as I'll explain later.

- To determine the appropriate amount to award, you can consider the following factors:

- the profits [name of defendant] earned because of the infringement;

- the revenues that [name of plaintiff] lost because of the infringement;

- the difficulty of proving [name of plaintiff]'s actual damages;

- the circumstances of the infringement;

- whether [name of defendant] intentionally infringed [name of plaintiff]'s copyright; and

- deterrence of future infringement.

[If [name of plaintiff] proves that [name of defendant] willfully infringed [his/her/its] copyright, 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 "willful" if [name of plaintiff] proves that [name of defendant] knew that [his/her/its] actions constituted infringement of [name of plaintiff]'s copyright.]

[If [name of defendant] proves that he innocently infringed [name of plaintiff]'s copyright, you may — but are not required to — reduce the statutory damage award to a sum as low as $200 per copyrighted work. Infringement is "innocent" if [name of defendant] proves that [he/she/it] didn't know, and had no reason to know, that [his/her/its] acts constituted infringement.]

[You can't find that [name of defendant] was an innocent infringer if a notice of copyright appeared in the correct form and position on the published [copy/copies/phonorecords] of [name of plaintiff]'s [work/sound recording] to which [name of 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."/in the case of phonorecords, the & phonorec symbol (the letter p in a circle)], [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, in the case of a phonorecord, in addition to the foregoing, if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, the producer's name must be considered part of the notice], 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.]

SPECIAL INTERROGATORIES

You should answer the following questions for each work infringed:

1. Do you find by a preponderance of the evidence that the [name of defendant]'s infringement was innocent?

Yes: ____ No: ____

If your answer to this question is “No,” then proceed to Question No. 2. If your answer to this question is “Yes,” then you may award statutory damages between $200 and $30,000 per work.

What is the amount of statutory damages you award for this work?

$_____

[If the infringed work is published, then the following Questions Nos. 1A and 1B should be substituted for Question No. 1 above, and should be further modified as necessary in accordance with the type of work at issue in the case. See Note 6 below.

1A. Do you find by a preponderance of the evidence that [name of defendant]’s infringement was innocent?

Yes: ____ No: ____

If your answer to this question is “No,” then proceed to Question No. 2. If your answer to this question is “Yes,” then proceed to Question No. 1B.

1B. Do you find that the copy of the published work to which [name of defendant] had access contained a copyright notice in the proper form — that is, the word “copyright” or the © symbol, the year of first publication, and identification of the copyright owner?

[This special interrogatory should be modified appropriately in the case of sound recordings.]

Yes: ____ No: ____

If your answer to this question is “No,” then proceed to Question No. 2. If your answer to this question is “Yes,” then you may award statutory damages between $200 and $30,000 per work.

What is the amount of statutory damages you award for this work?

$_____]

2. Do you find by a preponderance of the evidence that [name of defendant]'s infringement was willful?

Yes: ____ No: ____

If your answer to this question is "No," then you may award statutory damages between $750 and $30,000 per work. If your answer to this question is "Yes," then you may award statutory damages between $750 and $150,000 per work.

What is the amount of statutory damages you award for this work?

$ _____

ANNOTATIONS AND COMMENTS

1. Authority. Under 17 U.S.C. § 504(c), a Plaintiff may obtain statutory damages in lieu of actual damages and profits. Even though the statute suggests that statutory damages are awarded by the court, the Seventh Amendment requires that the determination, including the amount of such award, be made by the jury. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353, 118 S.Ct. 1279, 1287, 140 L.Ed. 2d. 438, 353 (1998). The jury should be provided with a special interrogatory form in order to report its findings on the issue of statutory damages. The minimum for statutory damages is $750 per work infringed and the maximum is $30,000 per work infringed. 17 U.S.C. § 504(c)(1).

Because statutory damages serve both compensatory and punitive purposes, Plaintiff can recover statutory damages whether or not there is evidence of any actual damage suffered by Plaintiff or any profits reaped by the Defendant. *See. F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233, 73 S.Ct. 222, 225, 97 L.Ed. 2d. 281 (1952) ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy" of discouraging infringement.

2. Defining "work." One measure of statutory damages is allowed *per work* infringed for *all infringements* of that work. 17 U.S.C. § 504(c); *MCA Television Ltd. V.*

Feltner; 89 F.3d 766, 768-69. All the parts of a compilation or derivative work, however, constitute one work. 17 U.S.C. § 504(c).

3. Factors to be considered. *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) (difficulty or impossibility of providing actual damages, attitude and conduct of parties, willfulness of defendant's conduct, deterrence of future infringement); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233, 73 S.Ct. 222, 225, 97 L.Ed. 2d. 281 (1952) (deterrence of future infringement).

4. Increase for willful infringement. If copyright owner proves the infringement was committed willfully, award may be increased to not more than $150,000. 17 U.S.C. § 504(c)(2); *see also MCA Television LTD v. Feltner*, 89 F.3d 766, 768 (11th Cir. 1996) (stating that "'[i]t seems clean that as here used "willfully" means with knowledge that the defendant's conduct constitutes copyright infringement' " (quoting 3 Nimmer on Copyright (199), § 14.04[B], 14-58-60)).

5. Decrease for innocent infringement. 17 U.S.C. § 504(c)(2) (If infringer proves it was not aware and had no reason to believe that its acts constituted an infringement of copyright, the award may be reduced to not less than $200.)

6. Unavailability of reduction for innocent infringement in certain cases. The final bracketed paragraph of the instruction describes a category of cases in which the defense of innocent infringement is unavailable. *See* 17 U.S.C. §§ 401–02.

a. "Proper form." Under section 401, for the notice to be in proper form, three requirements typically must be met – the proper symbol or word, the year of first publication, and identification of the copyright owner. The year of first publication may be omitted "where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, if reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles," see id. § 401(b)(2), and for that reason this particular element is bracketed. The symbol/word and identification requirements each may be met by one of several alternatives. Because only one such alternative is likely to apply in a particular case, the alternative methods of satisfying the exception are bracketed.

b. "Proper form" – sound recordings. Section 402 provides the notice requirements for publicly distributed copies of sound recordings. Under section 402, for the notice to be in proper form, three requirements typically must be met – the proper symbol or word, the year of first publication, and identification of the copyright owner. In addition to the identification of the copyright owner, section 402 allows identification of the producer of the sound recording to suffice if no other name of the copyright owner appears in conjunction with the notice. *See* 17 U.S.C. § 402(b)(3). The symbol/word and identification requirements each may be met by one of several alternatives. Because only one such alternative is likely to apply in a particular case, the alternative methods of satisfying the exception are bracketed.

c. Compilations / derivative works/ collective works. Under section 401(b)(2), in a case involving a compilation or derivative work incorporating previously published material, the year of first publication of the compilation or derivative work is sufficient. In such a case, the instruction should be modified accordingly. Section 404 provides special rules as to collective works, and should be considered and the instruction modified as needed, where collective works are at issue.

d. Unavailability of exception. Section 401's limitation on the availability of the defense of innocent infringement does not apply in a case which:

> an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use, if the infringer was: (i) an employee or agent of a non-profit educational institution, library, or archives acting within the scope of his or her employment who infringed by reproducing the work in copies or phonorecords; (ii) a nonprofit educational institution, library, or archives itself that infringed by reproducing the work in copies or phonorecords; or (iii) a public broadcasting entity that, or a person who as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118), infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

See U.S.C. §§ 401(d) & 504(c)(2). In a case in which this exception to the exception applies, the instruction should be modified accordingly.

Availability of statutory damages for pre-registration infringement. Under 17 U.S.C. § 412, statutory damages are unavailable for copyright infringement that commenced prior to registration of an unpublished work or for infringement that commenced before registration within three months of its publication. In a case in which the issue of when infringement commenced presents a jury question, the instruction should be modified accordingly.

10 – Trademark

10.1 Trademark Infringement – Registered Trademark

[Name of plaintiff] claims that [Name of defendant] has infringed [his/her/its] registered trademark. To prove [his/her/its] claim, [Name of plaintiff] must prove the following facts by a preponderance of the evidence:

1: [Name of plaintiff] owns a trademark that is entitled to protection; and

2: That [Name of defendant] is using a mark that infringes upon [Name of plaintiff]'s trademark.

[You are instructed and must accept as a fact that [Name of plaintiff] owns a federal registration of the trademark [he/she/it] seeks to protect in this action. It is [Name of defendant]'s burden to prove that [Name of plaintiff]'s trademark is invalid.]

[This instruction should be used if the parties do not stipulate regarding a federal registration:

You must first find that [Name of plaintiff] owns a federal registration of the trademark at issue in this case. To do this, you must find that the trademark is covered by a registration on the Principal Register of the U.S. Patent and Trademark Office. If you do not find that [Name of plaintiff] owns a federal registration, then you must determine whether [Name of plaintiff] owns a trademark that is entitled to protection. **[If it is disputed whether [Name of plaintiff] has a registered trademark, the unregistered trademark instructions also should be given.]]**

If you find [Name of plaintiff]'s trademark is covered by a federal registration, [Name of plaintiff] enjoys what is known as "constructive nationwide priority" in [his/her/its] trademark, whether or not [Name of plaintiff] uses the trademark on a nationwide basis. [Name of plaintiff] is presumed to have started using the trademark nationwide as of its filing date, even if [he/she/it] only used it in a limited area. In this case, [Name of

plaintiff] enjoys nationwide priority of rights dating back to the filing date of the application, which is [filing date].

Because [Name of plaintiff] owns a federal registration of the trademark, [Name of defendant] is deemed to have knowledge of the registration and of the rights claimed in the registration. This is known as "constructive notice," and [Name of defendant] cannot claim that [he/she/it] adopted [his/her/its] trademark without knowledge of [Name of plaintiff]'s trademark. In this case, [Name of plaintiff] enjoys nationwide constructive notice of rights dating back to the filing date of the application, which is [filing date].

Infringement: Introductory Jury Charge

If you have determined that [Name of plaintiff] owns a trademark that is entitled to protection, you must next consider whether [Name of defendant] infringed [Name of plaintiff]'s trademark. The test for infringement is whether [Name of defendant]'s trademark is "likely to cause confusion" with [Name of plaintiff]'s trademark.

That is, you must determine if [Name of defendant], without [Name of plaintiff]'s consent, used the same or a similar trademark in connection with the sale of, or the offer to sell, goods in a manner that is likely to cause confusion among consumers as to the source, affiliation, approval, or sponsorship of the goods. "Source," "origin," "affiliation," "approval," or "sponsorship" means that the public believes that [Name of defendant]'s goods come from, are affiliated with, are approved by, or sponsored by [Name of plaintiff].

It is not necessary that the trademark used by [Name of defendant] be an exact copy of [Name of plaintiff]'s trademark. Instead, [Name of plaintiff] must demonstrate, by a preponderance of the evidence, that [Name of defendant]'s use of [his/her/its] trademark is, when viewed in its entirety, likely to cause confusion as to the source, origin, affiliation, approval, or sponsorship of the goods in question.

Infringement

[Name of plaintiff] claims that [Name of defendant] has infringed [his/her/its] trademark. For [Name of plaintiff] to succeed on this claim you must find by a preponderance of the evidence that [Name of defendant]:

1. used the trademark in connection with the sale or offer to sell goods;

2. used the trademark in commerce; and,

3. used the trademark in a manner that is likely to:

    a. cause confusion, mistake, or deception as to

    b. the source, origin, affiliation, approval, or sponsorship of [Name of defendant]'s goods.

Infringement: Likelihood of Confusion (Seven-Factor Test)

There are seven factors you can use to determine whether a likelihood of confusion exists. No single factor or consideration controls, and [Name of plaintiff] is not required to prove all, or even most, of the factors are present in any particular case. You may also use factors other than these seven. You should weigh all of the relevant evidence in determining whether a likelihood of confusion exists.

1. Type and Strength of [Name of plaintiff]'s Trademark

The first factor is the "type and strength" of the trademark. Trademarks come in different "types" or categories, namely, "generic," "descriptive," "suggestive," "arbitrary," and "fanciful" or "coined." The type of a claimed trademark is relevant to the trademark's strength.

Some trademarks are stronger than others. The "stronger" the trademark, the more protection should be given to it. I will now describe each type of trademark in the order of their general relative strength.

a. Generic

A claimed trademark is generic if it is the word, name, symbol, device, or any combination thereof, by which the good commonly is known. An example of a generic trademark is "escalator" for moving stairs.

Whether a claimed trademark is generic does not depend on the term itself, but on use of the term. A word may be generic of some things but not of others. For example, "ivory" is generic for elephant tusks, but it is not generic for soap.

Whether a claimed trademark is a generic term is viewed from the perspective of a member of the public evaluating the trademark.

Generic trademarks are not protected. They cannot be registered with the U.S. Patent and Trademark Office.

b. Descriptive:

A "descriptive" trademark only describes an ingredient, quality, characteristic, function, feature, purpose, or use of the good provided under it. An example of a descriptive trademark would be VISION CENTER for an eyeglasses store. Descriptive trademarks are eligible for registration with the U.S. Patent and Trademark Office if the trademark has acquired "secondary meaning." A trademark has acquired secondary meaning if the primary significance of the trademark in the minds of the consuming public is not the associated good itself, but instead the source or producer of the good.

There are four factors you may use in determining whether secondary meaning exists:

- The length and nature of the trademark's use;

- The nature and extent of advertising and promotion of the trademark;

- The efforts of the trademark owner to promote a conscious connection between the trademark and its business; and

- The degree to which the public recognizes [Name of plaintiff]'s good by the trademark.

[This instruction should be used if [Name of plaintiff]'s trademark registration has achieved incontestable status under 15 U.S.C. § 1065:

In this case, I have determined that [Name of plaintiff]'s trademark is covered by an incontestable registration on the Principal Register. The effect of that determination is that the registration is conclusive evidence that the trademark is at least descriptive with secondary meaning. You must accept that [Name of plaintiff]'s trademark was at least descriptive and possessed secondary meaning at the time [Name of plaintiff] applied for its registration.]

[This instruction should be used if [Name of plaintiff]'s trademark registration has not achieved incontestable status under 15 U.S.C. § 1065:

In this case, I have determined that this trademark is registered on the Principal Register and that it is at least descriptive with secondary meaning. Therefore [Name of defendant] has the burden of proving by a preponderance of the evidence that the trademark is invalid because it was descriptive but lacked secondary meaning before [Name of defendant] began using [his/her/its] trademark.]

c. Suggestive:

A "suggestive" trademark suggests, rather than describes, qualities of the underlying good. If a consumer's imagination is necessary to make the connection between the trademark and the goods then the trademark suggests the features of the good. An example of a suggestive trademark is ICEBERG for a refrigerator. Suggestive trademarks are eligible to be registered in the U.S. Patent and Trademark Office without proof of secondary meaning.

d. Arbitrary and Fanciful or Coined:

An "arbitrary" trademark is a real word but has no logical relationship to the underlying goods. An example of an arbitrary trademark is DOMINO for sugar.

A "fanciful" or "coined" trademark is a trademark created solely to function as a trademark but which has no meaning beyond the trademark itself. An example of a fanciful or coined trademark is EXXON for gasoline.

Arbitrary and fanciful or coined trademarks are eligible to be registered in the U.S. Patent and Trademark Office without proof of secondary meaning.

e. Additional Considerations Relating To Trademark Strength:

When evaluating the strength of [Name of plaintiff]'s trademark, you may also consider the extent of any use by third parties of similar trademarks, [Name of plaintiff]'s promotional expenditures, the volume of [Name of plaintiff]'s sales under [his/her/its] trademark, and whether [Name of plaintiff]'s registration has achieved incontestable status.

2. Similarity of the Parties' Trademarks

In evaluating whether trademarks are similar, you may consider the "overall impression" that [Name of plaintiff]'s and [Name of defendant]'s trademarks create, including the sound, appearance, and manner in which they are used. You may look at the trademarks as a whole rather than simply comparing their individual features.

3. Similarity of the Parties' Goods

This factor considers not only whether the consuming public can readily distinguish between the parties' goods, but also whether the goods at issue are of a kind that the public attributes to a single source.

4. Similarity of the Parties' Sales Channels, Distribution, and Customers

This factor considers where, how, and to whom the parties' goods are sold. Similarities increase the possibility of consumer confusion, mistake, or deception.

5. Similarity of the Parties' Advertising Media

This factor looks to each party's method of advertising. It is not a requirement that [Name of plaintiff] and [Name of defendant] advertise in the same magazines, publications, or other advertising outlets. The issue is whether the parties use the same forums and media outlets to advertise, leading to possible confusion.

6. [Name of defendant]'s Intent

You may also consider whether [Name of defendant] intended to infringe on [Name of plaintiff]'s trademark. That is, did [Name of defendant] adopt [his/her/its] trademark with the intention of deriving a benefit from [Name of plaintiff]'s reputation? If you determine that [Name of defendant] intentionally ignored the potential for infringement, you may impute to [Name of defendant] an intent to infringe.

7. Actual Confusion

Because the presence of actual confusion usually is difficult to show, a finding of actual confusion is not required to find trademark infringement. Alternatively, the absence of actual confusion does not necessarily mean [Name of defendant] is not liable for trademark infringement.

The evidence of actual confusion of trademarks should be reasonably significant. You should weigh the alleged actual confusion using the following factors:

- The amount and duration of the confusion;
- The degree of familiarity the confused party has with the goods;
- The type of person complaining of the alleged actual confusion (for example, whether that person is a customer or a noncustomer); and
- The alleged number of people who are actually confused (for example, whether the confused person is an actual customer or someone else).

If you find that [Name of defendant] has infringed [Name of plaintiff]'s trademark, you must next consider [Name of defendant]'s affirmative defenses. [See Defense Interrogatories at 10.3]

[The following instruction should be given in cases in which [Name of plaintiff] claims third party "contributory infringement" for an underlying claim of infringement.

[Name of plaintiff] claims that [Name of defendant] is liable for the "contributory infringement" of [Name of plaintiff]'s trademark.

"Contributory infringement" occurs when a defendant intentionally induces or causes another party to infringe a plaintiff's trademark. If this occurs, [Name of defendant] can be held liable for other party's infringement.]

__.__

Trademarks: Remedies

If you find that [Name of plaintiff] owns a valid trademark, that [Name of defendant] has infringed it, and [Name of defendant] does not have a defense you must consider whether, and to what extent, monetary relief should be awarded.

Plaintiff's Actual Monetary Damages

You may award actual damages that [Name of plaintiff] has sustained. [Name of plaintiff] may recover the economic injury to its business proximately resulting from [Name of defendant]'s wrongful acts. You are not required to calculate actual damages with absolute exactness—you may make reasonable approximations. But an award of actual damages to [Name of plaintiff] must be just and reasonable, based on facts, and proved by [Name of plaintiff] by a preponderance of the evidence.

Defendant's Profits and Calculation of Profits

In addition to [Name of plaintiff]'s actual damages, you may also make an award based on an accounting of [Name of defendant]'s profits if you find that:

- [Name of defendant]'s conduct was willful and deliberate;

- [Name of defendant] was unjustly enriched; or

- An award of [Name of defendant]'s profits is necessary to deter [Name of defendant]'s future conduct.

A defendant commits a "willful violation" of a trademark when that defendant knowingly and purposefully capitalizes on and appropriates the goodwill of a plaintiff.

"Unjust enrichment" occurs if [Name of defendant] receives a benefit to which [he/she/it] is not entitled.

In determining [Name of defendant]'s profits, [Name of plaintiff] only is required to prove [Name of defendant]'s gross sales. [Name of defendant] may then prove the amount of sales made for reasons other than the infringement. [Name of defendant] also may prove its costs or other deductions which [he/she/it] claims should be subtracted from the amount of [his/her/its] sales to determine [his/her/its] profits on such sales. Any costs or deductions that [Name of defendant] proves by a preponderance of the evidence are required to be subtracted from the sales attributable to the infringement and the difference is the amount that may be awarded to [Name of plaintiff].

Nominal Damages

If you find that [Name of defendant] infringed [Name of plaintiff]'s trademark, but you do not find that [Name of plaintiff] sustained any actual damages or damages based on [Name of defendant]'s profits, you may return a verdict for [Name of plaintiff] and award what are called "nominal" damages. By "nominal" I mean a small amount of damages that you, in your discretion, determine.

Infringement of a Registered Trademark

SPECIAL INTERROGATORIES TO THE JURY

We, the jury, find by a preponderance of the evidence that:

1. [Name of plaintiff] owns a federal registration of [his/her/its] trademark on the Principal Register.

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. [Name of defendant]'s use of [his/her/its] trademark caused a likelihood of confusion with [Name of plaintiff]'s trademark.

Answer Yes or No _____

If your answer is "Yes," answer the "Defenses" special interrogatories. If your answer is "No" and [Name of defendant] asserted that [Name of plaintiff]'s trademark registration is invalid, then answer the "Validity" special interrogatories. If your answer is "No" and [Name of defendant] has not asserted that [Name of plaintiff]'s trademark registration is invalid, then your foreperson should sign and date the last page of this verdict form.

[Use these special interrogatories if [Name of plaintiff] is claiming contributory infringement:

3. A party, other than [Name of defendant], has infringed [Name of plaintiff]'s trademark and [Name of defendant] knew that the other party would be engaging in trademark infringement if [he/she/it] undertook the challenged activity.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 4. If your answer is "No," then go to Question No. 6.

4. [Name of defendant] intentionally induced the other party to engage in the infringing activity.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 5. If your answer is "No," then go to Question No. 6, if appropriate.

5. [Name of defendant] is liable for contributory infringement.

Answer Yes or No _____

If your answer to this question is "Yes," then go to Question No. 6.]

[These special interrogatories should be used if [Name of plaintiff] seeks actual damages:

6. [Name of plaintiff] has suffered actual monetary damages.

Answer Yes or No _____

7. If your answer is "Yes," in what amount?

$_____.]

If your answer is "No," go to Question No. 8.

[**These special interrogatories should be used if [Name of plaintiff] seeks an award of [Name of defendant]'s profits:**

8. [Name of defendant]'s conduct was willful and deliberate, or [Name of defendant] was unjustly enriched, or an award of [Name of defendant]'s profits is necessary to deter future conduct.

Answer Yes or No _____

9. If your answer is "Yes," in what amount?

$_____.

If your answer is "No," go to Question No. 10.]

[This special interrogatory should be used if [Name of plaintiff] seeks nominal damages:

10. [Name of plaintiff] has not proved any actual monetary damages nor have [Name of defendant]'s profits been awarded, but [Name of plaintiff] is awarded nominal damages.

If your answer is "Yes," in what amount?

$_____.]

SO SAY WE ALL.

_____
Foreperson's signature

DATE: _____

ANNOTATIONS AND COMMENTS

These instructions should be given only in cases in which the Plaintiff seeks to protect a trademark registered on the Principal Register of the U.S. Patent and Trademark Office. In

light of the Supreme Court's suggestion in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992), that there is no reason to apply differing rules to conventional word marks and trade dresses, and these instructions may need to be amended if word marks or trade dress apply in a case. *See Two Pesos* in *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 120 S. Ct. 1339, 146 L. Ed. 2d 182 (2000), and *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164, 115 S. Ct. 1300, 1304, 131 L. Ed. 2d 248 (1995). Also, this instruction may be modified if the trademark at issue is a service mark, certification mark, or trade dress. *See* Annotations and Comments to Instruction 10.4 *supra* for additional discussion.

If the registration in question matured from an application filed before November 16, 1989, the evidentiary presumption of validity and constructive nationwide priority attaching to it are effective as of the date the registration issued. If the registration in question matured from an application filed on or after November 16, 1989, the constructive nationwide priority attaching to it is effective as of the filing date of the application. *See* Trademark Law Revision Act of 1988, Pub. L. 100-667, § 128(b)(1), 102 Stat. 3944. These instructions assume that any registrations at issue matured from applications filed after November 16, 1989, and that the constructive nationwide priority attaching to those registrations is effective as of the filing date of the applications from which they matured. For registrations maturing out of applications filed after that date, the instructions should be modified to refer to the dates of the registrations' issuance, rather than application filing dates.

Evidentiary Significance of Federal Registrations on the Principal Register

The U.S. Patent and Trademark Office maintains two "registers" on which trademarks can be registered: (1) the Principal Register; and (2) the Supplemental Register. *See* 15 U.S.C. §§ 1051, 1091 (2006).

Under Sections 7(b) and 33(a) of the Lanham Act, a federal registration on the Principal Register is, at least, "prima facie" evidence of the validity of the registered trademark and of the registration of the trademark, of the registrant's ownership of the trademark, and of the registrant's exclusive right to use the registered trademark in connection with the goods recited in the registration. *See* 15 U.S.C. §§ 1057(b), 1115(a) (2006). If the registration matured from an application filed before November 16, 1989, the effective date of this presumption is the registration date. If the registration matured from an application filed on or after November 16, 1989, the effective date of this presumption is the application's filing date. *See* Trademark Law Revision Act of 1988, Pub. L. 100-667, § 128(b)(1), 102 Stat. 3944.

A registration on the Principal Register can become "incontestable" if its owner files with the Patent and Trademark Office an affidavit or declaration of incontestability under

Section 15 of the Lanham Act, 15 U.S.C. § 1065. An affidavit or declaration of incontestability requires the registrant to swear under oath that:

1. There has been no final decision to the registrant's claim of ownership of the registered trademark for the goods and services covered by the registration or to the registrant's right to register its trademark or to maintain the registration of its trademark;

2. There is no ongoing proceeding involving the registrant's rights to its trademark; and

3. The trademark has been in continuous use for the five-year period immediately preceding the execution of the affidavit or declaration.

Upon the filing (and not the acceptance) of the affidavit or declaration of incontestability, Section 33 of the Lanham Act, *id.* § 1115(b), provides that the registration is "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce." An incontestable registration can still be cancelled on certain grounds, and the registration's "conclusive" evidentiary significance is subject to certain affirmative defenses, as to both of which the defendant bears the burden of proof.

Outside of the Eleventh Circuit, there is a pronounced split of authority on the issue of whether a registration that has not yet become incontestable shifts the burden of *proof*, or merely the burden of *production*, to a defendant challenging the registered mark's validity. *Compare Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1356 (Fed. Cir. 2009) (shift in burden of proof), *Aktieselskabet AF 21. November 21 v. Fame Jean Inc.*, 525 F.3d 8, 14 (D.C. Cir. 2008) (same), *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 514 (6th Cir. 2007) (same), *Colt Defense LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 705 (1st Cir. 2007) (same), *and Aluminum Fabricating Co. v. Season-All Window Corp.*, 259 F.2d 314, 316 (2d Cir. 1958) (same) *with OBX-Stock, Inc. v. Bicast, Inc.*, 558 F.3d 334, 342 (4th Cir. 2009) (shift in burden of production) *and Custom Vehicles, Inc. v. Forest River, Inc.*, 476 F.3d 481, 485 (7th Cir. 2007) (same). Under the majority rule, there is no need to distinguish between the evidentiary effect of a registration that has become "incontestable" under Sections 15 and 33 of the Lanham Act, 15 U.S.C. §§ 1065, 1115: Both types of registrations shift the burden of proof on the issue of trademark validity from the Plaintiff to the Defendant. In contrast, a registration on the Supplemental Register has no evidentiary effect. *See, e.g., ERBE Elektromedizin GmbH v. Canady Tech. LLC*, 629 F.3d 1278, 1288 (Fed. Cir. 2010) (applying Third Circuit law).

Nationwide constructive priority is provided for by Section 7(c) of the Lanham Act, 15 U.S.C. § 1057(c) (2006). *See generally Tana v. Dantanna's*, 611 F.3d 767, 780 (11th Cir. 2010); *John R. Thompson Co. v. Holloway*, 366 F.2d 108, 115 (5th Cir. 1966).

Nationwide constructive notice is provided for by Section 22 of the Lanham Act, 15 U.S.C. § 1072 (2006). *See generally John R. Thompson Co.*, 366 F.2d at 115; *Faciane v. Starner*, 230 F.2d 732, 738 n.12 (5th Cir. 1956).

Infringement

General Introductory Charge

The statutory basis for the federal tort of the infringement of a registered trademark is Section 32(1) of the Lanham Act, 15 U.S.C. § 1114 (2006), which provides that:
Any person who shall, without the consent of the registrant

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided.

The "touchstone" of a finding of infringement under Section 32" is not simply whether there is an unauthorized use of a protected mark, but whether such use is likely to cause customer confusion." *Custom Mfg. & Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 647 (11th Cir. 2009), *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.* 522 F.3d 1200, 1205 (11th Cir. 2007); *see also Jellibeans, Inc. v. Skating Clubs of Ga., Inc.* 716 F.2d 833, 839 (11th Cir. 1983) (test for service mark infringement is whether or not the offending mark is "likely to cause confusion").

The infringement analysis in these charges is the same for word marks, service marks, certification marks, collective marks, logos and trade dress. This is meant to promote a more consistent approach to the analysis and is believed by the drafters of this charge to be more consistent with the case authority. This approach varies from other jury charge sources. *See e.g.*, *Model Jury Instructions: Copyright, Trademark and Trade Dress Litigation*, American Bar Association Section of Litigation (2008).

Likelihood of Confusion: Seven-Factor Test

This is the test most commonly applied for direct infringement, in which the Defendant is using an allegedly confusingly similar trademark in connection with its own goods. There are many Eleventh Circuit and former Fifth Circuit cases applying the seven-factor test set forth in these instructions. *See e.g., Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1335 (11th Cir 1999); *Tally-Ho, Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1027 (11th Cir. 1989), *Dieter v. B&H Indus. of Sw. Fla., Inc.*, 880 F.2d 322, 326 (11th Cir. 1989); *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1182 (11th Cir. 1985); *Univ. of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535, 1542-43 (11th Cir. 1985); *E. Remy Martin & Co. v. Shaw-Ross, Int'l Imps.*, 756 F.2d 1525 1530(11th Cir. 1985); *Wesco Mfg. v. Tropical Attractions of Palm Beach*, 833 F.2d 1484, 1488 (11th Cir. 1984); *Roto-Rooter Corp. v. O'Neal*, 513 F.2d 44, 45-46 (5th Cir. 1975). Nevertheless, the Eleventh Circuit has allowed the consideration of other factors where appropriate. *See, e.g., Tana v. Dantanna's*, 611 F.3d 767, 780 (11th Cir. 2010) ("Our circuit has recognized that new factors may merit consideration in determining whether there is a likelihood of confusion." (internal quotation marks omitted)); *accord Swatch Watch, S.A. v. Taxor, Inc*, 785 F.2d 956, 958 (11th Cir 1986). Examples of those additional factors include the degree of care exercised by purchasers of the parties' goods and services, *see Armstrong Cork Co. v. World Carpets, Inc.*, 597 F.2d 496, 504 n.10 (5th Cir. 1979), a prior affiliation between the parties, *see Prof'l Golfers Ass'n v. Bankers Life & Cas. Co.*, 514 F.2d 665, 670 (5th Cir. 1975), the Defendant's infringement of multiple trademarks owned by the plaintiff, *see Volkswagenwerk AG v. Rickard*, 492 F.2d 474, 479 (5th Cir. 1974), the geographic proximity between the parties, *see Tana*, 611 F.3d at 780-81, and, in cases involving product design trade dress, the prominence of any house trademarks used by the parties. *See Bauer Lamp v. Shaffer*, 941 F.2d 1165, 1171 (11th Cir. 1991).

Whatever the factors used, the test for likely confusion is not applied by simply using a mathematical approach, that is, adding up how many factors have been proven or not proven. Rather, as the Eleventh Circuit has explained, "[a] district court should not determine whether a likelihood of confusion exists merely by computing whether a majority of the subsidiary factors indicate that such a likelihood exits. Rather, the district court must evaluate the weight to be accorded the individual subsidiary facts and make the ultimate fact decision." *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.* 716 F.2d 833, 840 n.17 (11th Cir. 1983).

Types and Strength of Trademarks

A finding that a registered trademark is generic means that the mark cannot be protected *as* a trademark, *see Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S. Ct. 2753, 2757 (1992), and a jury finding that a registered trademark is generic therefore should not evaluate whether the plaintiff has proven valid rights to the claimed trademark independent of the registration. *See Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1183 (5th

Cir. 1980) ("A generic term can *never* become a trademark, [and] if a registered mark *at any time* becomes generic with respect to a particular article, the Lanham Act provides for the cancellation of that mark's registration." (footnote omitted) (citation omitted). Under limited circumstances, however, a defendant's use of a former trademark that has become generic can lead to liability for the tort of passing off. *See, e.g.*, *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 120, 59 S. Ct. 109, 114, 83 L. Ed. 2d. 73 (1938) (use of a generic designation by a defendant must "be done in a manner which reasonably distinguishes its product from that of a plaintiff").

This instruction adopts the test for genericness set forth in Section 14(3) of the Lanham Act, 15 U.S.C. § 1064(3) (2006). Eleventh Circuit cases bearing on the issue include *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1358, 1359 n.4 (11th Cir. 2007), *Investacorp, Inc. v. Arabian Inv. Banking Corp. (Investcorp) E.C.*, 931 F.2d 1519, 1522 (11th Cir. 1991), and *Vision Ctr. v. Opticks, Inc*., 596 F.2d 111, 115 (5th Cir. 1979).

The instruction provides a definition of what may constitute a descriptive trademark, but the definition sets forth the most commonly found types of descriptive trademarks. In addition to trademarks falling within the scope of the definition in this instruction, "[n]ames—both surnames and first names—are regarded as descriptive terms and therefore one who claims federal trademark rights in a name must prove that the name has acquired secondary meaning." *Tana*, 611 F.3d at 774 (citation omitted.) "The policy reasons for requiring secondary meaning for the use of a personal or surname as a trademark extend equally to the use of full names." *Id* . at 776. Other types of trademarks that are considered descriptive include individual colors, *see Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163, 115 S. Ct. 1300, 1303 131 L. Ed. 2d 248 (1995), geographically descriptive terms, *see Elgin Nat'l Watch Co. v. Ill. Watch Case Co.*, 179 U.S. 665, 673, 65 S. Ct. 270, 273, 45 L. Ed. 365 (1901), and noninherently distinctive tradedress. *See Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 857-58 (11th Cir. 1983).

In affirming a finding of no secondary meaning, one panel of the Eleventh Circuit has held that "[a]lthough we believe that proof of intentional copying is probative evidence on the secondary meaning issue, we cannot agree with Plaintiff that proof of intentional copying conclusively establishes that plaintiff's trademark or trade dress has acquired secondary meaning." *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 860 (11th Cir. 1983); *see also CPG Prods. Corp. v. Pegasus Luggage, Inc.*, 776 F.2d 1007, 1012 (Fed. Cir. 1985) (concluding, in application of Eleventh Circuit law, that "[e]vidence of intentional copying in this case, also supports a finding of secondary meaning"). Because the court has not addressed the precise role played by intentional copying in the secondary meaning inquiry, these instructions adopt the four-factor test most commonly applied by the court.

A registered trademark that has achieved incontestable status under 15 U.S.C. § 1065 cannot be challenged on the grounds that it is descriptive and lacks secondary meaning. *Park*

'N Fly v. Dollar Park N'Fly, Inc., 469 U.S. 189, 224, 105 S. Ct. 658, 83, 582 L. Ed. 2d (1985); *Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1209 (11th Cir. 1999); *Soweco*, 617 F.2d at 1184-85. Nevertheless, even though the registration covering a trademark may have achieved incontestable status, there are still a variety of defenses that may be made as to incontestability. *See* 15 U.S.C. § 1115(b).

Representative circuit case law bearing on the definition of suggestive trademarks includes *Am. Television & Commc'ns Corp. v. Am. Commc'ns & Television, Inc.*, 810 F.2d 1546, 1549 (11th Cir. 1987), *Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1545 (11th Cir. 1984), and *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1184 (5th Cir. 1980).

Representative circuit case law bearing on the definition of arbitrary and coined trademarks includes *Carnival Brand Seafood Co. v. Carnival Brands, Inc.*, 187 F.3d 1307, 1312 (11th Cir. 1999), *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1182 n.3 (11th Cir. 1985), and *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 260 (5th Cir. 1980).

The Eleventh Circuit's treatment of the considerations properly taken into in the trademark strength inquiry has been inconsistent. On the one hand, the court has suggested that suggestive, arbitrary, and coined trademarks, as well as those covered by incontestable registrations, are strong as a matter of law. *See, e.g., Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1335-36 (11th Cir. 1999) ("Arbitrary marks are the strongest of the four categories.); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1539 (11th Cir. 1986) ("[T]he scope of protection increases as the [trademark] moves toward the arbitrary end of the spectrum."); *Sun Banks, Inc. v. Sun Federal Sav. & Loan Ass'n*, 651 F.2d 311, 315 (5th Cir. 1981) ("A strong mark is usually fictitious, arbitrary or fanciful and is generally inherently distinctive."); *see also Caliber Automotive Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC*, 605 F.3d 931, 938 (11th Cir. 2010) (holding plaintiff's incontestably registered service mark strong as a matter of law); *Dieter v. B & H Indus. of Sw. Fla., Inc.*, 880 F.2d 322, 329 (11th Cir. 1989) (same).

On the other hand, however, a number of the court's decisions have departed from these bright-line rules in favor of an examination of the marketplace strength of the trademark sought to be protected. *See, e.g., Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1547 (11th Cir. 1984) ("The presumption of validity afforded plaintiff's [registered] mark under the Lanham Act is not material to [whether confusion is likely]."); *see also John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 974-75 n.13 (11th Cir. 1983) ("Of course, even if [the plaintiff's mark] initially was weak, it may have subsequently acquired strength through [the plaintiff's] promotional efforts."). In particular, those opinions have often focused on the extent of third-party use of arguably similar marks. *See, e.g., Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1183 (11th Cir. 1985) (finding plaintiff's suggestive mark weak as a matter of law on appeal based in part on evidence of third-party use);; *Exxon Corp. v. Tex. Motor Exch.*, 628 F.2d 500, 504 (5th Cir. 1980) (affirming finding of trademark strength

based on absence of evidence of third-party use); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 260 (5th Cir. 1980) (finding plaintiff's arbitrary mark weak as a matter of law on appeal based in part on evidence of third-party use). These instructions therefore adopt a dual approach that focuses on both the conceptual strength of the Plaintiff's trademark, as reflected in the trademark's placement on the spectrum of distinctiveness, and its commercial strength, as reflected in these other considerations.

Similarity or Dissimilarity of the Parties' Trademarks

Representative circuit case law applying this factor includes *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1361 (11th Cir. 2007), *Dippin' Dots, Inc. v. Frosty Bites, Distrib., LLC*, 369 F.3d 1197, 1207-09 (11th Cir. 2004), *Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1337-38 (11th Cir. 1999), *Exxon Corp. v. Tex. Motor Exch.*, 628 F.2d 500, 504-05 (5th Cir. 1980), *Eskay Drugs, Inc. v. Smith Kline & French Labs.*, 188 F.2d 430, 431-32 (5th Cir. 1951).

Similarity or Dissimilarity of the Parties' Goods

Representative circuit case law applying this factor includes *Tana v. Dantanna's* , 611 F.3d 767, 777-78 (11th Cir. 2010), *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1541 (11th Cir. 1986), *Jellibeans, Inc. v. Skating Clubs of Ga. Inc.*, 716 F.2d 833, 842 (11th Cir. 1983), *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 832 (11th Cir. 1982), and *Safeway Stores, Inc. v. Safeway Discount Drugs, Inc.*, 675 F.2d 1160, 1166 (11th Cir. 1982).

Similarity or Dissimilarity of the Parties' Retail Outlets and Purchasers

Representative circuit case law applying this factor includes *Carnival Brands Seafood v. Carnival Brands, Inc.*, 187 F.3d 1307, 1313-14 (11th Cir. 1999), *John H. Harland Co. v. Clarke Checks Inc.*, 711 F.2d 966, 976 (11th Cir. 1983), *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 262 (5th Cir. 1980) *Exxon Corp. v. Texas Motor Exch.*, 628 F.2d 500, 505 (5th Cir. 1980), and *Pure Foods, Inc. v. Minute Maid Corp.*, 214 F.2d 792, 797 (5th Cir. 1954).

Similarity or Dissimilarity of the Parties' Advertising Media

Representative circuit case law applying this factor includes *Tana v. Dantanna's* , 611 F.3d 767, 776-77 (11th Cir. 2010), *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 967-77 (11th Cir. 1983), *Exxon Corp. v. Tex. Motor Exch.*, 628 F.2d 500, 506 (5th Cir. 1980), and *Volkswagenwerk Aktiengesellschaft v. Rickard*, 492, F.2d 474, 478 (5th Cir. 1974).

Actual Confusion

Under Eleventh Circuit law:

> There can be no more positive or substantial proof of the likelihood of confusion than proof of actual confusion. Moreover, reason tells us that while very little proof of actual confusion would be necessary to prove the likelihood of confusion, an almost overwhelming amount of proof would be necessary to refute such proof.

World Carpets, Inc. v. Dick Littrell's New World Carpets, 438 F.2d 482, 489 (5th Cir. 1971) (footnote omitted).

Nevertheless, the Eleventh Circuit has held that "there is no absolute scale as to how many instances of actual confusion establish the existence of that factor." *See AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1543 (11th Cir. 1986). The sufficiency of "actual confusion" evidence depends on the circumstances. These circumstances can include the amount of actual confusion in the context of the case. *Compare Tana*, 611 F.3d at 779 (affirming finding of no infringement based in part on testimony of only two instances of actual confusion) and *Sun Banks v. Sun Fed. Sav. & Loan*, 651 F.2d 311, 319 (5th Cir. 1981) (nineteen reports of actual confusion over a three-year period was insufficient to establish a finding of actual confusion under the circumstances in that case) *with Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833, 844 (11th Cir. 1983) (testimony of three witnesses sufficient to support a finding of actual confusion) and *Roto-Rooter Corp. v. O'Neal*, 513 F.2d 44, 46 (5th Cir. 1975) (reversing trial court for applying a test of "statistically significant" confusion and finding confusion likely as a matter of law based on testimony of four instances of actual confusion). They can also include the type of person who was allegedly confused. *Compare Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1341 (11th Cir. 1999) (reversing finding of no likelihood of confusion based in part on evidence of confusion by plaintiff's professional buyer) and *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1510 n.10 (11th Cir. 1984 (affirming finding of likely confusion based on actual confusion among customers) *with Am. Television & Commc'ns Corp. v. Am. Commc'ns & Television, Inc.*, 810 F.2d 1546, 1550 (11th Cir. 1987) (according testimony of confusion among nonconsumers little weight) and *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1185 (11th Cir. 1985) (same).

The Defendant's Intent

Representative circuit case law applying this factor includes *Bauer Lamp v. Shaffer*, 941 F.2d 1165, 1172 (11th Cir. 1991) (per curiam), *Safeway Stores, Inc. v. Safeway Discount Drugs, Inc.*, 675 F.2d 1160, 1164 n.4 (11th Cir. 1982), *Sun Banks v. Sun Fed. Sav. & Loan Ass'n*, 651 F.2d 311, 318-19 (5th Cir. 1981) , and *Aetna Cas. & Surety Co. v. Aetna Auto Fin., Inc.*, 123 F.2d 582, 584 (5th Cir. 1941).

Likelihood of Confusion: Resale of new genuine goods bearing the Plaintiff's trademark

Under ordinary circumstances, the infringement cause of action is unavailable to trademark mark owners that already have sold their goods and are seeking to prevent subsequent sales by downstream purchasers. Specifically, the "genuine" nature of the goods will preclude confusion as to their source. *See generally Davidoff & CIE, SA v. PLD Int'l Corp.*, 263 F.3d 1297, 1301 (11th Cir. 2001) ("The resale of genuine trademarked goods generally does not constitute infringement. . . . Therefore, even though a subsequent sale is without a trademark owner's consent, the resale of a genuine good does not violate the [Lanham] Act."). The protection afforded by the "first sale" doctrine does not apply, however, when the good or the packaging has been materially altered. *See id.* at 1301 ("This [first sale] doctrine does not hold true when an alleged infringer sells trademarked goods that are materially different than those sold by the trademark owner."). When an infringement claim is grounded in the resale of goods bearing a plaintiff's trademark that are genuine but that are materially different from their authorized counterparts, the inquiry should focus on whether material differences exist and not the seven-factor test set forth above.

Likelihood of Confusion: Resale of used or reconditioned goods bearing the Plaintiff's mark

The sale of used or reconditioned goods bearing a plaintiff's trademark without adequate disclosure of the goods' status can constitute actionable infringement. *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 67 S. Ct. 1136, 91 L. Ed. 1386 (1947), is the seminal case on this theory of relief. In *Champion*, the Supreme Court held that used goods can be sold under the trademark owner's trademark in a way that does not confuse the public. The public's expectations for used goods are different than for new goods. *See also Nitro Leisure Prods., L.L.C. v. Acushnet Co.*, 341 F.3d 1356, 1359-60, 1367 (Fed. Cir. 2003)) (applying Eleventh Circuit law to hold that the "material differences" test for the resale of new goods has not replaced the statutory "likelihood of confusion" test in the resale of used or reconditioned trademarked goods). When an infringement claim is grounded in the resale of used or refurbished genuine goods bearing a plaintiff's trademark, the inquiry should focus on whether material differences exist and not the seven-factor test set forth above.

Contributory Infringement

The test for liability for infringement set forth above is one for direct infringement. Liability for contributory trademark infringement is governed by the standard set forth in *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 853-54, 102 S. Ct. 2182, 2188, 72 L. Ed. 2d 606 (1982) ("Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer is contributorially responsible for any harm done as a result of the deceit.").

Monetary Relief

The statutory basis for monetary relief is Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), which provides that:

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, . . . shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of [15 U.S.C. §§ 1111, 1114], and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty.

Award of the Plaintiff's Actual Damages

To be entitled to the legal remedy of an award of actual damages, the Plaintiff must demonstrate that it suffered actual monetary losses. *Babbit Elecs., Inc. v. DynaScan Corp.*, 38 F.3d 1161, 1182 (11thCir 1994). ("[T]he Plaintiff must prove both lost sales and that the loss was caused by the Defendant's actions."). Actual damages are not "speculative" if they are supported by a preponderance of the evidence. *See, e.g., Ramada Inns, Inc. v. Gadsden Motel Co.*, 804 F.2d 1562, 1565 (11th Cir. 1986) (affirming award of actual damages supported by unrebutted expert testimony).

It is "inappropriate" under Eleventh Circuit authority to award a trademark holder the "profit [it] would have made on sales to the defendant." *St. Charles Mfg. Co. v. Mercer*, 737 F.2d 891, 893 (11th Cir. 1983) ("While Plaintiffs in Lanham Act cases often receive profits from lost sales, these sales are sales made by Defendants to purchasers who sought to buy plaintiffs' products and instead received defendants'.") Nonetheless, franchise fees and lost royalties during the infringement period are recoverable. *See Ramada Inns*, 804 F.2d at 1565. An award of actual damages also may be based on findings that the Defendant's infringement has diverted sales from the Plaintiff or that the poor quality of the Defendant's goods has harmed the Plaintiff's business reputation. *See Boston Prof'l Hockey Ass'n v. Dallas Cap Mfg.*, 597 F.2d 71, 75 (5th Cir. 1979).

The Eleventh Circuit will not allow liquidated damages in addition to actual damages if it represents a "double recovery." *Ramada Inns,* 804 F.2d at 1566. Under appropriate circumstances, however, the Eleventh Circuit will allow for both trademark and liquidated damages in the same case. *Id.* at 1566. (liquidated damages and actual damages upheld even though they were "calculated in almost the same manner" because each damage calculation was meant to "compensate for separate wrongs.") Likewise, in a franchise "hold over" case, infringement damages as well as expenditures necessary to establish a new franchisee are recoverable. *Id.*

Accounting of the Defendant's Profits

A split exists outside of the Eleventh Circuit on the issue of whether the equitable remedy of an accounting of a defendant's profits is a matter properly delegated to a jury or, alternatively, whether it is within the province of the court. In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962), the Supreme Court held that a former franchisee from which a disgorgement of profits was sought was entitled to a jury trial. Based on this outcome, some courts have concluded that a plaintiff's prayer for an accounting creates a right to a jury trial because "[t]his type of remedy is fundamentally compensatory and legal in nature." *Alcan Int'l Ltd. v. S.A. Day Mfg. Co*., 48 U.S.P.Q.2d 1151, 1154 (W.D.N.Y. 1998); *see also Ideal World Mktg., Inc. v. Duracell, Inc.,* 997 F. Supp. 334, 337-39 (E.D.N.Y. 1998); *Oxford Indus. v. Hartmarx Corp*., 15 U.S.P.Q.2d 1648, 1653 (N.D. Ill. 1990). Others, however, have denied requests for jury trials on the ground that "the *Dairy Queen* Court based its decision on the fact that the predominant claim was for breach of contract and not for equitable relief." *G.A. Modefine S.A. v. Burlington Coat Factory Warehouse Corp*., 888 F. Supp. 44, 46 (S.D.N.Y. 1995); *see also Am. Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784, 789 (D.N.J. 1986). In the absence of controlling circuit authority, this instruction does not purport to resolve that issue; rather, it is intended to provide guidance to the extent that the accounting remedy is referred to a jury.

In an accounting under 15 U.S.C. § 1117 (2006),"[a] plaintiff need not demonstrate actual damage to obtain an accounting of the infringer's profits under section 35 of the Lanham Act." It is enough that the Plaintiff proves the infringer's sales. The burden then shifts to the Defendant, which must prove its expenses and other deductions from gross sales." *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.,* 833 F.2d 1484, 1487-88 (11th Cir. 1987) (citations omitted);

An award of profits based on unjust enrichment or deterrence does not require a "higher showing of culpability on the part of the defendant." *Burger King Corp. v. Mason,* 855 F.2d 779, 781 (11th Cir. 1988); *see also Optimum Techs., Inc. v. Home Depot U.S.A., Inc.*, 217 Fed App'x 899 (11th Cir. 2007) (holding that willful and deliberate infringement, unjust enrichment and deterrence are appropriate circumstances for an accounting of profits, as well as setting forth definitions of willful infringement and unjust enrichment). Likewise, "the law

of this Circuit is well settled that a plaintiff need not demonstrate actual damage to obtain an award reflecting an infringer's profits under Section 35 of the Lanham Act." *Burger King Corp. v. C. R. Weaver*, 169 F.3d 1310, 1321 (11th Cir. 1999)); *see also id.* (accounting of defendant's profits may be appropriate even in absence of direct competition between the parties. *Babbit Elecs., Inc. v. DynaScan Corp.*, 38 F.3d 1161, 1182 (11th Cir. 1994).

Punitive Damages

Section 35 of the Lanham Act does not authorize awards of punitive damages, and, indeed, it provides that any monetary relief made under it be compensation and not a penalty. 15 U.S.C. § 1117(a) (2006). Nevertheless, the Lanham Act does not preempt awards of punitive damages under state law. *See generally* 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 30:96 (4th ed.) (citing state law cases).

10.2 Trademark Infringement – Unregistered Trademark

[Name of plaintiff] claims that [Name of defendant] has infringed [his/her/its] trademark. To prove [his/her/its] claim, [Name of plaintiff] must prove the following facts by a preponderance of the evidence:

1: [Name of plaintiff] owns a trademark that is entitled to protection; and

2: [Name of defendant] is using a trademark that infringes [Name of plaintiff]'s trademark.

Validity

You must first find that [Name of plaintiff] owns protectable rights to a trademark. [Name of plaintiff] must prove by a preponderance of the evidence that the trademark is:

1. Used in commerce;

2. Distinctive; and

3. Nonfunctional

Used in Commerce

The right to a particular trademark grows out of the trademark's use. Use is sufficient to establish rights if it is public enough that it identifies the goods in question as those of the person using the trademark. It is sufficient to establish valid rights if the trademark is used in genuine transactions in commerce and the use is consistent and continuous. Mere "token use" of the trademark—use made solely to reserve rights in the trademark—is not enough to establish valid rights. Wide public recognition

of the trademark is not required, but secret or undisclosed use is not adequate.

A trademark is used in commerce and in connection with goods when it is placed on:

- the goods or their containers or the associated displays,
- the tags or labels affixed to the goods or their containers, or
- the documents associated with the goods or their sale, and
- the goods are sold or transported in commerce in more than one state, or in the United States and a foreign country.

[The following instruction should be given in cases in which [Name of plaintiff] asserts rights to a trademark through use in commerce by a licensee:

[Name of plaintiff] may acquire rights to a trademark through another party's use of the trademark, even if [Name of plaintiff] did not use the trademark. [Name of plaintiff] may enter into an agreement that permits another person to use the trademark. This agreement is called a license; [Name of plaintiff] is the licensor and the party permitted to use the trademark is the licensee. An exclusive license may include the right to prevent others from using the same or a similar trademark that, in the marketplace, is likely to cause confusion. A license does not have to be in writing.

For a license to be valid, the licensor must retain adequate control over the quality of goods sold under the trademark. A licensee acquires no ownership interest in the licensed trademark. Instead, the licensee acquires only those rights granted by the license.]

[The following instruction should be given in cases in which the parties claim prior rights in particular geographic areas:

[Name of plaintiff]'s rights are ordinarily limited to the places that [he/she/it] actually uses the trademark. Therefore, it is possible for another party to gain rights to the same or a similar trademark in a different geographic area.

There are two exceptions to this rule. First, [Name of plaintiff]'s rights may reach beyond the geographic areas where [he/she/it] uses the trademark into [his/her/its] zone of natural expansion. In other words, [Name of plaintiff]'s trademark rights can extend to places where it is probable that [Name of plaintiff] would have expanded use of the trademark.

Second, [Name of plaintiff]'s rights may extend to places where [he/she/it] does not use the trademark, but where [Name of defendant] adopted and used the trademark with a bad-faith intent to violate [Name of plaintiff]'s rights. Mere knowledge of [Name of plaintiff]'s rights is insufficient to trigger this exception. [Name of defendant] must have intended to violate [Name of plaintiff]'s rights.]

Distinctiveness

For [Name of plaintiff] to have a protectable trademark, the trademark must be distinctive. In other words, the trademark must be recognized in its market as a trademark.

To be distinctive, a trademark can either:

- Be inherently distinctive; or
- Have acquired distinctiveness.

You must look at the trademark as a whole when evaluating the distinctiveness or lack of distinctiveness.

Acquired Distinctiveness

A trademark is protectable if it has “acquired distinctiveness,” also known as “secondary meaning.” A claimed trademark has acquired secondary meaning if the primary significance of the trademark in the minds of the consuming public is not the associated good itself, but instead the source or producer of the good.

There are four factors you may use in determining secondary meaning:

- The length and nature of the trademark’s use;
- The nature and extent of advertising and promotion of the trademark;
- The efforts of the trademark’s owner to promote a conscious connection between the trademark and its business; and
- The degree to which the public recognizes the good by the trademark.

Inherent Distinctiveness

A trademark also is protectable if it is inherently distinctive. To determine whether a claimed trademark is inherently distinctive, you must first place it into one of four “types” or categories. Trademarks come in different “types” or categories, namely: “generic,” “descriptive,” “suggestive,” “arbitrary,” and “fanciful” or “coined.” The type of trademark is relevant to the trademark’s strength.

I will now describe each type of trademark in the order of their general relative strength:

a. Generic:

A claimed trademark is generic if it is the word, name, symbol, or device, or any combination thereof, by which the good is known. An example of a generic trademark is “escalator” for moving stairs.

Whether a claimed trademark is generic does not depend on the term itself, but on use of the term. A word may be generic of some things but not of others. For example, “ivory” is generic for elephant tusks, but it is not generic for soap.

Whether a claimed trademark is generic is viewed from the perspective of a member of the relevant public evaluating the trademark.

Generic trademarks are not protected and cannot be registered with the U.S. Patent and Trademark Office.

b. Descriptive:

A claimed trademark is “descriptive” if it merely describes an ingredient, quality, characteristic, function, feature, purpose, or use of the good. An example of a descriptive trademark would be VISION CENTER for an eyeglasses store.

Descriptive trademarks are eligible for protection if they have acquired “secondary meaning.” I previously instructed you on how to determine if a claimed trademark has acquired secondary meaning.

c. Suggestive:

A “suggestive” trademark suggests, rather than describes, qualities of the underlying good. If a consumer’s imagination is necessary to make the connection between the trademark and the goods, then the trademark suggests the features of the goods. An example of a suggestive

trademark is ICEBERG for a refrigerator. Suggestive trademarks are eligible for protection without proof of secondary meaning.

d. Arbitrary and Fanciful or Coined:

An "arbitrary" trademark is a trademark that is a real word but has no logical relationship to the underlying goods. An example of an arbitrary trademark is DOMINO for sugar.

A "fanciful" or "coined" trademark is a trademark created solely to function as a trademark but which has no meaning beyond the trademark itself. An example of a fanciful or coined trademark is EXXON for gasoline.

Arbitrary and fanciful or coined trademarks are eligible for protection without proof of secondary meaning.

Nonfunctionality

The third element that [Name of plaintiff] must prove is that the trademark is primarily nonfunctional. A claimed trademark is functional if it is essential to the use or purpose of the good, or if it affects the good's cost or quality. In other words, if allowing [Name of plaintiff] to have exclusive use of the trademark would put competitors at a disadvantage that does not relate to [Name of plaintiff]'s reputation, then the trademark may be functional. For example, a trademark for the color of ice cream—such as white for vanilla, pink for strawberry, and brown for chocolate—would be functional if the color identifies the flavor of the ice cream.

In evaluating nonfunctionality, you must keep in mind that a claimed trademark may be primarily nonfunctional even if it serves a practical purpose. The fact that individual components of a claimed trademark are functional does not prevent the overall combination of those elements from being primarily nonfunctional. Nevertheless, individually functional elements are not valid merely because they are part of an overall nonfunctional trademark.

INFRINGEMENT

Introductory Infringement Jury Charge

If you have determined that [Name of plaintiff]'s trademark is entitled to protection, you must next consider whether [Name of defendant] infringed [Name of plaintiff]'s trademark. The test for infringement is whether [Name of defendant]'s mark is "likely to cause confusion" with [Name of plaintiff]'s trademark.

That is, you must determine if [Name of defendant], without [Name of plaintiff]'s consent, used the same or a similar trademark in connection with the sale of, or the offer to sell, goods in a manner that is likely to cause confusion among consumers as to the source, affiliation, approval, or sponsorship of the goods. "Source," "origin," "affiliation," "approval," or "sponsorship" means that the public believes that [Name of defendant]'s goods come from, are affiliated with, are approved by, or sponsored by [Name of plaintiff].

It is not necessary that the trademark used by [Name of defendant] be an exact copy of [Name of plaintiff]'s trademark. Rather, [Name of plaintiff] must demonstrate, by a preponderance of the evidence, that [Name of defendant]'s use of [his/her/its] trademark is, when viewed in its entirety, likely to cause confusion as to the source, origin, affiliation, approval, or sponsorship of the goods in question.

Infringement

[Name of plaintiff] claims that [Name of defendant] has infringed [his/her/its] trademark. For [Name of plaintiff] to succeed on this claim you must find by a preponderance of the evidence that [Name of defendant]:

1. Used the trademark in connection with the sale or offer to sell goods;
2. Used the trademark in commerce; and,

3. Used the trademark in a manner that is likely to:

a. cause confusion mistake, or deception as to

b. the source, origin, affiliation, approval, or sponsorship of [Name of defendant]'s goods.

Infringement: Likelihood of Confusion (Seven-Factor Test)

There are seven factors you can use to determine whether a likelihood of confusion exists. No single factor or consideration controls, and [Name of plaintiff] is not required to prove that all, or even most, of the factors are present in any particular case. You also may use factors other than these seven. You should weigh all of the relevant evidence in determining whether a likelihood of confusion exists.

1. Type and Strength of [Name of plaintiff]'s Mark

The first factor is the "type and strength" of the trademark. Some trademarks are stronger than others. The "stronger" the trademark, the more protection should be given to it.

I previously have instructed you as to the four "types" or categories of trademarks, namely, "generic," "descriptive," "suggestive," "descriptive," "arbitrary," and "fanciful" or "coined." The type of a claimed trademark is relevant to the trademark's strength. When evaluating the strength of [Name of plaintiff]'s trademark, you also may consider the extent of any use by third parties of similar trademarks, [Name of plaintiff]'s promotional expenditures, and the volume of [Name of plaintiff]'s sales under [his/her/its] trademark.

2. Similarity of the Parties' Trademarks

In evaluating whether trademarks are similar, you may consider the "overall impression" that [Name of plaintiff]'s and [Name of defendant]'s trademarks create, including the sound, appearance, and manner in which they are used. You may look at the trademarks as a whole rather than simply comparing their individual features.

3. Similarity of the Parties' Goods

This factor considers not only whether the consuming public can readily distinguish between the parties' goods, but also whether the goods at issue are of a kind that the public attributes to a single source.

4. Similarity of the Parties' Sales Channels, Distribution, and Customers

This factor considers where, how, and to whom the parties' goods are sold. Similarities increase the possibility of consumer confusion, mistake, or deception.

5. Similarity of the Parties' Advertising Media

This factor looks to each party's method of advertising. It is not a requirement that [Name of plaintiff] and [Name of defendant] advertise in the same magazines, publications, or other advertising outlets. The issue is whether the parties use the same forums and media outlets to advertise, leading to possible confusion.

6. [Name of defendant]'s Intent

You also may consider whether [Name of defendant] intended to infringe on [Name of plaintiff]'s trademark. That is, did [Name of defendant] adopt [his/her/its] trademark with the intention of deriving a benefit from [Name of plaintiff]'s reputation? If you determine that [Name

of defendant] intentionally ignored potential infringement, you may impute to [Name of defendant] an intent to infringe.

7. Actual Confusion

Because the presence of actual confusion usually is difficult to show, a finding of actual confusion is not required to find trademark infringement. Alternatively, the absence of actual confusion does not necessarily mean [Name of defendant] is not liable for trademark infringement.

The evidence of actual confusion of trademarks should be reasonably significant. You should weigh the alleged actual confusion, using the following factors:

- The amount and duration of the confusion;
- The degree of familiarity the customer has with the goods;
- The type of person complaining of the alleged actual confusion (for example, whether that person is a customer or a noncustomer); and
- The alleged number of people who are actually confused (for example, whether the confused person is an actual customer or someone else).

If you find that [Name of defendant] has infringed [Name of plaintiff]'s trademark, you must next consider [Name of defendant]'s affirmative defenses. [See Defense Interrogatories at 10.3]

[The following instruction should be given in cases in which [Name of plaintiff] claims third party "contributory infringement" for an underlying claim of infringement.

[Name of plaintiff] claims that [Name of defendant] is liable for the "contributory infringement" of [Name of plaintiff]'s trademark. "Contributory infringement" occurs when a defendant intentionally induces or causes another party to infringe a plaintiff's trademark. If this occurs, [Name of defendant] can be held liable for other party's infringement.]

__.__
Remedies

If you find that [Name of plaintiff]'s trademark is valid, that [Name of defendant] has infringed it, and [Name of defendant] does not have a defense to the infringement, you must determine whether and to what extent, money damages should be awarded.

Plaintiff's Actual Monetary Damages

You may award actual damages [Name of plaintiff] has sustained. [Name of plaintiff] may recover the economic injury to [his/her/its] business proximately resulting from [Name of defendant]'s wrongful acts. You are not required to calculate actual damages with absolute exactness— you may make reasonable approximations. However, any award of actual damages to [Name of plaintiff] must be just and reasonable, based on facts, and proved by [Name of plaintiff] by a preponderance of the evidence.

Defendant's Profits and Calculation of Profits

In addition to [Name of plaintiff]'s actual damages, you may also make an award based on an accounting of [Name of defendant]'s profits if you find that:

- [Name of defendant]'s conduct was willful and deliberate;

- [Name of defendant] was unjustly enriched; or,

- An award of [Name of defendant]'s profits is necessary to deter [Name of defendant]'s future conduct.

A defendant commits a "willful violation" of a trademark when that defendant knowingly and purposefully capitalizes on and appropriates for itself the goodwill of a plaintiff.

"Unjust enrichment" occurs if [Name of defendant] receives a benefit to which [he/she/it] is not entitled.

In determining [Name of defendant]'s profits, [Name of plaintiff] only is required to prove [Name of defendant]'s gross sales. [Name of defendant] may then prove the amount of sales made for reasons other than the infringement. [Name of defendant] also may prove its costs or other deductions which [he/she/it] claims should be subtracted from the amount of [his/her/its] sales to determine [his/her/its] profits on such sales. Any costs or deductions that [Name of defendant] proves by a preponderance of the evidence are required to be subtracted from the sales attributable to the infringement, and the difference is the amount that may be awarded to [Name of plaintiff].

Nominal Damages

If you find that [Name of defendant] infringed [Name of plaintiff]'s trademark, but you do not find that [Name of plaintiff] sustained any actual damages or damages based on [Name of defendant]'s profits, you may return a verdict for [Name of plaintiff] and award what are called "nominal" damages. By "nominal" I mean a small amount of damages that you, in your discretion, determine.

__.__

Infringement of an Unregistered Trademark

SPECIAL INTERROGATORIES TO THE JURY

We, the jury, find by a preponderance of the evidence that:

VALIDITY

1. [Name of plaintiff] owns a trademark that is entitled to protection.

Answer Yes or No _____

If your answer is "Yes," go to either Question No. 2 or 5, as appropriate. If your answer is "No," you should sign and date this form.

[Use these special interrogatories where the parties claim prior rights in particular geographic areas:

2. [Name of plaintiff] used [his/her/its] trademark in commerce prior to the date of first use of [Name of defendant]'s trademark in the geographic area in dispute.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 5. If your answer is "No," go on to Question No. 3.

3. The geographic area in which [Name of defendant] uses [his/her/its] trademark lies within [Name of plaintiff]'s zone of natural expansion.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 5. If your answer is "No," go on to Question No. 4.

4. [Name of defendant] adopted [his/her/its] trademark with a bad-faith intent to violate [Name of plaintiff]'s rights in [his/her/its] trademark.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 5. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.]

5. [Name of plaintiff]'s trademark was distinctive prior to the date of first use of [Name of defendant]'s trademark, either because [Name of plaintiff]'s trademark was inherently distinctive or because it had acquired distinctiveness.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 6. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

6. [Name of plaintiff]'s trademark is nonfunctional.

Answer Yes or No _____

If your answer is "yes," go to Question No. 7. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

INFRINGEMENT

7. [Name of defendant]'s use of [his/her/its] trademark causes a likelihood of confusion.

Answer Yes or No _____

If your answer is “Yes,” go to Question No. 8. If your answer is “No,” then your foreperson should sign and date the last page of this verdict form.

[Use these special interrogatories if [Name of plaintiff] is claiming contributory infringement:

8. A party, other than [Name of defendant], has infringed [Name of plaintiff]’s trademark and [Name of defendant] knew that the other party would be engaging in trademark infringement if [he/she/it] undertook the challenged activity.

Answer Yes or No _____

If your answer is “Yes,” go to Question No. 9. If your answer is “No,” then go to Question No. 11.

9. [Name of defendant] intentionally induced the other party to engage in the infringing activity.

Answer Yes or No _____

If your answer is “Yes,” go to Question No. 10. If your answer is “No,” then go to Question No. 11.

10. [Name of defendant] is liable for contributory infringement.

Answer Yes or No _____

If your answer to this question is “Yes,” then go to question number 11.]

REMEDIES

These interrogatories should be given if [Name of plaintiff] seeks actual damages for infringement:

11. [Name of plaintiff] has suffered actual damages.

Answer Yes or No _____

If your answer is "Yes," in what amount?

$_____.

[These interrogatories should be given if [Name of plaintiff] seeks an award of [Name of defendant]'s profits:

12. [Name of defendant]'s conduct was willful and deliberate, [Name of defendant] was unjustly enriched, or such an award is necessary to deter future conduct.

Answer Yes or No _____

If your answer to this question is "Yes," then go to Question No. 13. If your answer is "No," then go to Question No. 14.

13. [Name of plaintiff] is awarded [Name of defendant]'s profits.

Answer Yes or No _____

If your answer is "Yes," in what amount?

$_____.

14. Even though [Name of plaintiff] has not been awarded any actual monetary damages or [Name of defendant]'s profits, [Name of plaintiff] is awarded nominal damages.

Answer Yes or No _____

If your answer is "Yes," in what amount?

$_____.

SO SAY WE ALL.

_____
Foreperson's signature

DATE: _____

ANNOTATIONS AND COMMENTS

These instructions should be given only in cases in which the Plaintiff seeks to protect an unregistered trademark. Although the Supreme Court suggested in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992), that there is no reason to apply differing rules to conventional word marks and trade dresses, these instructions use the term "trademark" only to refer to conventional word marks. Separate jury instructions relating to trade dress are contained in these Annotations and Comments to implement the Supreme Court's later qualifications of *Two Pesos* in *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 120 S. Ct. 1339, 146 L. Ed. 2d 182 (2000), and *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164, 115 S. Ct. 1300, 1304, 131 L. Ed. 2d 248 (1995). Additionally, the instruction may be modifie if the trademark at issue is a service mark, certification mark, a collective mark, or a trade dress. *See* the Annotations and Comments to the Counterclaims for Cancellation of a Registered Trademark, *supra*, for additional discussion.

The three prerequisites for a trademark's validity, namely, use in commerce, distinctiveness, and nonfunctionality, are well-established under Eleventh Circuit law. *See, e.g.*, *Epic Metals Corp. v. Souliere*, 99 F.3d 1034, 1038-39 (11th Cir. 1996); *Univ. of Fla. v. KPB, Inc.*, 89 F.3d 773, 776-77 (11th Cir. 1996); *Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165, 1170 (11th Cir. 1991); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1535 (11th Cir. 1986). Claimed verbal trademarks have been found to be functional in rare cases outside of the Eleventh Circuit, *see, e.g.*, *Autodesk, Inc. v. Dassault Systemès Solidworks Corp.*, 685 F. Supp. 2d 1023, 1028 (N.D. Cal. 2009), but the nonfunctionality/functionality distinction typically comes into play only in disputes over the validity of claimed trade dresses. As a practical matter, a jury hearing an action involving the claimed rights to a conventional trademark,

service mark, collective mark, or certification mark will not ordinarily be required to determine whether that claimed trademark is functional or nonfunctional.

Use in Commerce

The definitions of use in commerce set forth in this instruction are drawn from the statutory definition of use in commerce found in Section 45 of the Lanham Act, *id.* § 1127, as well as from the U.S. Patent and Trademark Office's internal operating guidelines. *See* United States Patent & Trademark Office, *Trademark Manual of Examining Procedure* §§ 1303.01, 1306.01-.03, 1304.08-.09 (2010); Restatement (Third) of Unfair Competition §§ 10-11 (1995). Eleventh Circuit opinions addressing the issue have done so in the context of the extent of use in commerce necessary to create common-law rights, but the underlying principles are the same. *See, e.g.*, *Planetary Motion, Inc. v. Techplosion, Inc.*, 261 F.3d 1188, 1193-2000 (11th Cir. 2001) (applying statutory definition of use in commerce and holding that nonmonetary transactions can create protectable rights); *Leigh v. Warner Bros.*, 212 F.3d 1210, 1217 (11th Cir. 2000) (requiring claimed trademark to be used in a manner recognizable as a trademark); *Geovision, Inc. v. Geovision Corp.*, 928 F.2d 387, 388-89 (11th Cir. 1991) ("[A] mere contract of sale without a product or mark is not within the statutory meaning of a sale."); *Blue Bell, Inc. v. Farah Mfg. Co.*, 508 F.2d 1260, 1267 (5th Cir. 1975) (shipments of goods made only to create or to preserve trademark rights do not qualify as bona-fide uses in commerce).

The instruction departs from the express statutory definition of trademark use in commerce to the extent that that definition fails to require use in interstate commerce or in commerce with a foreign country. *See* 15 U.S.C. § 1127. That requirement is incorporated into the instruction to maintain consistency with the requirements of trademark use in connection with services.

Section 5 of the Lanham Act, 15 U.S.C. § 1055 (2006), expressly recognizes the ability of a plaintiff to qualify for registration through the properly licensed use of registered trademark, and this principle has long been recognized by the law of the Circuit as well. *See generally Turner v. H M H Publ'g Co.*, 380 F.2d 224, 229 (5th Cir. 1967) (affirming validity of licensed service mark); *see also Planetary Motion*, 261 F.3d at 1198 (same); *Mini Maid Servs. Co. v. Maid Brigade Sys., Inc.*, 967 F.2d 1516, 1519 (11th Cir. 1992) (same); *Prof'l Golfers Ass'n of Am. v. Bankers Life & Cas. Co.*, 514 F.2d 665, 688 (5th Cir. 1975) (affirming validity of licensed collective mark).

The principles underlying this instruction's treatment of geographic rights are drawn from *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 98, 39 S. Ct. 48, 51 (1918), *Hanover Star Milling Co. v. D. D. Metcalf Co.*, 240 U.S. 403, 419-20, 36 S. Ct. 357, 363 (1916), *Tally-Ho, Inc. v. Coast Cmty. College Dist.*, 889 F.2d 1018, 1027 (11th Cir. 1989), *Ky. Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 387 (5th Cir. 1977), *Am.*

Foods, Inc. v. Golden Flake, Inc., 312 F.2d 619, 626 (5th Cir. 1963), *Persha v. Armour & Co.*, 239 F.2d 628, 630 (5th Cir. 1957), *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 364 (2d Cir. 1954), and *El Chico, Inc. v. El Chico Cafe*, 214 F.2d 721, 725-26 (5th Cir. 1954).

Carnival Brand Seafood Co. v. Carnival Brands, Inc., 187 F.3d 1307, 1312-13 (11th Cir. 1999), suggests that the zone of natural expansion applies to goods and services as well as to geographic areas. *Planetary Motion*, 261 F.3d at 1201 n.23, however, criticizes this methodology as conflating the use-in-commerce prerequisite for protectable rights with the likelihood-of-confusion test for infringement.

Distinctiveness of Word Marks

The principles set forth in this instruction's treatment of distinctiveness are applicable to conventional word marks are generally drawn from *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769, 112 S. Ct. 2753, 2758, 120 L. Ed. 2d 615 (1992), *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 120 S. Ct. 1339, 146 L. Ed. 2d 182 (2000), *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 115 S. Ct. 1300 131 L. Ed. 2d 248 (1995), *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 545-46, 40 S. Ct. 414, 416-18, 64 L. Ed. 705 (1920), *Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1335-36 (11th Cir. 1999), *Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc.*, 106 F.3d 355, 362 (11th Cir), *modified on other grounds*, 122 F.3d 1379 (1997); and *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1190 (5th Cir. 1980).

The spectrum of distinctiveness applicable to trademarks, service marks, collective marks, and certification marks is most commonly applied in cases involving conventional word marks. *See, e.g.*, *Two Pesos*, 505 U.S. at 768, 112 S. Ct. at 2757, 120 L. Ed. 2d 615, *Dieter v. B & H Indus.*, 880 F.2d 322, 327-28 (11th Cir. 1989); *Am. Television & Commc'ns Corp. v. Am. Commc'ns & Television, Inc.*, 810 F.2d 1546, 1548 (11th Cir. 1987); *Freedom Sav. & Loan v. Way*, 757 F.2d 1176, 1182 n.5 (11th Cir. 1985). Nevertheless, it also has been invoked in evaluations of the potential inherent distinctiveness of design marks. *See Univ. of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535, 1540 (1985).

A finding that a claimed trademark is generic means that the mark cannot be protected *as* a trademark, *see Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S. Ct. 2753, 2757 (1992), and a jury finding that a claimed trademark is generic therefore should not evaluate whether the plaintiff has proven valid rights to the claimed trademark independent of the registration. *See Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1183 (5th Cir. 1980) ("A generic term can *never* become a trademark, [and] if a registered mark *at any time* becomes generic with respect to a particular article, the Lanham Act provides for the cancellation of that mark's registration." (footnote omitted) (citation omitted). Under limited circumstances, however, a defendant's use of a former trademark that has become generic can lead to liability for the tort of passing off. *See, e.g.*, *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 120, 59 S.

Ct. 109, 114, 83 L. Ed. 2d. 73 (1938) (use of a generic designation by a defendant must "be done in a manner which reasonably distinguishes its product from that of a plaintiff").

This instruction adopts the test for genericness set forth in Section 14(3) of the Lanham Act, 15 U.S.C. § 1064(3) (2006). Eleventh Circuit cases bearing on the issue include *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1358, 1359 n.4 (11th Cir. 2007), *Investacorp, Inc. v. Arabian Inv. Banking Corp. (Investcorp) E.C.*, 931 F.2d 1519, 1522 (11th Cir. 1991), and *Vision Ctr. v. Opticks, Inc.*, 596 F.2d 111, 115 (5th Cir. 1979).

In addition to trademarks falling within the scope of the definition in this instruction, "[n]ames—both surnames and first names—are regarded as descriptive terms and therefore one who claims federal trademark rights in a name must prove that the name has acquired secondary meaning." T*ana*, 611 F.3d at 774 (citation omitted.) "The policy reasons for requiring secondary meaning for the use of a personal or surname as a mark extend equally to the use of full names." *Id* . at 776. Other types of trademarks that are considered descriptive include individual colors, *see Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163, 115 S. Ct. 1300, 1303 131 L. Ed. 2d 248 (1995), geographically descriptive terms, *see Elgin Nat'l Watch Co. v. Ill. Watch Case Co.*, 179 U.S. 665, 673, 65 S. Ct. 270, 273, 45 L. Ed. 365 (1901), and noninherently distinctive trade dress. *See Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 857-58 (11th Cir. 1983). In affirming a finding of no secondary meaning, one panel of the Eleventh Circuit has held that "[a]lthough we believe that proof of intentional copying is probative evidence on the secondary meaning issue, we cannot agree with Plaintiff that proof of intentional copying conclusively establishes that plaintiff's trademark or trade dress has acquired secondary meaning." *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 860 (11th Cir. 1983); *see also CPG Prods. Corp. v. Pegasus Luggage, Inc.*, 776 F.2d 1007, 1012 (Fed. Cir. 1985) (concluding, in application of Eleventh Circuit law, that "[e]vidence of intentional copying in this case, also supports a finding of secondary meaning"). Because the court has not addressed the precise role played by intentional copying in the secondary meaning inquiry, these instructions adopt the four-factor test most commonly applied by the court.

A registered trademark that has achieved incontestable status under 15 U.S.C. § 1065 cannot be challenged on the grounds that it is descriptive and lacks secondary meaning. *Park 'N Fly v. Dollar Park N' Fly, Inc.*, 469 U.S. 189, 224, 105 S. Ct. 658, 83, 582 L. Ed. 2d (1985); *Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1209 (11th Cir. 1999); *Soweco*, 617 F.2d at 1184-85. Nevertheless, even though the registration covering a trademark may have achieved incontestable status, there are still a variety of defenses that may be made as to incontestability. *See* 15 U.S.C. § 1115(b).

Representative circuit case law bearing on the definition of suggestive trademarks includes *Am. Television & Commc'ns Corp. v. Am. Commc'ns & Television, Inc.*, 810 F.2d

1546, 1549 (11th Cir. 1987), *Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1545 (11th Cir. 1984), and *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1184 (5th Cir. 1980).

Representative circuit case law bearing on the definition of fanciful or arbitrary and coined trademarks includes *Carnival Brand Seafood Co. v. Carnival Brands, Inc.*, 187 F.3d 1307, 1312 (11th Cir. 1999), *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1182 n.3 (11th Cir. 1985), and *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 260 (5th Cir. 1980).

Distinctiveness of Trade Dress

Most unregistered trademarks found or held to be protectable under Section 43(a) are conventional verbal marks. *See, e.g.*, *Conagra, Inc. v. Singleton*, 743 F.2d 1508 (11th Cir. 1984) (verbal trademark); *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833 (11th Cir. 1983) (verbal service mark). Nevertheless, Section 43(a) had been held to protect nonverbal trademarks, or "trade dress," such as restaurant interiors. *See, e.g.*, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992); *University of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535 (11th Cir. 1985) (collegiate mascots); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986) (product packaging); *Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165 (11th Cir. 1991) (product configurations); and *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821 (11th Cir. 1982)(business techniques).

For clarity, the instructions do not include specific instructions relating to trade dress infringement. The test for distinguishing between inherently distinctive and non-inherently distinctive trade dress is taken from *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 857-58 (11th Cir. 1983), and has its origin in *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977). In *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986), the court declined to disturb the district court's reliance on the *Seabrook* factors in finding a claimed trade dress to be inherently distinctive, although the court also invoked the four-tiered spectrum of distinctiveness this instruction proposes for conventional trademarks, service marks, collective marks, and certification marks. *See id.* at 1347; *see also Univ. of Fla. v. KPB, Inc.*, 89 F.3d 773, 776 n.4 (11th Cir. 1996) (noting use of both tests in prior case law). Because there is no necessary inconsistency between the two tests, this instruction is not intended to foreclose application of the spectrum-of-distinctiveness test in actions to protect claimed trade dresses.

The factors set forth in this In affirming a finding of no secondary meaning, one panel of the Eleventh Circuit has held that "[a]lthough we believe that proof of intentional copying is probative evidence on the secondary meaning issue, we cannot agree with Plaintiff that proof of intentional copying conclusively establishes that plaintiff's trademark or trade dress has acquired secondary meaning." *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 860 (11th Cir. 1983); *see also CPG Prods. Corp. v. Pegasus Luggage, Inc.*, 776 F.2d 1007, 1012 (Fed. Cir. 1985) (concluding, in application of Eleventh Circuit law, that "[e]vidence of

intentional copying in this case, also supports a finding of secondary meaning"). Because the court has not addressed the precise role played by intentional copying in the secondary meaning inquiry, these instructions adopt the four-factor test most commonly applied by the court. instruction for consideration in the acquired distinctiveness, or "secondary meaning," inquiry are drawn from *Knights Armament*, 654 F.3d at 1189, *Am. Television & Commc'ns Corp.*, 810 F.2d at 1549, *Conagra,*, 743 F.2d at 1513, and *Brooks Shoe*, 716 F.2d at 860.

Nonfunctionality of Trade Dress

A finding that a claimed trademark is functional means that the trademark cannot be protected *as* a trademark. *See Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1206-07 (11th Cir. 2004). Under limited circumstances, however, a Defendant's use of a functional designation can lead to liability for the tort of passing off. *See, e.g.*, *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 121, 59 S. Ct. 109, 114-115, 83 L. Ed. 2d 73 (1938).

The functionality doctrine prevents trademark law, which seeks to promote competition, from instead inhibiting legitimate competition. *See TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 32-33, 121 S. Ct. 1255, 1261-62, 149 L. Ed. 2d 164 (2001); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164, 115 S. Ct. 1300, 1304, 131 L. Ed. 2d 248 (1995); *Dippin' Dots*, 369 F.3d at 1202-03; *Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571, 1579-80 (Fed. Cir. 1995) (applying Eleventh Circuit law); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1538 (11th Cir. 1986).

The requirement that a trademark be nonfunctional in the utilitarian sense is often regarded as necessary to maintain the distinction between possibly perpetual trademark protection and the temporally limited protection available under federal utility patent law. *See TrafFix Devices*, 532 U.S. at 34, 121 S. Ct. at 1262, 149 L. Ed. 2d 164 ("The Lanham Act does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity."). At least some Circuit case law, however, suggests that the requirement has constitutional dimensions. *See, e.g.*, *Wilhelm Pudenz GmbH v. Littlefuse Inc.*, 177 F.3d 1204, 1208 (11th Cir. 1999) ("[W]hen the operation of the Lanham Act would upset the balance struck by the Patent Act, the Lanham Act must yield. The functionality doctrine serves this purpose by eliminating the possibility of a perpetual exclusive right to the utilitarian features of a product under trademark law, which would be impossible (as well as unconstitutional) under the Patent Act."); *cf. B.H. Bunn Co. v. AAA Replacement Parts Co.*, 451 F.2d 1254, 1254, 1258-59 (5th Cir. 1971) ("It runs counter to federal purposes, and perhaps borders on the unconstitutional, for a state to prolong or to create any trade monopoly, to an originator [of a useful article] by forbidding the production of copies under the rubric of unfair competition.").

Infringement

General Introductory Charge.

The statutory basis for the federal tort of infringement of unregistered trademarks is Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which proscribes the use in commerce "by any person" of:

any word, term, symbol, or device, or any combination thereof, . . . which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.

15 U.S.C. § 1125(a). This language has long been recognized as creating a cause of action against the violation of rights to unregistered trademarks substantively equivalent to the federal infringement cause of action under Section 32 of the Act, *id.* § 1114, which is reserved to owners of trademarks that have been federally registered on the U.S. Patent and Trademark Office's Principal Register.

In keeping with conventional practice, these instructions refer to unfair competition grounded in the alleged misappropriation of a trademark as "infringement." Assuming that a protectable trademark exists, the "touchstone" of a finding of infringement "is not simply whether there is an unauthorized use of a protected trademark, but whether such use is likely to cause customer confusion." *Custom Mfg. & Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 647 (11th Cir. 2009); *see also Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.* 522 F.3d 1200, 1205 (11th Cir. 2007); *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.* 716 F.2d 833, 839 (11th Cir. 1983) (test for service mark infringement is whether or not the offending service mark is "likely to cause confusion").

The infringement analysis in these charges is the same for word marks, logos and trade dress. This is meant to promote a more consistent approach to the analysis and is believed by the drafters of this charge to be more consistent with the case authority. This approach varies from other jury charge sources. *See, e.g.*, American Bar Association Section of Litigation, *Model Jury Instructions: Copyright, Trademark and Trade Dress Litigation* (2008).

Likelihood of Confusion: Seven-Factor Test

This is the test most commonly applied for direct infringement, in which the Defendant is using an allegedly confusingly similar trademark in connection with its own goods. There are many Eleventh Circuit and former Fifth Circuit cases applying the seven-factor test set

forth in these instructions. *See e.g., Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1335 (11th Cir 1999); *Tally-Ho, Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1027 (11th Cir. 1989), *Dieter v. B&H Indus. of Sw. Fla., Inc.*, 880 F.2d 322, 326 (11th Cir. 1989); *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1182 (11th Cir. 1985); *Univ. of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535, 1542-43 (11th Cir. 1985); *E. Remy Martin & Co. v. Shaw-Ross, Int'l Imps.*, 756 F.2d 1525 1530(11th Cir. 1985); *Wesco Mfg. v. Tropical Attractions of Palm Beach*, 833 F.2d 1484, 1488 (11th Cir. 1984); *Roto-Rooter Corp. v. O'Neal*, 513 F.2d 44, 45-46 (5th Cir. 1975). Nevertheless, the Eleventh Circuit has allowed the consideration of other factors where appropriate. *See, e.g.,Tana v. Dantanna's*, 611 F.3d 767, 780 (11th Cir. 2010) ("Our circuit has recognized that new factors may merit consideration in determining whether there is a likelihood of confusion." (internal quotation marks omitted)); *accord Swatch Watch, S.A. v. Taxor, Inc*, 785 F.2d 956, 958 (11th Cir 1986). Examples of those additional factors include the degree of care exercised by purchasers of the parties' goods and services, *see Armstrong Cork Co. v. World Carpets, Inc.*, 597 F.2d 496, 504 n.10 (5th Cir. 1979), a prior affiliation between the parties, *see Prof'l Golfers Ass'n v. Bankers Life & Cas. Co.*, 514 F.2d 665, 670 (5th Cir. 1975), the defendant's infringement of multiple trademarks owned by the plaintiff, *see Volkswagenwerk AG v. Rickard*, 492 F.2d 474, 479 (5th Cir. 1974), the geographic proximity between the parties, *see Tana*, 611 F.3d at 780-81, and, in cases involving product design trade dress, the prominence of any house trademarks used by the parties. *See Bauer Lamp v. Shaffer*, 941 F.2d 1165, 1171 (11th Cir. 1991).

Whatever the factors used, the test for likely confusion is not applied by simply using a mathematical approach, that is, adding up how many factors have been proven or not proven. Rather, as the Eleventh Circuit has explained, "[a] district court should not determine whether a likelihood of confusion exists merely by computing whether a majority of the subsidiary factors indicate that such a likelihood exits. Rather, the district court must evaluate the weight to be accorded the individual subsidiary facts and make the ultimate fact decision." *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.* 716 F.2d 833, 840 n.17 (11th Cir. 1983).

Types and Strength of Trademarks

Eleventh Circuit doctrine governing the categories of trademarks, namely, "generic," "descriptive," "suggestive," and "arbitrary" or "coined and "fanciful," is discussed above.

The Eleventh Circuit's treatment of the considerations properly taken into in the trademark strength inquiry has been inconsistent. On the one hand, the court has suggested that suggestive, arbitrary, and coined trademarks, as well as those covered by incontestable registrations, are strong as a matter of law. *See, e.g., Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1335-36 (11th Cir. 1999) ("Arbitrary marks are the strongest of the four categories.); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1539 (11th Cir. 1986) ("[T]he scope of

protection increases as the [trademark] moves toward the arbitrary end of the spectrum."); *Sun Banks, Inc. v. Sun Federal Sav. & Loan Ass'n*, 651 F.2d 311, 315 (5th Cir. 1981) ("A strong mark is usually fictitious, arbitrary or fanciful and is generally inherently distinctive."); *see also Caliber Automotive Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC*, 605 F.3d 931, 938 (11th Cir. 2010) (holding plaintiff's incontestably registered service mark strong as a matter of law); *Dieter v. B & H Indus. of Sw. Fla., Inc.*, 880 F.2d 322, 329 (11th Cir. 1989) (same).

On the other hand, however, a number of the court's decisions have departed from these bright-line rules in favor of an examination of the marketplace strength of the trademark sought to be protected. *See, e.g.*, *Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1547 (11th Cir. 1984) ("The presumption of validity afforded plaintiff's [registered] mark under the Lanham Act is not material to [whether confusion is likely]."); *see also John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 974-75 n.13 (11th Cir. 1983) ("Of course, even if [the plaintiff's mark] initially was weak, it may have subsequently acquired strength through [the plaintiff's] promotional efforts."). In particular, those opinions have often focused on the extent of third-party use of arguably similar marks. *See, e.g.*, *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1183 (11th Cir. 1985) (finding plaintiff's suggestive mark weak as a matter of law on appeal based in part on evidence of third-party use); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 974-75 n.13 (11th Cir. 1983) ("Of course, even if [the plaintiff's mark] initially was weak, it may have subsequently acquired strength through [the plaintiff's] promotional efforts."); *Exxon Corp. v. Tex. Motor Exch.*, 628 F.2d 500, 504 (5th Cir. 1980) (affirming finding of trademark strength based on absence of evidence of third-party use); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 260 (5th Cir. 1980) (finding plaintiff's arbitrary mark weak as a matter of law on appeal based in part on evidence of third-party use). These instructions therefore adopt a dual approach that focuses on both the conceptual strength of the plaintiff's trademark, as reflected in the trademark's placement on the spectrum of distinctiveness, and its commercial strength, as reflected in these other considerations.

Similarity or Dissimilarity of the Parties' Trademarks

Representative circuit case law applying this factor includes *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1361 (11th Cir. 2007), *Dippin' Dots, Inc. v. Frosty Bites, Distrib., LLC*, 369 F.3d 1197, 1207-09 (11th Cir. 2004), *Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1337-38 (11th Cir. 1999), *Exxon Corp. v. Tex. Motor Exch.*, 628 F.2d 500, 504-05 (5th Cir. 1980), *Eskay Drugs, Inc. v. Smith Kline & French Labs.*, 188 F.2d 430, 431-32 (5th Cir. 1951).

Similarity or Dissimilarity of the Parties' Goods

Representative circuit case law applying this factor includes *Tana v. Dantanna's* , 611 F.3d 767, 777-78 (11th Cir. 2010), *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d

1531, 1541 (11th Cir. 1986), *Jellibeans, Inc. v. Skating Clubs of Ga. Inc.*, 716 F.2d 833, 842 (11th Cir. 1983), *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 832 (11th Cir. 1982), and *Safeway Stores, Inc. v. Safeway Discount Drugs, Inc.*, 675 F.2d 1160, 1166 (11th Cir. 1982).

Similarity or Dissimilarity of the Parties' Retail Outlets and Purchasers

Representative circuit case law applying this factor includes *Carnival Brands Seafood v. Carnival Brands, Inc.*, 187 F.3d 1307, 1313-14 (11th Cir. 1999), *John H. Harland Co. v. Clarke Checks Inc.*, 711 F.2d 966, 976 (11th Cir. 1983), *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 262 (5th Cir. 1980) *Exxon Corp. v. Texas Motor Exch.*, 628 F.2d 500, 505 (5th Cir. 1980), and *Pure Foods, Inc. v. Minute Maid Corp.*, 214 F.2d 792, 797 (5th Cir. 1954).

Similarity or Dissimilarity of the Parties' Advertising Media

Representative circuit case law applying this factor includes *Tana v. Dantanna's* , 611 F.3d 767, 776-77 (11th Cir. 2010), *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 967-77 (11th Cir. 1983), *Exxon Corp. v. Tex. Motor Exch.*, 628 F.2d 500, 506 (5th Cir. 1980), and *Volkswagenwerk Aktiengesellschaft v. Rickard*, 492, F.2d 474, 478 (5th Cir. 1974).

Actual Confusion

Under Eleventh Circuit law:

There can be no more positive or substantial proof of the likelihood of confusion than proof of actual confusion. Moreover, reason tells us that while very little proof of actual confusion would be necessary to prove the likelihood of confusion, an almost overwhelming amount of proof would be necessary to refute such proof.

World Carpets, Inc. v. Dick Littrell's New World Carpets, 438 F.2d 482, 489 (5th Cir. 1971) (footnote omitted).

Nevertheless, the Eleventh Circuit has held that "there is no absolute scale as to how many instances of actual confusion establish the existence of that factor." *See AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1543 (11th Cir. 1986). The sufficiency of "actual confusion" evidence depends on the circumstances. These circumstances can include the amount of actual confusion in the context of the case. *Compare Tana*, 611 F.3d at 779 (affirming finding of no infringement based in part on testimony of only two instances of actual confusion) and *Sun Banks v. Sun Fed. Sav. & Loan*, 651 F.2d 311, 319 (5th Cir. 1981) (nineteen reports of actual confusion over a three-year period was insufficient to establish a finding of actual confusion under the circumstances in that case) with *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833, 844 (11th Cir. 1983) (testimony of three witnesses sufficient to support a finding of actual confusion) and

Roto-Rooter Corp. v. O'Neal, 513 F.2d 44, 46 (5th Cir. 1975) (reversing trial court for applying a test of "statistically significant" confusion and finding confusion likely as a matter of law based on testimony of four instances of actual confusion). They can also include the type of person who was allegedly confused. Compare *Frehling Enters. v. Int'l Select Grp.*, 192 F.3d 1330, 1341 (11th Cir. 1999) (reversing finding of no likelihood of confusion based in part on evidence of confusion by plaintiff's professional buyer) and *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1510 n.10 (11th Cir. 1984 (affirming finding of likely confusion based on actual confusion among customers) with *Am. Television & Commc'ns Corp. v. Am. Commc'ns & Television, Inc.*, 810 F.2d 1546, 1550 (11th Cir. 1987) (according testimony of confusion among nonconsumers little weight) and *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1185 (11th Cir. 1985) (same).

The Defendant's Intent

Representative circuit case law applying this factor includes *Bauer Lamp v. Shaffer*, 941 F.2d 1165, 1172 (11th Cir. 1991) (per curiam), *Safeway Stores, Inc. v. Safeway Discount Drugs, Inc.*, 675 F.2d 1160, 1164 n.4 (11th Cir. 1982), *Sun Banks v. Sun Fed. Sav. & Loan Ass'n*, 651 F.2d 311, 318-19 (5th Cir. 1981), and *Aetna Cas. & Surety Co. v. Aetna Auto Fin., Inc.*, 123 F.2d 582, 584 (5th Cir. 1941).

Likelihood of Confusion: Resale of new genuine goods bearing the Plaintiff's mark

Under ordinary circumstances, the infringement cause of action is unavailable to trademark owners that already have sold their goods and are seeking to prevent subsequent sales by downstream purchasers. Specifically, the "genuine" nature of the goods will preclude confusion as to their source. S*ee generally Davidoff & CIE, SA v. PLD Int'l Corp.*, 263 F.3d 1297, 1301 (11th Cir. 2001) ("The resale of genuine trademarked goods generally does not constitute infringement. . . . Therefore, even though a subsequent sale is without a trademark owner's consent, the resale of a genuine good does not violate the [Lanham] Act."). The protection afforded by the "first sale" doctrine does not apply, however, when the good or the packaging has been materially altered. See id. at 1301 ("This [first sale] doctrine does not hold true when an alleged infringer sells trademarked goods that are materially different than those sold by the trademark owner."). When an infringement claim is grounded in the resale of goods bearing a plaintiff's trademark that are genuine but that are materially different from their authorized counterparts, the inquiry should focus on whether material differences exist and not the seven-factor test set forth above.

Likelihood of Confusion: Resale of used or reconditioned goods bearing the Plaintiff's mark

The sale of used or reconditioned goods bearing a plaintiff's trademark without adequate disclosure of the goods' status can constitute actionable infringement. *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 67 S. Ct. 1136, 91 L. Ed. 1386 (1947) is the seminal case on this theory of relief.. In *Champion*, the Supreme Court held that used goods can be sold under the trademark owner's trademark in a way that does not confuse the public. The public's expectations for used goods is different than for new goods. *See also Nitro Leisure Prods., L.L.C. v. Acushnet Co.*, 341 F.3d 1356, 1359-60, 1367 (Fed. Cir. 2003)) (applying Eleventh Circuit law to hold that the "material differences" test for the resale of new goods has not replaced the statutory "likelihood of confusion" test in the resale of used or reconditioned trademarked goods) When an infringement claim is grounded in the resale of used or refurbished genuine goods bearing a plaintiff's trademark, the inquiry should focus on whether material differences exist and not the seven-factor test set forth above.

Contributory Infringement

The test for liability for infringement set forth above is one for direct infringement. Liability for contributory trademark infringement is governed by the standard set forth in *Inwood Labs. v. Ives Labs*., 456 U.S. 844, 853-54, 102 S. Ct. 2182, 2188, 72 L. Ed. 2d 606 (1982) ("Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer is contributorially responsible for any harm done as a result of the deceit.").

Monetary Relief

The statutory basis for monetary relief is Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), which provides that:

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, . . . shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of [15 U.S.C. §§ 1111, 1114], and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the

circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty.

Award of the Plaintiff's Actual Damages

To be entitled to the legal remedy of an award of actual damages, the Plaintiff must demonstrate that it suffered actual monetary losses. *Babbit Elecs., Inc. v. DynaScan Corp*., 38 F.3d 1161, 1182 (11thCir 1994). ("[T]he Plaintiff must prove both lost sales and that the loss was caused by the Defendant's actions."). Actual damages are not "speculative" if they are supported by a preponderance of the evidence. *See, e.g., Ramada Inns, Inc. v. Gadsden Motel Co*., 804 F.2d 1562, 1565 (11th Cir. 1986) (affirming award of actual damages supported by unrebutted expert testimony).

It is "inappropriate" under Eleventh Circuit authority to award a trademark holder the "profit [it] would have made on sales to the defendant." *St. Charles Mfg. Co. v. Mercer*, 737 F.2d 891, 893 (11th Cir. 1983) ("While Plaintiffs in Lanham Act cases often receive profits from lost sales, these sales are sales made by Defendants to purchasers who sought to buy plaintiffs' products and instead received defendants'.") Nonetheless, franchise fees and lost royalties during the infringement period are recoverable. *See Ramada Inns*, 804 F.2d at 1565. An award of actual damages also may be based on findings that the Defendant's infringement has diverted sales from the Plaintiff or that the poor quality of the Defendant's goods has harmed the Plaintiff's business reputation. *See Boston Prof'l Hockey Ass'n v. Dallas Cap Mfg*., 597 F.2d 71, 75 (5th Cir. 1979).

The Eleventh Circuit will not allow liquidated damages in addition to actual damages if it represents a "double recovery." *Ramada Inns*, 804 F.2d at 1566. Under appropriate circumstances, however, the Eleventh Circuit will allow for both trademark and liquidated damages in the same case. *Id*. at 1566. (liquidated damages and actual damages upheld even though they were "calculated in almost the same manner" because each damage calculation was meant to "compensate for separate wrongs.") Likewise, in a franchise "hold over" case, infringement damages as well as expenditures necessary to establish a new franchisee are recoverable. Id.

Accounting of the Defendant's Profits

A split exists outside of the Eleventh Circuit on the issue of whether the equitable remedy of an accounting of a defendant's profits is a matter properly delegated to a jury or, alternatively, whether it is within the province of the court. In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962), the Supreme Court held that a former franchisee from which a disgorgement of profits was sought was entitled to a jury trial. Based on this outcome, some courts have concluded that a plaintiff's prayer for an

accounting creates a right to a jury trial because "[t]his type of remedy is fundamentally compensatory and legal in nature." *Alcan Int'l Ltd. v. S.A. Day Mfg. Co.*, 48 U.S.P.Q.2d 1151, 1154 (W.D.N.Y. 1998); see also *Ideal World Mktg., Inc. v. Duracell, Inc.*, 997 F. Supp. 334, 337-39 (E.D.N.Y. 1998); *Oxford Indus. v. Hartmarx Corp.*, 15 U.S.P.Q.2d 1648, 1653 (N.D. Ill. 1990). Others, however, have denied requests for jury trials on the ground that "the *Dairy Queen* Court based its decision on the fact that the predominant claim was for breach of contract and not for equitable relief." *G.A. Modefine S.A. v. Burlington Coat Factory Warehouse Corp.*, 888 F. Supp. 44, 46 (S.D.N.Y. 1995); see also *Am. Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784, 789 (D.N.J. 1986). In the absence of controlling circuit authority, this instruction does not purport to resolve that issue; rather, it is intended to provide guidance to the extent that the accounting remedy is referred to a jury.

In an accounting under 15 U.S.C. § 1117 (2006),"[a] plaintiff need not demonstrate actual damage to obtain an accounting of the infringer's profits under section 35 of the Lanham Act." It is enough that the Plaintiff proves the infringer's sales. The burden then shifts to the Defendant, which must prove its expenses and other deductions from gross sales." *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484, 1487-88 (11th Cir. 1987) (citations omitted);

An award of profits based on unjust enrichment or deterrence does not require a "higher showing of culpability on the part of the defendant." *Burger King Corp. v. Mason*, 855 F.2d 779, 781 (11th Cir. 1988); *see also Optimum Techs., Inc. v. Home Depot U.S.A., Inc.*, 217 Fed App'x 899 (11th Cir. 2007) (holding that willful and deliberate infringement, unjust enrichment and deterrence are appropriate circumstances for an accounting of profits, as well as setting forth definitions of willful infringement and unjust enrichment). Likewise, "the law of this Circuit is well settled that a plaintiff need not demonstrate actual damage to obtain an award reflecting an infringer's profits under Section 35 of the Lanham Act." *Burger King Corp. v. C. R. Weaver*, 169 F.3d 1310, 1321 (11th Cir. 1999)); *see also id*. (accounting of defendant's profits may be appropriate even in absence of direct competition between the parties. *Babbit Elecs., Inc. v. DynaScan Corp.*, 38 F.3d 1161, 1182 (11th Cir. 1994).

Punitive Damages

Section 35 of the Lanham Act does not authorize awards of punitive damages, and, indeed, it provides that any monetary relief made under it be compensation and not a penalty. 15 U.S.C. § 1117(a) (2006). Nevertheless, the Lanham Act does not preempt awards of punitive damages under state law. *See generally* 5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:96 (4th ed.) (citing state law cases).

10.3 Defenses to Claim of Infringement of a Trademark

[Name of plaintiff] has shown a likelihood of confusion, but [Name of defendant] claims that [Name of defendant] is not liable to [Name of plaintiff] for trademark infringement, because one or more of the following defenses exist. [Name of defendant] has the burden of proving [a] defense[s] to trademark infringement by a preponderance of the evidence.

[The following instruction should be given in cases in which [Name of defendant] claims that the use of [Name of plaintiff]'s trademark is a nominative fair use:

Nominative fair use is a defense to a claim of trademark infringement. Under this defense, [Name of defendant] may use [Name of plaintiff]'s trademark to refer to [Name of plaintiff]'s goods, but [Name of defendant] may not use [Name of plaintiff]'s trademark to refer to [Name of defendant]'s own goods. You must find that [Name of defendant]'s use of the trademark was not infringing if [Name of defendant] proves by a preponderance of the evidence that [his/her/its] use of [Name of plaintiff]'s trademark meets the following elements:

- [Name of plaintiff]'s trademark is the only name, term, or symbol reasonably available to describe [Name of defendant]'s goods;

- [Name of defendant] does not attempt to capitalize on consumer confusion or to appropriate the prestige of [Name of plaintiff]'s trademark; and

- [Name of defendant]'s use of [Name of plaintiff]'s trademark does not identify [Name of plaintiff] as the source of [Name of defendant]'s goods.]

[The following instruction should be given in cases in which [Name of defendant] claims that [his/her/its] use of [Name of plaintiff]'s trademark is descriptive fair use:

Descriptive fair use is a defense to a claim of trademark infringement. [Name of defendant] is not liable for infringement if [he/she/it] proves by a preponderance of the evidence that [his/her/its] use of [Name of plaintiff]'s trademark is necessary to accurately describe a characteristic of [his/her/its] goods. To establish this defense, [Name of defendant] must prove that [Name of plaintiff]'s trademark is used:

- Other than as a trademark;
- In a descriptive sense; and
- Fairly and in good faith—that is, [Name of defendant] did not intend to trade on the goodwill of [Name of plaintiff] by creating confusion as to the source of [Name of defendant]'s goods.]

[The following instruction should be given in cases in which [Name of defendant] claims that [Name of plaintiff] abandoned [his/her/its] trademark:

Abandonment of a trademark is a defense to a claim of infringement. To prove abandonment, [Name of defendant] must prove by a preponderance of the evidence the following:

- [Name of plaintiff] discontinued the bona fide use of [Name of plaintiff]'s trademark, and did so with the intent to not resume [his/her/its] use in the reasonably foreseeable future. If you find that [Name of plaintiff] has not used the trademark for three consecutive years, you may presume that [Name of plaintiff] did not intend to resume use of the trademark, but [Name of plaintiff] can rebut that presumption by producing evidence that [he/she/it] intended to resume use; or
- [Name of plaintiff] acted or failed to act, and as a result [Name of plaintiff]'s trademark no longer identifies the source of [Name of

plaintiff]'s goods and has become a generic term for the associated goods.]

Defenses to Claim of Infringement of a Trademark

SPECIAL INTERROGATORIES TO THE JURY

We, the jury, find by a preponderance of the evidence that:

Use these special interrogatories if [Name of defendant] is claiming that [his/her/its] use is nominative fair use:

1. [Name of plaintiff]'s trademark is the only reasonable way to describe [Name of defendant]'s goods.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 2. If your answer is "No," then go to Question No. 4.

2. [Name of defendant]'s use of [Name of plaintiff]'s trademark is not an attempt to capitalize on consumer confusion or to appropriate the prestige of [Name of plaintiff]'s trademark.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 3. If your answer is "No," then go to Question No. 4.

3. [Name of defendant]'s use of [Name of plaintiff]'s trademark is not intended to identify [his/her/its] goods with the source of [Name of plaintiff]'s goods.

Answer Yes or No _____

If your answer is “Yes,” then your foreperson should sign and date the last page of this verdict form. If your answer is “No,” then go to Question No. 4.

[Use these special interrogatories if [Name of defendant] is claiming that [his/her/its] use is descriptive fair use:

4. [Name of defendant] used [Name of plaintiff]’s trademark in a way other than as a trademark.

Answer Yes or No _____

If your answer is “Yes,” then go to Question No. 5. If your answer is “No,” then go to Question No. 7.

5. [Name of defendant] used [Name of plaintiff]’s trademark in a descriptive sense.

Answer Yes or No _____

If your answer is “Yes,” then go to Question No. 6. If your answer is “No,” then go to Question No. 7.

6. [Name of defendant] used [Name of plaintiff]’s trademark in good faith.

Answer Yes or No _____

If your answer is “Yes,” then your foreperson should sign and date the last page of this verdict form. If your answer is “No,” then go to Question No. 7.]

[Use these special interrogatories if [Name of defendant] asserts that [Name of plaintiff] has abandoned [his/her/its] trademark:

7. [Name of plaintiff] has ceased using the trademark with the intent to not resume [his/her/its] use in the reasonably foreseeable future.

Answer Yes or No _____

If your answer is "Yes," then your foreperson should sign and date the last page of this verdict form. If your answer is "No," then go to Question No. 8.

8. Because of [Name of plaintiff]'s acts or omissions, the trademark no longer identifies the source of the goods but rather identifies the goods themselves.

Answer Yes or No _____

If your answer is "Yes," then your foreperson should sign and date the last page of this verdict form. If your answer is "No," then go to Question No. 9 only if [Name of plaintiff]'s trademark is registered.]

[Use these special interrogatories if [Name of defendant] has asserted a counterclaim for cancellation of [Name of plaintiff]'s registered trademark registration on the basis that [Name of plaintiff] abandoned the trademark.

9. [Name of plaintiff] has abandoned [his/her/its] trademark.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 10. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

10. [Name of plaintiff]'s trademark registration is cancelled.

Answer Yes or No _____]

SO SAY WE ALL.

_____
Foreperson's signature

DATE: _____

ANNOTATIONS AND COMMENTS

Nominative and Descriptive Fair Use

The Eleventh Circuit does not appear to have expressly adopted the "nominative fair use" defense. In *Int'l Stamp Art, Inc. v. U.S. Postal Serv.*, 456 F.3d 1270 (11th Cir. 2006). However, the Court cited the leading Ninth Circuit case on the issue with approval, and recited the three elements above. *Id.* at 1277 (citing *New Kids on the Block v. News Am. Publ'g In*c., 971 F.2d 302, 308 (9th Cir. 1992)).

Descriptive fair use by the Defendant of either the Plaintiff's trademark or the words making up the Plaintiff's trademark may be justified under either of two theories. First, Section 33(b)(4) of the Lanham Act recognizes as a defense to the conclusive evidentiary presumption attaching to an incontestably registered trademark that a defendant is using a personal name "in his own business" or other words "fairly and in good faith only to describe the [associated] goods or services . . . or their geographic origin." 15 U.S.C. § 1115(b)(4) (2006). Second, the common law preserves defendants' ability to use personal names and descriptive terms in their primary descriptive sense. *See generally KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 125 S. Ct. 542, 160 L. Ed. 2d 440 (2004); *Pure Foods, Inc. v. Minute Maid Corp.*, 214 F.2d 792 (5th Cir. 1954); *Creamette Co. v. Conlin*, 191 F.2d 108 (5th Cir. 1951).

Abandonment

The statutory basis of this defense is Section 33(b) of the Lanham Act. 15 U.S.C. § 1115(b) (2006). A finding that a trademark has been abandoned means that the Plaintiff no longer has valid rights as of the date of abandonment. Nevertheless, because the Plaintiff may have acquired new rights to its trademark by resuming the use of its trademark after the initial abandonment took place, a jury finding that a registration is subject to cancellation on this ground is not dispositive of the Plaintiff's rights, and the jury therefore evaluate whether the Plaintiff has proven valid rights to the claimed

trademark independent of the registration. The Plaintiff's resumption of a trademark's use after abandonment will not allow the Plaintiff to claim valid rights that date back to its original use; rather, the new rights will date only from the resumed use. *See generally AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1549-50 (11th Cir. 1986).

Eleventh Circuit case law suggests that a defendant alleging that a plaintiff has abandoned its trademark faces a high burden: "[T]he burden a defendant bears on the affirmative defense of abandonment is, in fact, 'strict.' Because a finding of abandonment works an involuntary forfeiture of rights, federal courts uniformly agree that defendants asserting an abandonment defense face a 'stringent,' 'heavy,' or 'strict burden of proof.'" *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1174 (11th Cir. 2002) (citation omitted) (footnote omitted); *see also Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1516 (11th Cir. 1984) ("The defense of abandonment is one for which we require strict proof."); *Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1545 (11th Cir. 1984) (affirming finding that defendants had failed to carry the "strict burden of proof applicable to abandonment claims"). The court has not, however, expressly held that abandonment must be shown by clear and convincing evidence.

10.4 Counterclaims for Cancellation of a Federal Trademark Registration

[The following instruction should be given in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal registration:

If [I have instructed you to find that] [Name of plaintiff] has a registered trademark that is presumed to be valid, and that [Name of plaintiff] enjoys nationwide priority of rights and nationwide constructive notice of [his/her/its] rights, then you must consider [Name of defendant]'s claim that [Name of plaintiff]'s registration is invalid, because [insert ground or grounds for cancellation]. You must determine whether [Name of defendant] has proved by a preponderance of the evidence that [Name of plaintiff]'s registration should be cancelled.]

[The following instruction should be given in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. § 1051 on the ground that the registered trademark was not in use in commerce as of the date [Name of plaintiff] represented to the U.S. Patent and Trademark Office that the trademark was being used in commerce:

The right to a particular trademark grows out of the trademark's use. Use is sufficient to establish rights if it is public enough that it identifies the goods in question as those of the person using the trademark. It is sufficient to establish valid rights if the trademark is used in genuine commercial transactions and the use is consistent and continuous. Mere "token use" of the trademark—use made solely to reserve rights in the trademark—is not enough to establish valid rights. Wide public recognition of the trademark is not required, but secret or undisclosed use is not adequate.

As part of the process of registering a trademark with the Patent and Trademark Office, an applicant must swear under oath that it is using its trademark in commerce in connection with the goods covered by the application. If it was not using the trademark in commerce in connection with the goods covered by [Name of plaintiff]'s trademark application, the trademark registration is cancelled.

A trademark is used in commerce and in connection with goods when it is placed on:

- the goods or their containers or the associated displays,
- the tags or labels affixed to the goods or their containers,
- the documents associated with the goods or their sale, and
- the goods are sold or transported in commerce in more than one state, or in the United States and a foreign country.]

[The following instruction should be given in cases in which [Name of defendant] has asserted a counterclaim for cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. § 1064(3) because the registered trademark has been abandoned through nonuse or a failure to police:

Abandonment of a trademark is a ground for the cancellation of a trademark registration. To prove abandonment, [Name of defendant] must prove by a preponderance of the evidence that:

- [Name of plaintiff] discontinued the bona fide use of the trademark, and did so with intent to not resume [his/her/its] use in the reasonably foreseeable future. If you find that [Name of plaintiff] has not used the trademark for three consecutive years, you may presume that [Name of plaintiff] did not intend to resume use of the

trademark, but [Name of plaintiff] can rebut that presumption by producing evidence that it intended to resume use; or

- [Name of plaintiff] acted or failed to act, and as a result, [Name of plaintiff]'s trademark no longer identifies the source of [Name of plaintiff]'s goods and has become a generic term for the associated goods.

[The following instruction should be given in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. § 1064(3) on the ground that the registered trademark is a generic designation for the goods covered by the registration:

A claimed trademark that is generic may not be registered in the U.S. Patent and Trademark Office. You must consider whether the registered trademark was a generic trademark which must be cancelled. That is, if [Name of defendant] proves by a preponderance of the evidence that [Name of plaintiff]'s registered trademark is generic, both the trademark and the registration covering it are invalid, and the trademark registration must be cancelled.

A claimed trademark is generic if it is the word, name, symbol, device, or any combination thereof, by which the good is commonly known. An example of a generic trademark is "escalator" for moving stairs.

Whether a claimed trademark is generic does not depend on the term itself, but on use of the term. A word may be generic of some things but not of others. For example, "ivory" is generic for elephant tusks, but it is not generic for soap.

Whether a claimed trademark is generic term is viewed from the perspective of a member of the relevant public.

Generic trademarks are not eligible for registration in the U.S. Patent and Trademark Office and they are not protected. In considering if a claimed trademark is generic, you should also consider if the trademark is only descriptive.]

[The following instruction should be given in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. § 1052(e)(1) on the ground that the registered trademark is merely descriptive of the goods covered by the registration and lacked acquired distinctiveness as of the registration date:

A registered trademark that is only descriptive of the goods covered by the registration may not be registered unless the trademark has acquired distinctiveness, or "secondary meaning," as of the date the registration is issued. If [Name of defendant] proves by a preponderance of the evidence that [Name of plaintiff]'s trademark is descriptive and that the trademark had not acquired distinctiveness as of the registration date, [Name of plaintiff]'s registration may be cancelled.

"Secondary meaning" means the consuming public associates the trademark with the trademark holder's goods. A claimed trademark has acquired secondary meaning if the primary significance of the trademark in the minds of the consuming public is not the associated good itself, but instead the source or producer of the good.

There are four factors you may use in determining whether secondary meaning exists:

- The length and nature of the trademark's use;
- The nature and extent of advertising and promotion of the trademark;

- The efforts of the trademark owner to promote a conscious connection between the trademark and [his/her/its] business; and

- The degree to which the public recognizes [Name of plaintiff]'s product by the trademark.

Cancellation of a registration on this ground does not necessarily mean that [Name of plaintiff] does not enjoy valid rights to the covered trademark. If you find that [Name of plaintiff]'s registration should be cancelled on this ground, you must determine whether [Name of plaintiff] has rights to [his/her/its] claimed trademark as an unregistered trademark. Instructions on how to determine if [Name of plaintiff] owns protectable rights to an unregistered trademark or a trademark once covered by registration, and the extent of those rights will be given later.]

[The following general instruction should be given in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. §§ 1052(e)(5) & 1064(3) on the ground that the registered trademark comprises matter that, as a whole, is functional:

A claimed trademark comprising matter that, as a whole, is functional may not be registered in the U.S. Patent and Trademark Office. A claimed trademark is functional if it is essential to the use or purpose of the good or if it affects the good's cost or quality. In other words, if allowing [Name of plaintiff] to have exclusive use of the trademark would put competitors at a disadvantage that does not relate to [Name of plaintiff]'s reputation, then the trademark may be functional. For example, a trademark for the color of ice cream—such as white for vanilla, pink for strawberry, and brown for chocolate—would be functional if the color identifies the flavor of the ice cream.

If [Name of defendant] proves by a preponderance of the evidence that [Name of plaintiff]'s registered trademark is functional, both the trademark and the registration covering it are invalid, and you need not

consider further whether [Name of plaintiff] has rights to the trademark independent of the registration or whether [Name of plaintiff]'s rights have been violated.

In evaluating nonfunctionality, you must keep in mind that a claimed trademark may be primarily nonfunctional even if it serves a practical purpose. The fact that individual components of a claimed trademark are functional does not prevent the overall combination of those elements from being primarily nonfunctional. Nevertheless, individually functional elements are not valid merely because they are part of an overall nonfunctional trademark.]

[The following instruction should be given in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. § 1064(3) on the ground that the registration was procured or maintained through a fraudulent filing in the U.S. Patent and Trademark Office:

If [Name of plaintiff]'s registration was obtained from, or has been maintained in, the U.S. Patent and Trademark Office through a false or fraudulent filing, the registration may be cancelled. To succeed on this ground for cancellation, [Name of defendant] must prove by clear and convincing evidence that:

- [Name of plaintiff] knowingly made a false representation of fact to the U.S. Patent and Trademark Office;

- The false representation was made with an intent to deceive; and

- The false representation was material in the sense that the U.S. Patent and Trademark Office would not have issued or maintained [Name of plaintiff]'s registration in the absence of the false representation.

Cancellation of a registration on this ground does not necessarily

mean that [Name of plaintiff] does not enjoy valid rights to the covered trademark. If you find that [Name of plaintiff]'s registration should be cancelled on this ground, you must determine whether [Name of plaintiff] has rights to [his/her/its] claimed trademark independent of its registration.]

[Note that there are a number of additional counterclaims [Name of defendant] may raise that are not discussed in detail here. *See* the Annotations and Comments for discussion of additional potential counterclaims.]

TRADEMARKS

_____ . _____

Counterclaims for Cancellation of a Registered Trademark

SPECIAL INTERROGATORIES TO THE JURY

We, the jury, find by a preponderance of the evidence that:

[The following interrogatory should be used in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. § 1051 on the ground that the registered trademark was not in use in commerce as of the date [Name of plaintiff] represented to the U.S. Patent and Trademark Office the trademark was being used:

1. [Name of plaintiff]'s registration is invalid because the registered trademark was not in use in commerce as of the date [Name of plaintiff] represented to the U.S. Patent and Trademark Office that the trademark was being used.

Answer Yes or No _____

If your answer is “Yes,” go to the next question. If your answer is “No,” the registered trademark is presumed to be valid.]

[The following special interrogatory should be used in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]’s federal trademark registration under 15 U.S.C. § 1052(e)(1) on the ground that the registered trademark is merely descriptive of the goods covered by the registration and lacked acquired distinctiveness as of the registration date:

1. [Name of plaintiff]’s registration is invalid because the registered trademark is merely descriptive of the goods covered by the registration and lacked acquired distinctiveness as of the registration date.

Answer Yes or No _____

If your answer is “Yes,” go to the next question. If your answer is “No,” the registered trademark is presumed to be valid.]

[The following special interrogatory should be used in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]’s federal trademark registration under 15 U.S.C. §§ 1052(5) and 1064(3) on the ground that the registered trademark comprises matter that, as a whole, is functional:

1. [Name of plaintiff]’s registration is invalid because the registered trademark comprises matter that, as a whole, is functional.

Answer Yes or No _____

If your answer is “Yes,” then your foreperson should sign and date the last page of this verdict form. If your answer is “No,” the registered trademark is presumed to be valid.]

[The following special interrogatory should be used in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. § 1064(3) on the ground that the registered trademark is a generic designation for the goods or services covered by the registration:

1. [Name of plaintiff]'s registration is invalid because the registered trademark is a generic designation for the goods covered by the registration.

Answer Yes or No _____

If your answer is "Yes," then your foreperson should sign and date the last page of this verdict form. If your answer is "No," the registered trademark is presumed to be valid.]

[The following special interrogatory should be used in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration under 15 U.S.C. § 1064(3) on the ground that the registration was procured or maintained through a fraudulent filing:

1. [Name of plaintiff]'s registration is invalid, because [Name of plaintiff] procured or maintained the registration through a fraudulent filing.

Answer Yes or No _____

If your answer is "Yes," go to the next question. If your answer is "No," the registered trademark is presumed to be valid.]

[The following special interrogatory should be used in cases in which [Name of defendant] has asserted a counterclaim for the cancellation of [Name of plaintiff]'s federal trademark registration

under 15 U.S.C. § 1064(3) on the ground that the registered trademark has been abandoned by a discontinuance of [his/her/its] use with an intent not to resume use:

1. [Name of plaintiff] has stopped using [his/her/its] trademark with the intent to not resume [his/her/its] use in the reasonably foreseeable future.

Answer Yes or No _____

If your answer is "Yes," then your foreperson should sign and date the last page of this verdict form. If your answer is "No," the registered trademark is presumed to be valid.

2. Because of [Name of plaintiff]'s acts or omissions, [his/her/its] trademark no longer identifies the source of [Name of plaintiff]'s goods but rather identifies the goods or services themselves.

Answer Yes or No _____

If your answer is "Yes," then continue to the "Remedies" questions. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.]

SO SAY WE ALL.

_____
Foreperson's signature

DATE: _____

ANNOTATIONS AND COMMENTS

A registration on the Principal Register that is less than five years old may be cancelled on any ground or grounds that would have prevented the registration's issuance in the first place, , which are set forth in Sections 1, 2, and 14 of the Lanham Act. *See* 15 U.S.C. §§ 1051, 1052, 1064 (2006) and *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 1091 (Fed. Cir. 1984). Immediately upon the registration's fifth anniversary of issuance, however, it may be cancelled only on the limited grounds set forth in Section 14(3) of the Lanham Act, , regardless of whether the plaintiff has filed a declaration or affidavit of incontestability for its registration. 15 U.S.C. § 1064(3). *See Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 1579 n.5 (Fed. Cir. 1990); *Wallpaper Mfrs. Ltd. v. Crown Wallcovering Corp.*, 680 F.2d 755, 761 n.6 (C.C.P.A. 1981). When discussing grounds for cancellation, the annotations and comments to these instructions therefore indicate if particular grounds are available if the registration in question has reached its fifth anniversary of issuance. Also, this instruction may be modified if the trademark at issue is a service mark, certification mark, or trade dress.

Certain grounds for cancellation correspond to the prerequisites for trademark validity in the first instance, and invalidation of a registration based on them necessarily invalidates any rights to the registered trademark as well. Some of these same grounds are also expressly recognized as affirmative defenses to the evidentiary presumption of validity attaching to a federal registration under Section 33(b) of the Lanham Act, but, if they result in the registration's invalidation, there is no need to address them in that context. 15 U.S.C. § 1115(b).

In contrast, certain other grounds for cancellation, even if proven, will *not* result in the invalidation of the underlying trademark, and it is therefore possible for the plaintiff to prove that it has rights to the trademark independent of the registration. These instructions therefore contemplate that a jury invalidating the plaintiff's registration on one of the grounds falling into this category will need to conduct the same inquiry into the validity of the Plaintiff's trademark as if the Plaintiff never had a registration.

Finally, certain of what otherwise are grounds for cancellation will be trumped by the trademark's acquisition of distinctiveness, or "secondary meaning," prior to the registration's issuance. These instructions therefore distinguish between grounds to which a showing of acquired distinctiveness is relevant and those to which it is not. Where the former are concerned, the factors set forth consideration in the acquired distinctiveness inquiry are drawn from *Knights Armament Co. v. Optical Sys. Tech., Inc.*, 654 F.3d 1179, 1189 (11th Cir. 2011), *Am. Television & Commc'ns Corp. v. Am. Commc'ns & Television, Inc.*, 810 F.2d 1546, 1549 (11th Cir. 1987), *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1513 (11th Cir. 1984), and *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 860 (11th Cir. 1983).

The registered trademark was not used in commerce as of the date the date the Plaintiff represented to the U.S. Patent and Trademark Office the trademark was used in commerce:

Under Sections 1(a)-(b) of the Lanham Act, use in commerce is a prerequisite for the registration of a trademark owned by a United States domiciliary. 15 U.S.C. § 1051(a)-(b) (2006). The statutory basis of this ground for cancellation is Section 14(1) of the Act. *Id.* § 1064(1). This ground for cancellation may not be asserted against a registration that has reached its fifth anniversary of issuance or against a registration that issued under Section 44 or Section 66 of the Act. *Id.* §§ 1064(3)-(5), 1126, 1141(f). The existence or nonexistence of acquired distinctiveness, or "secondary meaning," is irrelevant to this ground for cancellation. *See id.* § 1052(f). And a defendant pursuing cancellation therefore need not prove the absence of acquired distinctiveness to prevail.

Cancellation of a registration on this ground does not prevent the former registrant from establishing rights to its trademark independent of the registration. A jury finding a registration subject to cancellation on this ground therefore should evaluate whether the Plaintiff otherwise has proven valid rights to its trademark and, if so, when those rights arose.

The definitions of use in commerce bearing on this ground for cancellation are drawn from the statutory definition of use in commerce found in Section 45 of the Lanham Act, as well as from the U.S. Patent and Trademark Office's internal operating guidelines and, in the case of certification trademarks, the Restatement of Unfair Competition. *See* 15. U.S.C. § 1127; UNITED STATES PATENT & TRADEMARK OFFICE, *Trademark Manual of Examining Procedure* §§ 1303.01, 1306.01-.03, 1304.08-.09 (2010); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § § 10-11 (1995). Eleventh Circuit opinions addressing the issue have done so in the context of the extent of use in commerce necessary to create common-law rights, but the underlying principles are the same. *See, e.g., Planetary Motion, Inc. v. Techplosian, Inc.*, 261 F.3d 1188, 1193-2000 (11th Cir. 2001) (applying statutory definition of use in commerce and holding that nonmonetary transactions can create protectable rights); *Leigh v. Warner Bros.*, 212 F.3d 1210, 1217 (11th Cir. 2000) (requiring claimed trademark to be used in a manner recognizable as a trademark); *Geovision, Inc. v. Geovision Corp.*, 928 F.2d 387, 388-89 (11th Cir. 1991) ("[A] mere contract of sale without a product or mark is not within the statutory meaning of a sale."); *Blue Bell, Inc. v. Farah Mfg. Co.*, 508 F.2d 1260, 1267 (5th Cir. 1975) (shipments of goods made only to create or to preserve trademark rights do not qualify as bona-fide uses in commerce).

The definitions of use in commerce bearing on this ground for cancellation depart from the express statutory definition of use in commerce in connection with goods to the extent that that definition fails to require use in interstate commerce or in commerce with a foreign country. *See* 15 U.S.C. § 1127. That requirement is incorporated into the instruction to maintain consistency with the requirements of trademark use in connection

with services.

Section 5 of the Lanham Act, 15 U.S.C. § 1055 (2006), expressly recognizes the ability of a Plaintiff to qualify for registration through the properly licensed use of registered trademark, and this principle has long been recognized by the law of the Circuit as well. *See generally Turner v. H M H Publ'g Co.*, 380 F.2d 224, 229 (5th Cir. 1967) (affirming validity of licensed service mark); *see also Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1198 (11th Cir. 2001) (same); *Mini Maid Servs. Co. v. Maid Brigade Sys., Inc.*, 967 F.2d 1516, 1519 (11th Cir. 1992) (same); *Prof'l Golfers Ass'n of Am. v. Bankers Life & Cas. Co.*, 514 F.2d 665, 688 (5th Cir. 1975) (affirming validity of licensed collective mark).

The Plaintiff lacked a bona-fide intent to use its trademark in commerce at a time the Plaintiff represented to the U.S. Patent and Trademark Office it had such an intent:

The statutory basis of this ground for cancellation is Section 1(b) of the federal Lanham Act. 15 U.S.C. § 1051(b) (2006). It may not be asserted against a registration that has reached its fifth anniversary of issuance. *See id.* § 1064(3)-(5). The existence or nonexistence of acquired distinctiveness, or "secondary meaning," is irrelevant to this ground for cancellation and a defendant pursuing it therefore need not prove the absence of acquired distinctiveness to prevail. *See id.* § 1052(f),

Cancellation of a registration on this ground does not prevent the former registrant from establishing rights to its trademark independent of the registration. A jury finding a registration subject to cancellation on this ground therefore should evaluate whether the plaintiff otherwise has proven valid rights to its trademark and, if so, when those rights arose.

The Eleventh Circuit has not addressed the issue of what is necessary for a bona fide intent to use an applied-for trademark, but the Trademark Trial and Appeal Board has held that the inquiry is an objective one that ordinarily requires the applicant to produce documentary evidence predating the application's filing date. *See Spirits Int'l B.V. v. S.S. Taris Zeytin Ve Zeytinyagi Tarim satis Kooperatiferi Birligi*, 99 U.S.P.Q.2d 1545, 1549 (T.T.A.B. 2011); *SmithKline Beecham Corp. v. Omnisource DDS LLC*, 97 U.S.P.Q.2d 1300, 1305 (T.T.A.B. 2010); *see also* S. Rep. No. 100-515, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5587 ("In connection with the [Lanham Act's intent-to-use provisions], 'bona fide' should be read to mean a fair, objective determination of the applicant's intent based on all the circumstances."). Under the Board's case law: (1) the registrant bears an initial burden of producing contemporary documentary evidence of a bona fide intent to use its trademark in connection with the goods and services covered by the application; but, if the registrant satisfies its burden of production, (2) the burden of proof reverts to the party challenging the validity of the registration. *See Boston Red Sox Baseball Club L.P. v. Sherman*, 88 U.S.P.Q.2d 1581, 1587-88 (T.T.A.B. 2008); *SmithKline Beecham Corp.*, 97

U.S.P.Q.2d at 1305.

The registered trademark is a generic designation for the goods or services covered by the registration:

The statutory basis of this ground for cancellation is Section 14(3) of the Lanham Act, , which also contains the statutory definition of genericness found in the last paragraph of the instruction. 15 U.S.C. § 1064(3) (2006). It may be asserted against a registration that has reached the fifth anniversary of its issuance. *See* 15 U.S.C. § 1064(3). The existence or nonexistence of acquired distinctiveness, or "secondary meaning," is irrelevant to this ground for cancellation, and a defendant pursuing it therefore need not prove the absence of acquired distinctiveness to prevail. *See id.* § 1052(f).

A finding that a registered trademark is generic means that the trademark cannot be protected *as* a trademark, and a jury finding a registration subject to cancellation on this ground therefore should not evaluate whether the plaintiff has proven valid rights to the claimed trademark independent of the registration. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S. Ct. 2753, 2757, 120 L. Ed. 2d 615 (1992). Under limited circumstances, however, a defendant's use of a former trademark that has become generic can lead to liability for the tort of passing off. *See, e.g., Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 120, 59 S. Ct. 109, 114, 83 L. Ed. 2d. 73 (1938) (use of a generic designation by a defendant must "be done in a manner which reasonably distinguishes its product from that of a plaintiff").

The examples of generic designations set forth in this instruction are drawn from *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1358, 1359 n.4 (11th Cir. 2007); *Investacorp, Inc. v. Arabian Inv. Banking Corp. (Investcorp) E.C.*, 931 F.2d 1519, 1522 (11th Cir. 1991); and *Vision Ctr. v. Opticks, Inc.*, 596 F.2d 111, 115 (5th Cir. 1979).

If the registered trademark is a conventional trademark, the trademark is descriptive of the goods or services covered by the registration, and lacked acquired distinctiveness as of the registration date:

The statutory basis of this ground for cancellation is Section 2(e)(1) of the Lanham Act, 15 U.S.C. § 1052(e)(1) (2006). It may not be asserted against a registration that has reached the fifth anniversary of its issuance. *See id.* § 1064(3)-(5). Because descriptive trademarks may be registered with a showing of acquired distinctiveness, or "secondary meaning," a defendant pursuing this ground for cancellation bears the burden of demonstrating by a preponderance of the evidence and testimony that the registered trademark did not enjoy acquired distinctiveness as of that date. *See id.* § 1052(f). The fact that another person has copied another's mark, in and of itself, does satisfy a party's burden

of proof and automatically establish that such mark has acquired a secondary meaning. In affirming a finding of no secondary meaning, one panel of the Eleventh Circuit has held that "[a]lthough we believe that proof of intentional copying is probative evidence on the secondary meaning issue, we cannot agree with [the plaintiff] that proof of intentional copying conclusively establishes that [plaintiff's] trademark or tradedress has acquired secondary meaning." *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 860 (11th Cir. 1983); *see also CPG Prods. Corp. v. Pegasus Luggage, Inc.*, 776 F.2d 1007, 1012 (Fed. Cir. 1985) (concluding, in application of Eleventh Circuit law, that "[e]vidence of intentional copying in this case, also supports a finding of secondary meaning."). Because neither the Eleventh Circuit, nor the Federal Circuit has not addressed the precise role played by intentional copying in the secondary meaning inquiry, these instructions adopt the four-factor test most commonly applied by the courts.

Cancellation of a registration on this ground does not prevent the former registrant from establishing rights to its trademark independent of the registration. A jury finding a registration subject to cancellation on this ground therefore should evaluate whether the plaintiff otherwise has proven valid rights to its trademark and, if so, when those rights arose.

The examples of descriptive trademarks set forth in the instruction bearing on this ground for cancellation are drawn from *Knights Armament Co. v. Optical Sys. Tech., Inc.*, 654 F.3d 1179, 1188 (11th Cir. 2011), *Investacorp, Inc. v. Arabian Inv. Banking Corp.*, 931 F.2d 1519, 1522-24 (11th Cir. 1990), *Am. Television & Commc'ns Corp. v. Am. Commc'ns & Television, Inc.*, 810 F.2d 1546, 1549 (11th Cir. 1987), and *Beneficial Indus. Loan Corp. v. Allenstein*, 173 F.2d 38, 40 (5th Cir. 1949).

If the registered trademark is a trade dress, the trademark is not an inherently distinctive indicator of the origin of the goods or services covered by the registration and lacked acquired distinctiveness as of the registration date:

The statutory basis of this ground for cancellation is Section 2(e)(1) of the Lanham Act, 15 U.S.C. § 1052(e)(1) (2006). It may not be asserted against a registration that has reached the fifth anniversary of its issuance. *See id.* § 1064(3)-(5). Because noninherently distinctive trademarks may be registered with a showing of acquired distinctiveness, or "secondary meaning," a defendant pursuing this ground for cancellation bears the burden of demonstrating by a preponderance of the evidence and testimony that the registered trademark did not enjoy acquired distinctiveness as of that date. *See id.* § 1052(f).

Cancellation of a registration on this ground does not prevent the former registrant from establishing rights to its trademark independent of the registration. A jury finding a registration subject to cancellation on this ground therefore should evaluate whether the plaintiff otherwise has proven valid rights to its trademark and, if so, when those rights arose.

The test for distinguishing between inherently distinctive and noninherently distinctive trademarks in the instruction bearing on this ground for cancellation is taken from *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 716 F.2d 854, 857-58 (11th Cir. 1983), and has its origin in *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977). In *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986), the court declined to disturb the district court's reliance on the *Seabrook* factors in finding a claimed trade dress to be inherently distinctive, although the court also invoked the four-tiered spectrum of distinctiveness this instruction proposes for conventional trademarks, service marks, collective marks, and certification marks. *See id.* at 1347; *see also Univ. of Fla. v. KPB, Inc.*, 89 F.3d 773, 776 n.4 (11th Cir. 1996) (noting use of both tests in prior case law). Because there is no necessary inconsistency between the two tests, this instruction is not intended to foreclose application of the spectrum-of-distinctiveness test in actions to protect claimed trade dresses.

The registered trademark is primarily geographically descriptive of the goods or services covered by the registration and lacked acquired distinctiveness as of the registration date

The statutory basis of this ground for cancellation is Section 2(e)(2) of the Lanham Act, 15 U.S.C. § 1052(e)(2) (2006). It may not be asserted against a registration that has reached the fifth anniversary of its issuance. *See id.* § 1064(3)-(5). Because primarily geographically descriptive trademarks may be registered with a showing of acquired distinctiveness, or "secondary meaning," a defendant pursuing this ground for cancellation

bears the burden of demonstrating by a preponderance of the evidence and testimony that the registered trademark did not enjoy acquired distinctiveness as of that date. *See id.* § 1052(f).

Cancellation of a registration on this ground does not prevent the former registrant from establishing rights to its trademark independent of the registration. A jury finding a registration subject to cancellation on this ground therefore should evaluate whether the plaintiff otherwise has proven valid rights to its trademark and, if so, when those rights arose.

The examples of primarily geographically descriptive marks set forth in this instruction are drawn from *Elgin Nat'l Watch Co. v. Ill. Watch Case Co.*, 179 U.S. 665, 21 S. Ct. 270, 45 L. Ed. 365 (1901); *Canal Co. v. Clark*, 80 U.S. (13 Wall.) 311, 20 L. Ed. 581 (1872), and *Int'l Breweries, Inc. v. Anheuser-Busch, Inc.*, 364 F.2d 262, 262-63 (5th Cir. 1966). The example of a trademark that is not primarily geographically descriptive is drawn from *World Carpets, Inc. v. Dick Littrell's New World Carpets*, 438 F.2d 482, 485 (5th Cir. 1971).

The registered trademark is primarily merely a surname and lacked secondary meaning as of the registration date

The statutory basis of this ground for cancellation is Section 2(e)(4) of the Lanham Act, 15 U.S.C. § 1052(e)(4) (2006). It may not be asserted against a registration that has reached its fifth anniversary of issuance. *See id.* § 1064(3)-(5). Because surnames may be registered with a showing of acquired distinctiveness, or "secondary meaning," a defendant pursuing this ground for cancellation bears the burden of demonstrating by a preponderance of the evidence and testimony that the registered trademark did not enjoy acquired distinctiveness as of that date. *See id.* § 1052(f).

Cancellation of a registration on this ground does not prevent the former registrant from establishing rights to its trademark independent of the registration. A jury finding a registration subject to cancellation on this ground therefore should evaluate whether the plaintiff otherwise has proven valid rights to its trademark and, if so, when those rights arose.

The examples of surnames in the instruction bearing on this ground for cancellation are drawn from *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1513 (11th Cir. 1984), and *Investacorp, Inc. v. Arabian Inv. Banking Corp. (Investcorp) E.C.*, 931 F.2d 1519, 1522 (11th Cir. 1991).

The registered trademark comprises matter that, as a whole, is functional:

The statutory bases of this ground for cancellation are Sections 2(e)(5) and 14(3) of the Lanham Act. 15 U.S.C. §§ 1052(e)(2) & 1064(3) (2006). It may be asserted against a

registration that has reached the fifth anniversary of its issuance. *See* 15 U.S.C. § 1064(3). The existence or nonexistence of acquired distinctiveness, or "secondary meaning," is irrelevant to this ground for cancellation, and a defendant pursuing it therefore need not prove the absence of acquired distinctiveness to prevail. *See id.* § 1052(f).

A finding that a registered trademark is functional means that the trademark cannot be protected *as* a trademark, and a jury finding a registration subject to cancellation on this ground therefore should not evaluate whether the plaintiff has proven valid rights to the claimed trademark independent of the registration. *See Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1206-07 (11th Cir. 2004). Under limited circumstances, however, a defendant's use of a functional designation can lead to liability for the tort of passing off. *See, e.g.*, *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 120, 59 S. Ct. 109, 120, 83 L. Ed. 2d 73 (1938).

The functionality doctrine prevents trademark law, which seeks to promote competition, from instead inhibiting legitimate competition. *See TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 32-33, 121 S. Ct. 1255, 1261-62 149 L. Ed. 2d 164 (2001); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164, 115 S. Ct. 1300, 1304, 131 L. Ed. 2d 248 (1995); *Dippin' Dots*, 369 F.3d at 1202-03; *Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571, 1579-80 (Fed. Cir. 1995) (applying Eleventh Circuit law); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1538 (11th Cir. 1986). The requirement that a trademark be nonfunctional in the utilitarian sense is often regarded as necessary to maintain the distinction between possibly perpetual trademark protection and the temporally limited protection available under federal utility patent law. *See TrafFix Devices*, 532 U.S. at 34, 121 S. Ct. at 1262, 149 L. Ed. 2d 164 ("The Lanham Act does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity.").

At least some Circuit case law, however, suggests that the requirement has constitutional dimensions. *See, e.g.*, *Wilhelm Pudenz GmbH v. Littlefuse Inc.*, 177 F.3d 1204, 1208 (11th Cir. 1999) ("[W]hen the operation of the Lanham Act would upset the balance struck by the Patent Act, the Lanham Act must yield. The functionality doctrine serves this purpose by eliminating the possibility of a perpetual exclusive right to the utilitarian features of a product under trademark law, which would be impossible (as well as unconstitutional) under the Patent Act."); *cf. B.H. Bunn Co. v. AAA Replacement Parts Co.*, 451 F.2d 1254, 1254, 1258-59 (5th Cir. 1971) ("It runs counter to federal purposes, and perhaps borders on the unconstitutional, for a state to prolong or to create any trade monopoly, to an originator [of a useful article] by forbidding the production of copies under the rubric of unfair competition.").

This instruction bearing on this ground for cancellation contemplates two different tests for functionality. The first test is most commonly applied when the claim of functionality or nonfunctionality bears on the utilitarian characteristics of the trademark sought to be protected. It has its origins in the Court of Customs and Patent Appeals'

decision in *In re Morton-Norwich Prods.*, 671 F.2d 1332, 1336 (C.C.P.A. 1982), and is consistent with the approach taken by such designs as *Dippin' Dots*, 369 F.3d at 1203, *Elmer*, 67 F.3d at 1579-80 (applying Eleventh Circuit law), and *J.R. Clark Co. v. Murray Metal Prods. Co.*, 219 F.2d 313, 320 (5th Cir. 1955). The second test is most commonly applied when the claim of functionality or nonfunctionality bears on the aesthetic characteristics of the trademark sought to be protected. *See Dippin' Dots*, 369 F.3d at 1203 ("[T]he second test . . . is commonly called the competitive necessity test and generally applied in cases of aesthetic functionality . . . ."). It has its origins in *Qualitex*, 514 U.S. at 164, 115 S. Ct. at 1304, 131 L. Ed. 2d 248. The two are not mutually exclusive, and, indeed, some courts have applied both in the same litigation. *See, e.g., Dippin' Dots*, 369 F.3d at 1203-04, 1206-07.

The registered trademark has been abandoned through non-use or failure to police:

The statutory basis of this ground for cancellation is Section 14(3) of the Lanham Act. 15 U.S.C. § 1064(3) (2006). It may be asserted against a registration that has reached the fifth anniversary of its issuance. *See id.* § 1064(3). The existence or nonexistence of acquired distinctiveness, or "secondary meaning," is irrelevant to this ground for cancellation, s*ee id.* § 1052(f), and a defendant pursuing it therefore need not prove the absence of acquired distinctiveness to prevail.

A finding that a registered trademark has been abandoned means that the registration is subject to cancellation and that the plaintiff no longer has valid rights as of the date of abandonment. Nevertheless, because the plaintiff may have acquired new rights to its trademark by resuming the use of its trademark after the initial abandonment took place, a jury finding that a registration is subject to cancellation on this ground is not dispositive of the plaintiff's rights, and the jury therefore evaluate whether the plaintiff has proven valid rights to the claimed trademark independent of the registration. The plaintiff's resumption of a trademark's use after abandonment will not allow the plaintiff to claim valid rights that date back to its original use; rather, the new rights will date only from the resumed use. *See generally AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1549-50 (11th Cir. 1986).

Eleventh Circuit case law suggests that a defendant alleging that a plaintiff has abandoned its trademark faces a high burden: "[T]he burden a defendant bears on the affirmative defense of abandonment is, in fact, 'strict.' Because a finding of abandonment works an involuntary forfeiture of rights, federal courts uniformly agree that defendants asserting an abandonment defense face a 'stringent,' 'heavy,' or 'strict burden of proof.'" *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1174 (11th Cir. 2002) (citation omitted) (footnote omitted); *see also Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1516 (11th Cir. 1984) ("The defense of abandonment is one for which we require strict proof."); *Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1545 (11th Cir. 1984) (affirming finding that defendants had failed to carry the "strict burden of proof applicable to abandonment claims"). The court has not, however, expressly held that abandonment must be shown by clear and convincing evidence.

The registered trademark has been abandoned through uncontrolled, or "naked," licensing:

The statutory basis of this ground for cancellation is Section 14(3) of the Lanham Act, 15 U.S.C. § 1064(3) (2006). It may be asserted against a registration that has reached the fifth anniversary of its issuance. *See id.* Cancellation of a registration on this ground prevents the former registrant from establishing valid rights to its mark as of the date of abandonment but does not prevent the plaintiff from potentially cultivating new rights dating from its resumption of the mark's use.

Few courts have addressed the issue of abandonment through uncontrolled licensing in the registration context. Outside of that context, however, the invalidation of rights under this theory requires a showing that the trademark owner failed to exercise control over the nature and quality of the goods provided by the licensee under the licensor's mark. *See generally Eva's Bridal Ltd. v. Halanick Enters.*, 639 F.3d 788 (7th Cir. 2011); *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509 (9th Cir. 2010). Thus, for example, in *Crystal Entm't & Filmworks, Inc. v. Jurado*, 643 F.3d 1313 (11th Cir. 2011), although not referring to the naked license doctrine by name, the court affirmed a finding that the defendants, although once licensees of the plaintiff, had become the owners of the service mark covered by the license because they, rather than the licensor, controlled the quality of the services provided under it. *See id.* at 1323.

This ground for cancellation may not be available in cases in which the licensee is the party asserting it, unless the conduct underlying the assertion of the ground occurred after the expiration of the license. *See generally Prof'l Golfers Ass'n v. Bankers Life & Cas. Co.*, 514 F.2d 665, 671 (5th Cir. 1975).

The registration of the trademark was procured or maintained fraudulently:

The statutory basis of this ground for cancellation is Section 14(3) of the Lanham Act, 15 U.S.C. § 1064(3) (2006); although that statute expressly authorizes the cancellation "at any time" only of registrations that were "obtained fraudulently," interpretations of it have held that it reaches the maintenance of registrations through fraudulent filings. *See, e.g.*, *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986) (upholding cancellation of fraudulently renewed, rather than fraudulently obtained, registration on ground that "[f]raud in obtaining renewal of a registration amounts to fraud in obtaining a registration within the meaning of [15 U.S.C. § 1064(3)]."). This ground for cancellation may be asserted against a registration that has reached the fifth anniversary of its issuance. *See* 15 U.S.C. § 1064(3). The existence or nonexistence of acquired distinctiveness, or "secondary meaning," is irrelevant to this ground for cancellation, and a defendant pursuing it therefore need not prove the absence of acquired distinctiveness to prevail. *See id.* § 1052(f).

Cancellation of a registration on this ground does not prevent the former registrant

from establishing rights to its trademark independent of the registration. A jury finding a registration subject to cancellation on this ground therefore should evaluate whether the plaintiff otherwise has proven valid rights to its trademark and, if so, when those rights arose.

The test set forth in this instruction is drawn from *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1210 (11th Cir. 2008) and *Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1544-45 (11th Cir. 1984).

10.5 Trademark Dilution

[Name of plaintiff] claims that [Name of defendant]'s use is likely to dilute the distinctiveness of [Name of plaintiff]'s trademark. To prove [his/her/its] claim of likely dilution, [Name of plaintiff] must prove the following facts by a preponderance of the evidence:

- [Name of plaintiff]'s trademark is famous and distinctive, either inherently or through acquired distinctiveness;

- [Name of defendant]'s use of [his/her/its] trademark began after [Name of plaintiff]'s trademark became famous; and

- [Name of defendant]'s use of [his/her/its] trademark is likely to cause [dilution by blurring/dilution by tarnishment] of [Name of plaintiff]'s famous trademark.

To prevail on a claim for likely dilution of [his/her/its] trademark, [Name of plaintiff] must prove by a preponderance of the evidence that [his/her/its] trademark was "famous" at the time of [Name of defendant]'s first use of [Name of defendant]'s trademark. A claimed trademark is "famous" if it is widely recognized by the general consuming public of the United States as the designation of the source of the owner's goods. In considering whether [Name of plaintiff]'s trademark is "famous," you may consider all relevant factors, including the following:

- The duration, extent, and geographic reach of advertising and publicity of the trademark, whether advertised or publicized by [Name of plaintiff] or third parties;

- The amount, volume, and geographic extent of sales of goods offered under [Name of plaintiff]'s trademark;

- The extent of actual recognition of [Name of plaintiff]'s trademark; and

- Whether [Name of plaintiff]'s trademark was registered on the Principal Register of the United States Patent and Trademark Office.

[The following instruction should be given when [Name of plaintiff] is claiming that [Name of defendant]'s use is likely to cause dilution by blurring:

[Name of plaintiff] claims that [Name of defendant]'s use of [his/her/its] trademark is likely to blur [Name of plaintiff]'s trademark. Likelihood of dilution by blurring occurs when the similarity between [Name of defendant]'s trademark and [Name of plaintiff]'s famous trademark impairs the distinctiveness of the famous trademark. In determining whether [Name of defendant]'s trademark is likely to blur the distinctiveness of [Name of plaintiff]'s trademark you may consider all relevant factors, including the following:

- The degree of similarity between [Name of defendant]'s trademark and [Name of plaintiff]'s trademark;

- The degree of inherent or acquired distinctiveness of [Name of plaintiff]'s trademark;

- The extent to which [Name of plaintiff] is engaging in substantially exclusive use of [his/her/its] trademark;

- The degree of recognition of [Name of plaintiff]'s trademark;

- Whether [Name of defendant] intended to create an association with [Name of plaintiff]'s trademark; and

- Any actual association between [Name of defendant]'s trademark and [Name of plaintiff]'s trademark.

[Name of plaintiff] is not required to prove actual or likely confusion or actual economic injury to prove that blurring is likely.]

[The following instruction should be given when [Name of plaintiff] is claiming that [Name of defendant]'s use is likely to cause dilution by tarnishment:

[Name of plaintiff] claims that [Name of defendant]'s use of [his/her/its] trademark is likely to tarnish [Name of plaintiff]'s trademark. Dilution by tarnishment occurs when a claimed trademark harms the reputation of a famous trademark.

[Name of plaintiff] is not required to prove actual or likely confusion or actual economic injury to prove that tarnishment is likely. [Name of plaintiff] only needs to prove likely dilution by tarnishment to recover on [his/her/its] dilution claim.]

__.__

Affirmative Defenses

There are defenses to a claim of likely dilution [by blurring/by tarnishment]. If [Name of defendant] proves by a preponderance of the evidence that the use of [his/her/its] trademark was [a fair use/in news reporting or commentary/noncommercial use], then [Name of defendant] has not engaged in trademark dilution.

"Fair use" includes a nominative or descriptive fair use, or facilitation of such fair use, of [Name of plaintiff]'s trademark by [Name of defendant] other than as a designation of source for [Name of defendant]'s own goods. Such fair use includes use of [Name of defendant]'s trademark in connection with:

- Advertising or promotions that permit consumers to compare [Name of plaintiff] and [Name of defendant]'s goods; or

- [Name of defendant]'s identifying and parodying, criticizing, or commenting upon [Name of plaintiff] or the goods of [Name of plaintiff]; or

- All forms of news reporting and news commentary; or

- Any noncommercial use of a trademark.

_____ . _____

Remedies

If you find that [Name of defendant]'s use is likely to dilute [Name of plaintiff]'s trademark, and [Name of defendant] does not have a defense to the likely dilution, you must consider whether, and to what extent, monetary relief should be awarded. You may award [Name of plaintiff] monetary relief if:

- [Name of defendant]'s mark was first used after October 6, 2006; and

- [Name of defendant]'s conduct was willful.

Plaintiff's Actual Monetary Damages

You may award actual damages that [Name of plaintiff] has sustained as a result of [Name of defendant]'s willful violation of [Name of plaintiff]'s trademark rights. [Name of plaintiff] may recover the economic injury to [his/her/its] business proximately resulting from [Name of defendant]'s wrongful acts. You are not required to calculate actual damages with absolute exactness—you may make reasonable approximations. But any award of actual damages to [Name of plaintiff] must be just and reasonable, based on facts, and proved by [Name of plaintiff] by a preponderance of the evidence.

Defendant's Profits and Calculation of Profits

Alternatively, you may make an award based on an accounting of [Name of defendant]'s profits as a result of [Name of defendant]'s willful violation of [Name of plaintiff]'s trademark rights.

A defendant commits a "willful violation" of a trademark when that defendant knowingly and purposefully capitalized on and appropriated

for itself the goodwill of a plaintiff.

In determining [Name of defendant]'s profits, [Name of plaintiff] is only required to prove [Name of defendant]'s gross sales. [Name of defendant] may then prove the amount of sales made for reasons other than the infringement. [Name of defendant] also may prove its costs or other deductions which [he/she/it] claims should be subtracted from the amount of [his/her/its] sales to determine [his/her/its] profits on such sales. Any costs or deductions that [Name of defendant] proves, by a preponderance of the evidence, are required to be subtracted from the sales attributable to the infringement and the difference is the amount that may be awarded to [Name of plaintiff].]

_____._____
Dilution

SPECIAL INTERROGATORIES TO THE JURY

We, the jury, find by a preponderance of the evidence that:

1. [Name of plaintiff]'s trademark has become famous.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 2. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

2. [Name of defendant]'s use of [his/her/its] trademark began after [Name of plaintiff]'s trademark became famous.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 3. If your answer is "No," your foreperson should sign and date the last page of this verdict form.

3. [Name of defendant]'s trademark is likely to cause dilution by blurring the distinctiveness of [Name of plaintiff]'s trademark.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 4. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

4. [Name of defendant]'s trademark is likely to cause dilution by tarnishing [Name of plaintiff]'s trademark.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 5. If your answer is "No," your foreperson should sign and date the last page of this verdict form.

5. [Name of defendant]'s use of [his/her/its] trademark is a "fair use" of [Name of plaintiff]'s trademark.

Answer Yes or No _____

If your answer is "No," go to Question No. 6. If your answer is "Yes," then your foreperson should sign and date the last page of this verdict form.

6. [Name of defendant]'s trademark is used for news reporting or news commentary.

Answer Yes or No _____

If your answer is "No," then go to Question No. 7. If your answer is "Yes," then your foreperson should sign and date the last page of this verdict form.

7. [Name of defendant]'s trademark is used for non-commercial purposes.

Answer Yes or No _____

If your answer is "Yes," then your foreperson should sign and date the last page of this verdict form. If your answer is "No," then go to Question No. 8.

8. [Name of defendant]'s trademark was first used after October 6, 2006.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 9. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

[The following special interrogatory should be used in cases in which [Name of plaintiff] claims likely dilution by blurring.

9. [Name of defendant] willfully intended to trade on the recognition of [Name of plaintiff]'s famous trademark.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 10. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.]

[The following special interrogatory should be used in cases in which [Name of plaintiff] claims likely dilution by tarnishment:

10. [Name of defendant] willfully intended to harm the reputation of [Name of plaintiff]'s famous mark.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 10. If your answer is "No," then your foreperson should sign and date the last page of this

verdict form.

[The following special interrogatories should be used if [Name of plaintiff] seeks actual damages for dilution:

11. [Name of plaintiff] suffered actual damages as a result of [Name of defendant]'s dilution of [Name of plaintiff]'s trademark.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 11. If your answer is "No," go to Question No. 12.

12. [Name of plaintiff] is awarded actual damages.

If your answer is "Yes," in what amount?

$_____.]

[The following special interrogatories should be used if [Name of plaintiff] seeks an Accounting of [Name of defendant]'s profits for likely dilution:

13. [Name of defendant]'s conduct was willful.

Answer Yes or No _____

If your answer to this question is "Yes," go to Question No. 14 below. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

14. [Name of plaintiff] is awarded [Name of defendant]'s profits.

If your answer is "Yes," in what amount?

$_____.]

SO SAY WE ALL.

_____
Foreperson's signature

DATE: _____

ANNOTATIONS AND COMMENTS

The statutory basis for a federal likelihood-of-dilution claim is Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c) (2006), which provides that:

> Subject to the principles of equity, the owner of a famous mark that is distinctive . . . shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

The Eleventh Circuit has not yet issued any precedential opinions interpreting this statute.

Trademark Fame

On the threshold issue of trademark fame, the legislative history of the bill that enacted the current version of 15 U.S.C. § 1125(c) in 2006 explains that "the legislation expands the threshold of 'fame' and thereby denies protection for marks that are famous only in 'niche' markets." H.R. Rep. No. 109-23, at 8 (2005). Similarly, one of the legislation's sponsors noted of it that:

> The goal must be to protect only the most famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it. . . . Dilution should once again be used sparingly as an "extraordinary" remedy, one that requires a significant showing of fame.
>
> This bill narrows the application of dilution by tightening the definition of what is necessary to be considered a famous mark. The bill eliminates fame for a

niche market and list factors necessary for a dilution by blurring claim. With these changes, it is our hope that the dilution remedy will be used in the rare circumstance and not as an alternative remedy.

Id. at 25. Consequently, for purposes of a federal likelihood-of-dilution claim, a claimed trademark is famous only if it "is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c)(2)(A) (2006)); *see generally Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671, 697-98 (W.D. Ky. 2010), *aff'd*, No. 19-5508, 2012 WL 1605755 (6th Cir. May 9, 2012).

Liability for likely dilution

The likelihood-of-dilution standard for liability codified in 15 U.S.C. § 1125(c) represents the legislative abrogation of *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 123 S. Ct. 1115. 1117, 155 L. Ed. 2d 1 (2003), in which the Court held that a predecessor statute required a showing of actual dilution.

Consistent with the express language of 15 U.S.C. § 1125(c), neither direct competition between the parties nor a likelihood of confusion between their marks is necessary for a finding of likely dilution. *See, e.g.*, *Nike Inc. v. Nikepal Int'l Inc.*, 84 U.S.P.Q.2d 1820 (E.D. Cal. 2007) (finding liability for likely dilution in absence of competition between parties or likely confusion between their marks); *cf. Cmty. Fed. Sav. & Loan Ass'n v. Orondorff*, 678 F.2d 1034 (11th Cir. 1982) (reversing finding of nonliability under Florida dilution statute based on absence of likely confusion between parties' marks).

Monetary Relief

The statutory basis for monetary relief is Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), which provides that:

When . . . a willful violation of [15 U.S.C. § 1125(c)] . . . shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of [15 U.S.C. §§ 1111, 1114], and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty.

There are no apparent Eleventh Circuit opinions interpreting or applying this statute in an action for likely dilution.

Award of the Plaintiff's actual damages

To be entitled to the legal remedy of an award of actual damages, the Plaintiff must demonstrate that it suffered actual monetary losses. *Babbit Elecs., Inc. v. DynaScan Corp.*, 38 F.3d 1161, 1182 (11thCir 1994). ("[T]he Plaintiff must prove both lost sales and that the loss was caused by the Defendant's actions."). Actual damages are not "speculative" if they are supported by a preponderance of the evidence. *See, e.g., Ramada Inns, Inc. v. Gadsden Motel Co.*, 804 F.2d 1562, 1565 (11th Cir. 1986) (affirming award of actual damages supported by unrebutted expert testimony).

It is "inappropriate" under Eleventh Circuit authority to award a trademark holder the "profit [it] would have made on sales to the defendant." *St. Charles Mfg. Co. v. Mercer*, 737 F.2d 891, 893 (11th Cir. 1983) ("While Plaintiffs in Lanham Act cases often receive profits from lost sales, these sales are sales made by Defendants to purchasers who sought to buy plaintiffs' products and instead received defendants'.") Nonetheless, franchise fees and lost royalties during the infringement period are recoverable. *See Ramada Inns*, 804 F.2d at 1565. An award of actual damages also may be based on findings that the defendant's infringement has diverted sales from the plaintiff or that the poor quality of the defendant's goods has harmed the plaintiff's business reputation. *See Boston Prof'l Hockey Ass'n v. Dallas Cap Mfg.*, 597 F.2d 71, 75 (5th Cir. 1979).

The Eleventh Circuit will not allow liquidated damages in addition to actual damages if it represents a "double recovery." *Ramada Inns*, 804 F.2d at 1566. Under appropriate circumstances, however, the Eleventh Circuit will allow for both trademark and liquidated damages in the same case. *Id.* at 1566. (liquidated damages and actual damages upheld even

though they were "calculated in almost the same manner" because each damage calculation was meant to "compensate for separate wrongs.") Likewise, in a franchise "hold over" case, infringement damages as well as expenditures necessary to establish a new franchisee are recoverable. *Id.*

Accounting of the Defendant's profits

A split exists outside of the Eleventh Circuit on the issue of whether the equitable remedy of an accounting of a defendant's profits is a matter properly delegated to a jury or, alternatively, whether it is within the province of the court. In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962), the Supreme Court held that a former franchisee from which a disgorgement of profits was sought was entitled to a jury trial. Based on this outcome, some courts have concluded that a plaintiff's prayer for an accounting creates a right to a jury trial because "[t]his type of remedy is fundamentally compensatory and legal in nature." *Alcan Int'l Ltd. v. S.A. Day Mfg. Co.*, 48 U.S.P.Q.2d 1151, 1154 (W.D.N.Y. 1998); *see also Ideal World Mktg., Inc. v. Duracell, Inc.*, 997 F. Supp. 334, 337-39 (E.D.N.Y. 1998); *Oxford Indus. v. Hartmarx Corp.*, 15 U.S.P.Q.2d 1648, 1653 (N.D. Ill. 1990). Others, however, have denied requests for jury trials on the ground that "the *Dairy Queen* Court based its decision on the fact that the predominant claim was for breach of contract and not for equitable relief." *G.A. Modefine S.A. v. Burlington Coat Factory Warehouse Corp.*, 888 F. Supp. 44, 46 (S.D.N.Y. 1995); *see also Am. Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784, 789 (D.N.J. 1986). In the absence of controlling circuit authority, this instruction does not purport to resolve that issue; rather, it is intended to provide guidance to the extent that the accounting remedy is referred to a jury.

In an accounting under 15 U.S.C. § 1117 (2006),"[a] plaintiff need not demonstrate actual damage to obtain an accounting of the infringer's profits under section 35 of the Lanham Act." It is enough that the Plaintiff proves the infringer's sales. The burden then shifts to the Defendant, which must prove its expenses and other deductions from gross sales." *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484, 1487-88 (11th Cir. 1987) (citations omitted).

An award of profits based on unjust enrichment or deterrence does not require a "higher showing of culpability on the part of the defendant." *Burger King Corp. v. Mason*, 855 F.2d 779, 781 (11th Cir. 1988); *see also Optimum Techs., Inc. v. Home Depot U.S.A., Inc.*, 217 Fed App'x 899 (11th Cir. 2007) (holding that willful and deliberate infringement, unjust enrichment and deterrence are appropriate circumstances for an accounting of profits, as well as setting forth definitions of willful infringement and unjust enrichment). Likewise, "the law of this Circuit is well settled that a plaintiff need not demonstrate actual damage to obtain an award reflecting an infringer's profits under Section 35 of the Lanham Act." *Burger King Corp. v. C. R. Weaver*, 169 F.3d 1310, 1321 (11th Cir. 1999)); *see also id.* (accounting of defendant's profits may be appropriate even in absence of direct competition between the parties. *Babbit Elecs., Inc. v. DynaScan Corp.*, 38 F.3d 1161, 1182 (11th Cir. 1994).

Punitive Damages

Section 35 of the Lanham Act does not authorize awards of punitive damages, and, indeed, it provides that any monetary relief made under it be compensation and not a penalty. 15 U.S.C. § 1117(a) (2006). Nevertheless, the Lanham Act does not preempt awards of punitive damages under state law. *See generally* 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 30:96 (4th ed.) (citing state law cases).

10.6 Trademark Counterfeiting

[Name of plaintiff] claims that [Name of defendant] has committed counterfeiting by unlawfully using [Name of plaintiff]'s trademark in the sale, offer to sell, distribution, or advertising of goods without [Name of plaintiff]'s authorization. To prove a claim for counterfeiting, [Name of plaintiff] must prove the following facts by a preponderance of the evidence:

- The trademark used by [Name of defendant] is a copy that is identical or substantially indistinguishable from [Name of plaintiff]'s trademark that is registered on the Principal Register of the United States Patent and Trademark Office;

- [Name of defendant]'s trademark was affixed without [Name of plaintiff]'s permission; and

- [Name of defendant] used [Name of plaintiff]'s trademark in the sale, offering for sale, distribution, or advertising of goods that are covered by [Name of plaintiff]'s trademark registration.

_____ . _____

Remedies

[This instruction should be given if [Name of plaintiff] seeks actual damages and [Name of defendant]'s profits:

If you find that [Name of plaintiff] proved that [Name of defendant] engaged in counterfeiting in violation of [Name of plaintiff]'s trademark, you must consider whether, and to what extent, money damages should be awarded.

Plaintiff's Actual Monetary Damages

You may award actual damages that [Name of plaintiff] has sustained. [Name of plaintiff] may recover the economic injury to [his/her/its] business proximately resulting from [Name of defendant]'s wrongful acts. You are not required to calculate actual damages with absolute exactness—you may make reasonable approximations. However, an award of actual damages to [Name of plaintiff] must be just and reasonable, based on facts, and proved by [Name of plaintiff] by a preponderance of the evidence.

Defendant's Profits and Calculation of Profits

In addition to [Name of plaintiff]'s actual damages, you may also make an award based on an accounting of [Name of defendant]'s profits if you find that:

- [Name of defendant]'s conduct was willful and deliberate;
- [Name of defendant] was unjustly enriched; or
- An award of [Name of defendant]'s profits is necessary to deter [Name of defendant]'s future conduct.

A defendant commits a "willful violation" of a trademark when that defendant knowingly and purposefully capitalized on and appropriated for itself the goodwill of a plaintiff.

"Unjust enrichment" occurs if [Name of defendant] received a benefit to which [he/she/it] was not entitled.

In determining [Name of defendant]'s profits, [Name of plaintiff] is only required to prove [Name of defendant]'s gross sales. [Name of defendant] may then prove the amount of sales made for reasons other than the infringement. [Name of defendant] also may prove its costs or other deductions which [he/she/it] claims should be subtracted from the amount of [his/her/its] sales to determine [his/her/its] profits on such

sales. Any costs or deductions that [Name of defendant] proves by a preponderance of the evidence are required to be subtracted from the sales attributable to the infringement and the difference is the amount that may be awarded to [Name of plaintiff].]

[This instruction should be given if [Name of plaintiff] seeks statutory damages for counterfeiting:

If you find that [Name of plaintiff] proved that [Name of defendant] violated [Name of plaintiff]'s trademark by counterfeiting, you must consider whether, and to what extent, money damages should be awarded.

[Name of plaintiff] seeks what is known as an award of "statutory damage." Statutory damages are damages established by Congress in the Lanham Act. The purpose of statutory damages is to: compensate the trademark owner, penalize the counterfeiter, and deter future trademark counterfeiting. You may award statutory damages between $1,000 and $200,000 for each trademark that [Name of plaintiff] proves [Name of defendant] used, for each type of goods sold, offered for sale, or distributed.

If you find that [Name of plaintiff] proved that [Name of defendant] knew that the trademark [he/she/it] used was a counterfeit, you may award additional statutory damages. It is not necessary that [Name of defendant] knew that the mark was registered by [Name of plaintiff], only that [Name of defendant]'s knew that the trademark was the same or substantially indistinguishable from [Name of plaintiff]'s trademark.

If [Name of plaintiff] proves that [Name of defendant]'s use of the counterfeit trademark was willful, then you may, but are not required to, increase the statutory damage award to a maximum of $2,000,000 per type of goods sold, offered for sale, or distributed.]

__.__
Counterfeiting

We, the jury, find by a preponderance of the evidence that:

1. [Name of plaintiff] has a registered trademark.

Answer Yes or No _____

If your answer to this question is "Yes," go to Question No. 2. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

2. [Name of plaintiff] gave permission for [his/her/its] trademark to be affixed to [Name of defendant]'s products.

Answer Yes or No _____

If your answer is "No," go to Question No. 3. If your answer to this question is "Yes," then your foreperson should sign and date the last page of this verdict form.

3. [Name of defendant] used a trademark which is identical or substantially indistinguishable from [Name of plaintiff]'s registered trademark on goods that are covered by the registration.

Answer Yes or No _____

If your answer to this question is "Yes," go to Question No. 4. If your answer to this question is "No," then your foreperson should sign and date the last page of this verdict form.

4. [Name of defendant] used the counterfeit trademark in the sale, offering for sale, distribution, or advertising of goods.

Answer Yes or No _____

If your answer to this question is "Yes," go to Question No. 5. If your answer to this question is "No," then your foreperson should sign and date the last page of this verdict form.

[These special interrogatories should be used if [Name of plaintiff] seeks actual damages for counterfeiting:

5. [Name of plaintiff] has suffered actual damages.

Answer Yes or No _____

If your answer to this question is "Yes," in what amount?

$_____.]

[These interrogatories should be given if [Name of plaintiff] seeks an Accounting of [Name of defendant]'s profits for counterfeiting:

6. [Name of defendant]'s conduct was willful and deliberate [Name of defendant] was unjustly enriched, or an award of [Name of defendant]'s profits is necessary to deter future conduct.

Answer Yes or No _____

If your answer to this question is "Yes," then go to Question No. 7. If your answer to this question is "No," then go to Question No. 8.

7. [Name of plaintiff] is awarded [Name of defendant]'s profits.

Answer Yes or No _____

If your answer to this question is "Yes," in what amount?

$_____.]

[These special interrogatories should be used if [Name of plaintiff] seeks statutory damages for counterfeiting:

8. At the time of the counterfeiting activity, [Name of defendant] knew that the trademark [he/she/it] used was a counterfeit.

Answer Yes or No _____

If your answer to this question is "No," then you may award statutory damages between $1,000 and $200,000 per counterfeit mark, per type of goods sold, offered for sale, or distributed. If your answer to this question is "Yes," then you may award statutory damages to a maximum of $2,000,000 per counterfeit mark per type of goods sold, offered for sale, or distributed.

9. [Name of plaintiff] is awarded statutory damages.

Answer Yes or No _____

If your answer to this question is "Yes," in what amount?

$_____.]

SO SAY WE ALL.

_____
Foreperson's signature

DATE: _____

ANNOTATIONS AND COMMENTS

Under 15 U.S.C. § 1127 a "counterfeit" is a spurious trademark which is identical with, or substantially indistinguishable from, a registered trademark.

15 U.S.C. § 1116(d)(1)(B) requires that a counterfeit trademark must be registered on the Principal Register of the Patent and Trademark Office. In many cases the ownership and validity of a trademark registration will not be at issue. In such cases, Special Interrogatory No. 1 should be omitted.

Intentional and Knowing Use

In order for [Plaintiff] to prevail on its counterfeiting claim, it must demonstrate that [Defendant] infringed a registered trademark in violation of 15 U.S.C. § 1114(1)(a), for enhanced damages, the plaintiff must prove that [Defendant] 'intentionally used a mark, knowing such mark is a counterfeit mark. 15 U.S.C. § 1117(b). The Court has determined that [Defendant] infringed registered marks in violation of 15 U.S.C. § 1114(1)(a). The Court has also found that [Defendant] intentionally used the marks in question. 'The analysis therefore focuses on whether [Defendant] used the marks knowing that they were counterfeit.'

Babbit Elecs. v. Dynascan Corp., 38 F.3d 1161, 1181 (11th Cir. 1994).

"If the infringement is intentional . . . and the use of a counterfeit trademark has been proven, then § 1117(b) governs, and the Court is required to treble damages and award attorney's fees unless the Court finds extenuating circumstances." *Id.* at 1183.

Statutory Damages

Under 15 U.S.C. § 1117(c), in a case of trademark counterfeiting, a Plaintiff may obtain statutory damages in lieu of actual damages and profits. Even though the statute suggests that statutory damages are awarded by the court, the Seventh Amendment requires that the determination, including the amount of such award, be made by the jury. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353, 118 S .Ct. 1279, 1287, 140 L. Ed. 2d 438, 353 (1998). The jury should be provided with a special interrogatory form in order to report its findings on the issue of statutory damages. The minimum for statutory damages is $1,000 and the maximum is $200,000 per counterfeit trademark per type of goods or services sold, offered for sale, or distributed. 15 U.S.C. § 1117(c)(1).

Because statutory damages serve both compensatory and punitive purposes, the Plaintiff can recover statutory damages whether or not there is evidence of any actual damage suffered by the Plaintiff or any profits reaped by the Defendant. *See. F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233, 73 S .Ct. 222, 225, 97 L. Ed. 2d 281 (1952) ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy" of discouraging infringement.) Although this was a copyright case, courts, including courts within the Eleventh Circuit, have recognized that statutory damages under the Lanham Act are similarly intended to deter wrongful conduct. *Coach Inc. v. Just A Boun, LLC*, 2011 U.S. Dist. LEXIS 144582 (M.D. Fl. Nov. 8, 2011). The statutory damages remedy was specifically intended to address the likelihood that counterfeiters are unlikely to maintain accurate records from which to accurately determine actual damages. *Id.*

Increase for willful infringement

If the trademark owner proves that use of the counterfeit was willful, the award may be increased to not more than $2,000,000 per counterfeit trademark per type of goods or services sold, offered for sale, or distributed. To establish willfulness, it is only necessary that the Defendant knew that the trademark was a counterfeit. It is not necessary that the Defendant knew that the trademark was registered by the plaintiff. *Babbit Elecs. v. Dynascan Corp.*, 38 F.3d 1161, 1181 (11th Cir. 1994).

Notice requirements

The Lanham Act requires marking or notice for a plaintiff to collect an award of damages. The statute is not clear as to whether a failure to mark precludes an award of statutory damages as well as compensatory damages, but there is no clear exemption from the marking requirement in the case of statutory damages.

10.7 TRADEMARKS - VIOLATION OF 15 U.S.C. §1125(d) – THE ANTI-CYBERSQUATTING CONSUMER PROTECTION ACT

[Name of plaintiff] claims that [Name of defendant] violated the federal law known as the Anti-Cybersquatting Consumer Protection Act, which will be referred to as the "ACPA." To prove a violation of the ACPA, [Name of plaintiff] must prove the following facts by a preponderance of the evidence:

- [Name of defendant] has registered, trafficked in, or used the subject domain Name;

- [Name of plaintiff]'s trademark was distinctive at the time of [Name of defendant]'s registration of [his/her/its] domain Name and that domain Name is identical or confusingly similar to [Name of plaintiff]'s trademark; or [Name of plaintiff]'s trademark was famous at the time of [Name of defendant]'s registration of [his/her/its] domain Name and that domain Name is identical to, confusingly similar to, or likely to dilute [Name of plaintiff]'s trademark; and

- [Name of defendant] has committed such acts with a bad-faith intent to profit from [Name of plaintiff]'s trademark.

["Dilution" is the decrease in the power of a famous trademark to identify its goods. Dilution does not require 1) competition between the owner of the famous trademark and other parties, or (2) a likelihood of confusion.]

[Plaintiff's trademark is "famous" if it is widely recognized by the general public as identifying its goods.]

The purpose of the ACPA is to protect trademarks against certain confusing uses of those trademarks in Internet domain Names. A "domain Name" is a designation that forms at least part of an address on the Internet, such as www.cnn.com ("cnn" for the CNN television network), and has been registered with or assigned by domain-Name authority.

The term “traffics in” means to engage in a transaction including, but not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration. For example, selling a domain Name constitutes “trafficking in” that domain Name.

[Name of defendant] is not liable for use of [domain Name] unless you find that [Name of defendant] is the registrant or the registrant’s authorized licensee.

In determining whether [Name of defendant] had a bad-faith intent to profit from [Name of plaintiff]’s trademark, you may consider the following nine factors. No single factor controls, and [Name of plaintiff] is not required to prove that all, or even most, of the factors are present in any particular case. You may also use factors other than these nine to determine [Name of defendant]’s intent:

- Whether [Name of defendant] has trademark or other intellectual property rights in [his/her/its] domain Name;

- The extent to which [Name of defendant]’s domain Name consists of [Name of defendant]’s legal Name or a Name that is otherwise commonly used to identify [Name of defendant];

- The extent of [Name of defendant]’s prior use, if any, of [his/her/its] domain Name in connection with the bona fide offering of any goods;

- The extent to which [Name of defendant] used [Name of plaintiff]’s trademark noncommercially or as a “fair use” in a site accessible under the domain Name– "Fair use" is the good-faith descriptive use by the Defendant of a Name or term only to describe its goods or services, and not a trademark;

- Whether [Name of defendant] intended to divert consumers from [Name of plaintiff]’s online location to a site that is accessible under [Name of defendant]’s domain Name and could harm the goodwill represented by [Name of plaintiff]’s trademark. A site could harm the goodwill

represented by [Name of plaintiff]'s trademark if it (a) is for commercial gain, (b) intends to tarnish or disparage [Name of plaintiff]'s trademark, or (c) creates a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

- Whether [Name of defendant] offered to transfer, sell, or otherwise assign [his/her/its] domain Name to [Name of plaintiff] or any other third party for financial gain without using, or having an intent to use, [Name of defendant]'s domain Name in the bona fide offering of any goods, or whether [Name of defendant]'s prior conduct indicates a pattern of such conduct;

- Whether [Name of defendant] provided material and misleading false contact information when applying for registration of [his/her/its] domain Name, whether [Name of defendant] intentionally failed to maintain accurate contact information, or whether [Name of defendant]'s prior conduct indicates a pattern of such conduct;

- Whether [Name of defendant] registered or acquired multiple domain Names which [he/she/it] knows are identical or confusingly similar to trademarks of others that are distinctive at the time of registration of such domain Names, or dilutive of famous trademarks of others that are famous at the time of registration of such domain Names, without regard to the goods of the parties; and

- The extent to which [Name of plaintiff]'s trademark is distinctive and famous.

Defenses

[Name of defendant] is not liable for violation of the ACPA with respect to [domain Name] if you find that [Name of defendant] has proven by a preponderance of the evidence that at the time [Name of defendant] registered or otherwise obtained [his/her/its] domain Name:

- [Name of defendant] had reasonable grounds to believe that the use of [his/her/its] domain Name was a fair use or otherwise lawful; and

- [Name of defendant] actually believed that the use of [his/her/its] domain Name was fair use or otherwise lawful.

Remedies

If you find that [Name of defendant] violated the ACPA with respect to [domain Name], you should consider what damages to award to [Name of plaintiff]. [Name of plaintiff]'s remedies available under the ACPA are in addition to any other remedy otherwise applicable, even if they are duplicative of those made in another of [Name of plaintiff]'s claims against [Name of defendant].

[This instruction should be given if [Name of plaintiff] seeks actual damages and [Name of defendant]'s profits:

In this case, [Name of plaintiff] seeks to recover the actual damages [he/she/it] sustained and [Name of defendant]'s profits. [Name of plaintiff] may recover for all elements of injury to [Name of plaintiff]'s business proximately resulting from [Name of defendant]'s wrongful acts. You are not required to calculate actual damages with absolute exactness—you may make reasonable approximations. But any award of actual damages to [Name of plaintiff] must be just and reasonable based on facts that are proved by a preponderance of the evidence.

In addition to [Name of plaintiff]'s actual damages, you may also make an award based on an accounting of [Name of defendant]'s profits if you find that:

- [Name of defendant]'s conduct was willful and deliberate; or

- [Name of defendant] was unjustly enriched; or

- An award of [Name of defendant]'s profits is necessary to deter [Name of defendant]'s future conduct.

A defendant commits a "willful violation" of a trademark when that defendant knowingly and purposefully capitalized on and appropriated for itself the goodwill of a plaintiff.

"Unjust enrichment" occurs if [Name of defendant] received a benefit to which [he/she/it] was not entitled.

In determining [Name of defendant]'s profits, [Name of plaintiff] is only required to prove [Name of defendant]'s gross sales. [Name of defendant] may then prove the amount of sales made for reasons other than the infringement. [Name of defendant] also may prove its costs or other deductions which [he/she/it] claims should be subtracted from the amount of [his/her/its] sales to determine [his/her/its] profits on such sales. Any costs or deductions that [Name of defendant] proves by a preponderance of the evidence are subtracted from the sales attributable to the infringement and the difference is the amount that may be awarded to [Name of plaintiff].

[This instruction should be given if [Name of plaintiff] has elected to receive statutory damages:

In this case, [Name of plaintiff] seeks an award of "statutory damages." Under the ACPA, statutory damages are punitive in nature, meaning that they are designed to sanction or punish [Name of defendant] for [Name of defendant]'s bad-faith conduct and deter future violations of the ACPA. You may award statutory damages between $1,000 and $100,000 for each domain Name that [Name of plaintiff] proves [Name of defendant] used.]

Violation of the Anti-Cybersquatting Consumer Protection Act

SPECIAL INTERROGATORIES TO THE JURY

We, the jury, find by a preponderance of the evidence that:

1. [Name of plaintiff] owns a trademark.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 2. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

2. [Name of defendant] has registered, trafficked in, or used the domain Name.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 3. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

3. [Name of plaintiff]'s trademark was distinctive at the time of [Name of defendant]'s registration of [his/her/its] domain Name and that domain Name is identical or confusingly similar to [Name of plaintiff]'s trademark, or that [Name of plaintiff]'s trademark was famous at the time of [Name of defendant]'s registration of [his/her/its] domain Name and that domain Name is identical to, confusingly similar to, or likely to dilute [Name of plaintiff]'s trademark.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 4. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

4. [Name of defendant] had a bad-faith intent to profit from [Name of plaintiff]'s trademark.

Answer Yes or No _____

If your answer is "Yes," go to Question No. 5. If your answer is "No," then your foreperson should sign and date the last page of this verdict form.

Defenses

5. [Name of defendant] had reasonable grounds to believe that the use of [his/her/its] domain Name was a fair use or otherwise lawful and [Name of defendant] actually believed that the use of [his/her/its] domain Name was fair use or otherwise lawful.

Answer Yes or No _____

If your answer is "Yes," then your foreperson should sign and date the last page of this verdict form. If your answer is "No," then go to Question No. 6.

[These special interrogatories should be used if [Name of plaintiff] seeks actual damages for violation of the Anti-Cybersquatting Consumer Protection Act:

6. [Name of plaintiff] has suffered actual damages.

Answer Yes or No _____

If your answer is "Yes," then go to Question No. 7. If your answer is "No," then go to Question No. 8.

7. [Name of plaintiff] is awarded actual damages.

Answer Yes or No _____

If your answer is "Yes," in what amount?

$_____.]

[These special interrogatories should be used if [Name of plaintiff] seeks Defendant's profits for violation of the Anti-Cybersquatting Consumer Protection Act:

8. [Name of defendant]'s conduct was willful and deliberate, [Name of defendant] was unjustly enriched, or such an award is necessary to deter future conduct.

Answer Yes or No _____

If your answer to this question is "Yes," go to Question No. 9 below. If your answer is "No," then go to Question No. 10.

9. [Name of plaintiff] is awarded [Name of defendant]'s profits.

Answer Yes or No _____

If your answer is "Yes," in what amount?

$_____.]

These interrogatories should be given if [Name of plaintiff] seeks statutory damages for violation of the Anti-Cybersquatting Consumer Protection Act:

10. [Name of plaintiff] is awarded statutory damages.

Answer Yes or No _____

I f your answer is "Yes," in what amount?

$_____.]

SO SAY WE ALL.

_____
Foreperson's signature

DATE: _____

ANNOTATIONS AND COMMENTS

15 U.S.C. § 1125(d)(1)(A) & (d)(3); *see also* House Judiciary Committee Report on H.R. 3028, H.R. Rep. No. 106-412, at 15 (Oct. 15, 1999); Senate Section-by-Section Analysis, Cong. Rec., at S14715 (Nov. 17, 1999). Plaintiff's *in rem* civil action under the ACPA is in addition to any other civil action otherwise applicable.

The Eleventh Circuit has not ruled on what makes a trademark distinctive or famous under the ACPA. For dilution purposes under the Lanham Act, a "famous" trademark is one that is "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the trademark's owner." 15 U.S.C. § 1125(c)(2); *see also* J. Thomas McCarthy, Trademarks and Unfair Competition § 24.91 (4th ed.) (defining "famous" trademarks as those that are "truly prominent and renowned") (citing *Thane Int'l v. Trek Bicycle Corp.*, 305 F.3d 894, 910-11 (9th Cir. 2002) (concluding that the Federal Trademark Dilution Act only protected a trademark that is a "household name")). The Eleventh Circuit also has not yet ruled on the meaning of the terms "identical" or "confusingly similar" under the ACPA.

A Defendant's bad faith is not enough; the Plaintiff must prove a bad faith *intent to profit*. *S. Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235, 1246 (11th Cir. 2009). This statutory requirement of an intent to profit correlates with the ACPA's purpose—namely, "to 'curtail one form of cybersquatting—the act of registering someone else's name as a domain name for the purpose of demanding remuneration from the person in exchange for the domain name.'" *Id.* (quoting *Schmidheiny v. Weber*, 319 F.3d 581, 582 (3rd Cir. 2003)).

10.8 Trademarks- False Advertising

[Name of plaintiff] claims that [Name of defendant] is liable for false advertising. To prove [his/her/its] claim, [Name of plaintiff] must prove the following facts by a preponderance of the evidence:

- [Name of defendant]'s advertisements were false or misleading;

- [Name of defendant]'s advertisements deceived, or had the capacity to deceive, consumers;

- The deception had a material effect on purchasing decisions;

- The misrepresentation affected interstate commerce; and

- [Name of plaintiff] has been, or is likely to be, injured as a result of the false advertising.

There are two ways in which [Name of defendant]'s advertisement may be false or misleading: it may be literally false, or it may be literally true but misleading.

Additionally, [Name of plaintiff] must prove the materiality of [Name of defendant]'s advertising by showing that [Name of defendant]'s deception is likely to influence consumers' purchasing decisions.

False Advertising

SPECIAL INTERROGATORIES TO THE JURY

We, the jury, find by a preponderance of the evidence that:

1. [Name of defendant]'s advertising is false or misleading.

Answer Yes or No _____

If your answer is “Yes,” then go to Question No. 2. If your answer is “No,” then your foreperson should sign and date the last page of this verdict form.

2. [Name of defendant]’s advertising deceives, or has the capacity to deceive, customers.

Answer Yes or No _____

If your answer is “Yes,” then go to Question No. 3. If your answer is “No,” then your foreperson should sign and date the last page of this verdict form.

3. [Name of defendant]’s deception has a material effect on the customer’s purchasing decisions.

Answer Yes or No _____

If your answer is “Yes,” then go to Question No. 4. If your answer is “No,” then your foreperson should sign and date the last page of this verdict form.

4. The product or service misrepresented by [Name of defendant] affects or involves interstate commerce.

Answer Yes or No _____

If your answer is “Yes,” then go to the special interrogatories on Defenses and Remedies in either the jury charges for Infringement of Registered Trademark or Infringement of an Unregistered Trademark. If your answer is “No,” then your foreperson should sign and date the last page of this verdict form.

SO SAY WE ALL.

_____
Foreperson’s signature

DATE: _____

ANNOTATIONS AND COMMENTS

The statutory basis for this cause of action is 15 U.S.C. § 1125(a)(1)(B). The five-part test for liability is taken from *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1308 (11th Cir. 2010), and *N. Am Medical Corp. v. Axiom Worldwide, Inc*., 522 F.3d 1211, 1224 (11th Cir 2008).

The Eleventh Circuit adheres to the minority rule that even literally false advertising must be proven material to be actionable. *See Johnson & Johnson Vision Care v. 1-800 Contacts, Inc*., 299 F.3d 1242, 1250-51 (11th Cir. 2002). In doing so, however, the court also has cited approvingly to the majority rule that "[i]f the court deems an advertisement to be literally false, then the [plaintiff] is not required to present evidence of consumer deception." *Osmose*, 612 F.3d at 1319.