INTENTIONAL MISREPRESENTATION OR FRAUD

The plaintiff claims that the defendant intentionally misrepresented *[describe statement]***, that the plaintiff reasonably relied on the defendant's statement, and as a result, the plaintiff suffered damages. Intentional misrepresentation is also called fraud. To prove this claim, the plaintiff must prove six elements by a preponderance of the evidence:**

First: **that the defendant made a false statement to the plaintiff. [This would include a misleading half-truth.];**

Second**: that the false statement concerned a fact that was important to the plaintiff's decision to** *[describe the claim]***;**

Third: **that, when the defendant made the statement, the defendant knew that it was false or recklessly disregarded the fact that it was false;**

Fourth**: that the defendant intended for the plaintiff to rely on the false statement in making the plaintiff's decision;**

Fifth: **that the plaintiff reasonably relied on the defendant's statement; and,**

***Sixth*: that the plaintiff's reliance on the defendant's false statement caused the plaintiff to suffer some financial loss.**

Cumis Ins. Society, Inc. v. BJ's Wholesale Club, Inc., 455 Mass. 458, 471-472 (2009) ("To recover on their fraud claims, the plaintiffs must establish that the defendants made a false representation of material fact, with knowledge of its falsity, for the purpose of inducing the plaintiffs to act on this representation, that the plaintiffs reasonably relied on the representation as true, and that they acted upon it to their damage."), citing *Masingill v. EMC Corp.*, 449 Mass. 532, 540 (2007); *Danca v. Taunton Sav. Bank*, 385 Mass. 1, 8 (1982). See also *H1 Lincoln, Inc. v. South Washington Street, LLC*, 489 Mass. 1, 18-19 (2022).

I will now explain each element in more detail.

1. FALSE STATEMENT

First, the plaintiff must prove that the defendant made a false statement to the plaintiff. The statement could be clear and direct or could be indirect, meaning that the defendant's words [actions] reasonably suggested that the statement was true without (him / her / them / it) saying so. The statement could be oral or written [or made through the defendant's actions, or any combination of words and actions].

A party may also be liable for fraud by knowingly concealing or omitting material information in violation of a duty to disclose it. See *Buffalo-Water 1, LLC* v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 25 (2018) (elements of fraud by omission). In such a case, the judge must adapt these instructions.

Misrepresentation of fact **The plaintiff claims that the defendant misrepresented an existing fact, namely** *[restate/summarize alleged misrepresentation]***. Something is a fact if it can be**

determined with certainty whether it is true or false. For instance, suppose that I am buying a used car and the seller says the car has a brand new engine. If the car has its original engine, then the seller misrepresented a fact, because it is possible to know with certainty whether or not the engine is original or new.

Half-truths **A half-truth can be a misrepresentation of fact. If someone speaks about a matter, he or she must speak honestly and disclose all the important facts about that matter that are within his or her knowledge. A half truth occurs when someone only gives partial information and fails to mention that (he / she / they / it) knew other important facts. For instance, if I am buying a house and the seller says that there is a working septic system, the seller has a duty to tell me if he or she knows that the system will stop working soon and needs immediate replacement. If you find that the defendant told a half-truth, you may find that the defendant has made a misrepresentation.**

Kannavos v. Annino, 356 Mass. 42, 48 (1969); *Gossels v. Fleet National Bank*, 69 Mass. App. Ct. 797, 806 (2006); *Zimmerman v. Kent,* 31 Mass. App. Ct. 72, 80 (2003).

Misrepresentation of law **The plaintiff claims that the defendant misrepresented the law, namely** *[restate or summarize alleged misrepresentation]***. To succeed on this claim, the plaintiff must show that the defendant had superior knowledge about the law and used that knowledge to take advantage of the plaintiff's relative ignorance of the law. If both sides had about the same knowledge of the law, then the plaintiff has not proven a misrepresentation of law.**

Kannavos v. Annino, 356 Mass. 42, 48-49 (1969).

Fact vs. Opinion **The defendant's false statement must be factual and not purely a matter of opinion. An opinion is a personal belief or view that cannot be proven right or wrong with certainty, such as who makes the best pizza.**

In some cases, though, a statement that sounds like an opinion might suggest or imply that the speaker knew facts that support the opinion. In such cases, the plaintiff must prove that (he / she / they / it) reasonably believed that the defendant knew facts that supported the opinion. If this is the case and the opinion is not supported by facts, then

you may find that the defendant made a misrepresentation. For instance, if I sell you a car and tell you it is reliable and safe, but I know for a fact that the car needs thousands of dollars in repairs just to run safely, I have made a misrepresentation of fact even though I have stated an opinion. Whether a representation is a statement of fact or merely an opinion is a question of fact for you, the jury, to decide.

Briggs v. Carol Cars, Inc., 407 Mass. 391, 395-396 (1990).

In deciding whether this was an opinion or a statement of fact, you should consider all the circumstances and ask yourselves questions like these:

- **Was it possible to verify the statement? Generally, it is possible to verify a statement of fact but not an opinion.**
- **Where and how did the defendant make the statement? Sometimes the location or method in which a statement is made may support a finding that the defendant made a statement of fact while a different location or method may suport a finding that the defendant only expressed an opinion.**
- **What did else did the defendant say? For instance, did the defendant raise any cautions or limitations that might lead a reasonable person to think that the statements were matters of opinion?**

Non-disclosure where the plaintiff has identified a fiduciary or other special relationship between the parties creating a duty to disclose.

Ordinarily, the mere failure to mention facts is not misrepresentation. However, a failure to mention facts can be a misrepresentation if the defendant had a duty to disclose certain facts. In this case, the plaintiff claims that the defendant had a duty to tell (him / her / them / it) *[describe the facts]* **because** *[describe source of the alleged duty]***. To prove that duty, the plaintiff must show** *[describe facts needed to establish the duty]***. If the plaintiff proves these things, the defendant had a duty of disclosure and may be liable for misrepresentation if (he / she / they / it) did not mention those facts.**

Chace v. Curran, 71 Mass. App. Ct. 258, 263-264 (2007); *Rood v. Newberg*, 48 Mass. App. Ct. 185, 192 (1999) ("[N]ondisclosure may amount to fraud if a party is under a duty to the other [party] to exercise reasonable care to disclose the matter in question…. The duty may arise if there is a fiduciary or other similar relation of trust and confidence between the parties.") (internal citations omitted). See also *Sullivan v. Five Acres Realty Trust, Inc.*, 487 Mass. 64, 74-75 (2021) (where there is no affirmative duty, silence or "bare nondisclosure" is not basis for claiming fraud, even where a party may have knowledge of some weakness in the subject of the sale and fails to disclose).

Misrepresentation by conduct **Here, the plaintiff claims that the defendant made a misrepresentation through conduct rather than by written or spoken words. (He / she / they / it) alleges** *[describe conduct]***. It is not enough just to show that the plaintiff believed that the defendant's actions**

communicated a statement of fact. You must decide whether the plaintiff's belief was reasonable under the circumstances.

Cf. Phelan v. May Dep't Stores Co., 443 Mass. 52, 58 (2004).

2. MATERIALITY / IMPORTANCE

The second element the plaintiff must prove is that the false statement related to a material fact, meaning an important one. To do so, the plaintiff must prove two things.

First, the plaintiff must prove not only that (he / she / they / it) considered the statement important, but that it was reasonable to do so. You must focus on the decision the plaintiff was making and decide whether a reasonable person would also consider the statement important. As the jury, you are in the best position to say what a reasonable person would consider important under the circumstances of this case.

Second, the plaintiff must also prove that the false statement was one of the main reasons for (his / her / their / its) decision, even if it was not the only reason.

Welch v. Barach, 84 Mass. App. Ct. 113, 120-21 and n.11 (2013); *Nota Construction v. Keyes Associates*, 45 Mass. App. Ct. 15, 16-17 (1998); *Zimmerman v. Kent*, 31 Mass. App. Ct. 72, 78 (1991).

3. DEFENDANT'S KNOWLEDGE AND INTENT

Third, the plaintiff must prove that when the defendant made the statement, the defendant knew the statement was false or that (he / she / they / it) recklessly asserted that the statement was true when it was not.

To determine whether the defendant knew the statement was false, you must make a decision about the defendant's state of mind at the time. You may examine all of the defendant's actions and words and all of the surrounding circumstances to help you determine the extent of the defendant's knowledge at the time. You should consider the evidence and any reasonable inferences you draw from the evidence.

See Criminal Model Jury Instruction 3.140, Knowledge.

If the defendant could easily have found out the truth and failed to do so, then you may find that the defendant was reckless even if the defendant believed that (his / her / their / its) statement was true. For instance, you may find the defendant was reckless if, by

exercising even a little diligence, the defendant would have had easy access to accurate facts and failed to check out those facts.

Zimmerman v. Kent, 31 Mass. App. Ct. 72, 81-82 (2003), citing *Chatham Furnace Co*. v. *Moffatt*, 147 Mass. 403, 406 (1888); *Acushnet Fed. Credit Union* v. *Roderic*k, 26 Mass. App. Ct. 604, 605 (1988).

4. INTENT FOR THE PLAINTIFF TO RELY

Fourth, the plaintiff must prove that the defendant intended the plaintiff to rely on the false statement in making the decision. The plaintiff does not have to prove that the defendant intended to deceive (him / her / them / it).

A person's intent is (his / her / their / its) purpose or objective. In this case, you may examine all of the defendant's actions and words and all of the surrounding circumstances to help you determine what the defendant's intent was at the time.

If "arms length" dealings alleged. **If the plaintiff did not deal on a one-to-one basis with the defendant, the plaintiff must prove that the defendant had reason to expect that the plaintiff would rely on the misrepresentation.**

Primarily in cases involving real estate sales and "particularly where … the seller was also the builder of the structure", the Massachusetts appellate courts have said that:
"It is the law in the Commonwealth that proof of the elements of knowledge and intent in actions for fraudulent misrepresentation 'may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in

such case it is not necessary to make any further proof of an actual intent to deceive.'" *Henderson* v. *D'Annolfo*, 15 Mass. App. Ct. 413, 422 (1983), quoting *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403, 404 (1888). See also *Yorke* v. *Taylor*, 332 Mass. 368, 371 (1955) (rescission of contract); *Reisman v. KPMG Peat Marwick LLP*, 57 Mass. App. Ct. 100, 110 (2003).

5. RELIANCE

The next element is reliance, which has two parts. First, the plaintiff must prove that (he / she / they / it) actually relied on the defendant's misrepresentation and that it caused the plaintiff to act or fail to act in some way.

Second, the plaintiff must prove that (his / her / their / its) reliance on the defendant's statement was reasonable under the circumstances. The plaintiff had no duty to make an independent investigation of the truth or falsity of the defendant's statement. You may find the plaintiff's reliance is reasonable if the plaintiff used common sense, and paid attention to the facts.

Obviously, if the plaintiff knew the statement was false, then, of course, it was not reasonable to rely on it. Ordinarily, it is also unreasonable to rely on a statement that is obviously false or preposterous. It is also unreasonable to rely upon statements that were obviously just hype or sales talk and nothing more.

You may consider all the circumstances, including whether any facts should have alerted the plaintiff to the untruthfulness of the statement and whether the defendant's representations led the plaintiff not to undertake an independent examination of the facts or led the plaintiff to place confidence in the defendant's assurances. Ultimately, you must decide whether a reasonable person in the plaintiff's circumstances would have relied on the statement.

"[I]n *Yorke v. Taylor*, 332 Mass. 368, 374 (1955), this court adopted the rule of the Restatement of Torts § 540 (1938), which states: 'The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation.' " *Kuwaiti Danish Computer Co. v. Digital Equipment Corporation*, 438 Mass. 459, 467 (2003). See also *Snyder v. Sperry & Hutchinson Co.,* 368 Mass. 433, 446 (1975); *Kabatchnick v. Hanover-Elm Bldg. Corp*., 328 Mass. 341, 344 (1952); *Stolzorr v. Waste Systems*, 58 Mass. App. Ct. 747, 760 (2003); *Zimmerman v. Kent,* 31 Mass. App. Ct. 72, 81 (2003); *Henderson v. D'Annolfo*, 15 Mass. App. Ct. 413, 423 (1983). Restatement (Second) of Torts § 540. Compare *Mahaney v. John Hancock Mut. Life Ins., Co*., 6 Mass. App. Ct. 919, 920 (1978) (plaintiff cannot sustain claim of common-law deceit where he relied upon preposterous representation).

"Restatement (Second) of Torts § 541 states: 'The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.' There is thus a distinction between a falsity that could only be uncovered by way of 'investigation' and a falsity that was readily apparent or 'obvious.' Comment a to Restatement (Second) of Torts § 540, supra, states that, 'if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in § 541.' " *Kuwaiti Danish Computer Co. v. Digital Equipment Corporation*, 438 Mass. 459, 467 (2003).

Reliance – contractual disclaimers **You may also consider that the written contract between the plaintiff and the defendant says: "***[recite language of disclaimer]***." This language does not automatically require you to decide in the defendant's favor. People sometimes sign form agreements with this**

kind of language even though they correctly believe that the other side made representations and even though they rely upon those representations. You may consider the contract language as some evidence that the defendant made no representations and that it was unreasonable to rely upon any representations. However, other evidence may persuade you that the defendant did make misrepresentations and that the plaintiff reasonably relied on them.

See *Sheehy v. Lipton Indus., Inc*., 24 Mass. App. Ct. 188, 193-194 (1987).

6. CAUSATION

Sixth, the plaintiff must prove that he suffered some financial or economic loss because he relied on the defendant's false statement. To determine this you must ask: "would the same harm have occurred without the defendant's misrepresentation?" If the same harm would have happened anyway, then the defendant did not cause the harm.

Cf. *Doull* v. *Foster*, 487 Mass. 1, 17 n. 10 (2021) (but-for causation in a negligence case).

DAMAGES

I will now instruct you on the issue of damages. By instructing you on the issue of damages, I am not suggesting how you ought to

decide this case; that is your responsibility. I am only informing you as to what the law is regarding the calculation of damages, in the event you get to that point.

If the plaintiff has proven all six elements by a preponderance of the evidence, you should award money damages that will fairly compensate the plaintiff for the harm caused by the defendant.

The purpose of damages is to give the plaintiff the value of what the defendant promised or represented. You cannot award damages to reward the plaintiff or punish the the defendant. You also cannot award damages to compensate for emotional distress. You may not include any sum for court costs, interest or any amount for attorney's fees.

The amount of damages must be proved to a reasonable degree of certainty. While the plaintiff does not have to prove damages to a mathematical certainty, the plaintiff must show evidence of a damage amount that is reasonably certain so that you are not required to speculate.

To calculate damages, you must determine the value that the plaintiff would have received if the defendant's representations had been true. Then you subtract the value of what the plaintff actually

received. The result is the plaintiff's damages. [In addition, if the misrepresentation caused the plaintiff to incur any reasonably foreseeable expenses related to the transaction, you should compensate the plaintiff by awarding money damages for those expenses.]

Rice v. Price, 340 Mass. 502, 508 (1960). There is flexibility in the measure of damages where this rule does not compensate for the "direct results of the wrong." *Id*. at 510-511 See *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co*., 445 Mass. 411, 425 (2005), quoting *Anzalone v. Strand*, 14 Mass. App. Ct. 45, 48 n.2 (1982) ("the benefit of the bargain rule 'may be modified or supplemented to prevent injustice'"). Note that benefit of bargain damages are not appropriate where the plaintiff's only damage is lost opportunity for profit. *Twin Fires*, 445 Mass. at 425 ("Our courts have consistently limited the award of benefit of the bargain damages to cases of intentional misrepresentation where the person who was the target of the misrepresentation has actually acquired something in a transaction that is of less value than he was led to believe it was worth when he bargained for it."). There may be instances where the benefit of the bargain is not the appropriate measure of damages, and the appropriate measure may be reliance damages, measured by the loss the plaintiff incurred in reliance on the defendant's misrepresentation, even if there was no contractual relationship between the parties. See *id.* at 425-426.

If plaintiff is buyer of property **In this case the plaintiff's damages are the difference between the property's market value at the time of the sale and [what the defendant said the property was worth] [what the property would have been worth if the defendant's statements were true].**

Closing arguments **The law allows the lawyers to suggest an amount of damages in their closing arguments, but you should understand that any suggestions the lawyers make are not evidence and do not set any sort of standard or**

floor or ceiling for the amount of damages – it is up to you to evaluate the damages, based on the evidence and your own judgment.

See Mass. R. Civ. P. 51(a)(2).