PRECHARGE

1. *Burden of Proof.* **Members of the jury, I am about to make some brief introductory remarks to introduce you to the trial of this case and to acquaint you with some of the general legal principles that will control your deliberations. These remarks are not a substitute for the more detailed instructions on the law that I will be giving you at the end of the case.**

This is a trial of a civil case involving a dispute between private parties. In a civil case, the plaintiff, the party bringing the claim, must prove the case by the civil standard of proof, which is "preponderance of the evidence." Basically, what that means is that the plaintiff must prove that (his / her / their / its) case is more probably true than not true.

The plaintiff does not have to prove the case by the criminal standard of proof which you may be familiar with from television or general knowledge of proof beyond a reasonable doubt. That's <u>not</u> the standard that applies in civil cases such as this one. The civil standard of proof is not as strict as the criminal standard. In this case,

the plaintiff must prove the case is more probably true than not true.

I'll explain to you at the end of the trial in more detail about the civil standard of proof. I will also explain to you at the end of the trial the elements of the plaintiff's claim; that is, what the law requires the plaintiff to prove by a preponderance of the evidence.

[If appropriate, the judge may instruct the jury on the nature of the case and / or the elements of the causes of action.]

2. *Trial Procedure.* **The trial will proceed in the following order. We start the trial with the opening statements. That's a chance for the attorneys to describe to you what they expect the evidence is going to be. The plaintiff's attorney will go first and then the defendant's attorney may either make an opening statement right away, may choose to delay the opening statement until later in the case, or may choose to make no opening statement because the plaintiff has the burden of proof in this case.**

The opening statements of the attorneys are not evidence. In fact, nothing said or asked by the attorneys, no matter how artfully phrased, at any time during this trial is evidence. Only the answers

given by witnesses under oath in response to questions, and documents and items marked as exhibits which you will have with you in the deliberation room is the evidence in the case.

We allow the attorneys to make opening statements to give you a road map or preview of what they expect the evidence is going to be, so at the outset, you have a sense of what the case involves from the parties' point of view.

After the opening statements comes the presentation of evidence. That is when witnesses are asked questions and give testimony under oath as well as when documents and items marked as exhibits are entered into evidence. After the presentation of evidence, the closing arguments are presented. The closing argument is a chance, once again, for the attorneys to summarize their views of the case and suggest to you what conclusions they would like you to draw from what they suggest the evidence has been. I again remind you that the closing arguments of the attorneys, like their opening statements, are *not* evidence.

In the very last stage of this trial, I will instruct you on the law

that applies to this case.

3. *Function of judge and jury.* **Now let me speak with you briefly about your role as the jury and mine as the judge. My responsibility is to see that the case is tried in a way that is fair, orderly, and efficient. It is also my responsibility to rule on any questions of evidence or law that come up during the course of the trial and to instruct you at the end of the trial about the law that applies to this case. It is your duty as jurors to accept the law as I state it to you.**

Your function as the jury is to determine the facts. You are the sole and the exclusive judges of the facts of this case. You alone will determine what evidence to believe, how important any evidence is, and what conclusions to draw from all of the believable evidence. Ultimately you must decide whether or not the plaintiff has proven the case by a preponderance of the evidence.

Our system of justice requires you to render a fair decision based on the evidence, not on biases. As I told you earlier today during impanelment, because you are making very important decisions in this case, you must be alert to recognize any potential

biases that might affect your view of the evidence in this case. You must not allow bias – conscious or subconscious – to interfere with your ability to fairly evaluate the evidence, apply the law as I instruct you, and render a fair and impartial verdict based on the evidence presented at this trial.

4. *Objections*. **During the trial, the attorneys may object to questions or answers that they believe are not admissible under our rules of evidence. That is their responsibility and you should not look either positively or negatively upon either attorney or the side they are representing for making objections or requesting side-bar conferences.**

If I agree with an objection, I will use the word “sustained” in which case I will not allow the witness to answer and you are not to guess or speculate about what the answer would have been.

Sometimes I do not say the word “sustained” fast enough and the answer comes out. In that case, I will tell you that the answer is stricken or I will say “strike that.” That means you are to put that answer out of your mind and not rely on that answer in deciding the

fact issues of the case.

If I disagree with an objection, I will use the word "overruled" and allow the witness to answer. You should give that answer by that witness the same degree of belief or importance you would give to any other answer by that witness.

5. *Juror comfort*. **If you need to take a break at any time during this trial, if you can't hear, you can't see, you need a glass of water, anything at all to make this a comfortable, enjoyable experience for you, just raise your hand.**

Optional: **If need be, I will speak with you privately at sidebar.**

6. *Impartiality.* **Members of the jury, we start his trial with an agreement: that you are a fair, open-minded and impartial jury. Both sides agree that you can be what you are: the judges of the facts of this case. That is why we went through the impanelment process in which you just participated.**

A trial by its nature does not occur all at once. A trial necessarily occurs an answer at a time, a piece of paper at a time. If you start to form a view about this case before all of this evidence is

in, the closing arguments are made and the instructions given to you, you may actually start to take a position from which you would need to be dissuaded later on as the case more fully develops and you would no longer be fair, open-minded and impartial.

Keep an open mind. Do not make up your mind about what the verdict ought to be until after you have gone to the deliberation room at the end of the trial and had a chance to deliberate this case and to discuss it with all of your fellow jurors present. Keep an open mind until then.

Similarly, you are not allowed to pre-deliberate this case; that is, you should not discuss it with anyone. You should not even discuss it among one another until after the trial is complete and the deliberation process begins. You have to keep your thoughts to yourself until I instruct you to begin deliberation. You can talk about anything else you would like among each other; you just cannot talk about this case until the deliberations begin.

You may only consider evidence presented to you in the courtroom. You may not conduct any investigation on your own; nor

may you engage in any research on the law that might apply in this case.

You have been chosen precisely because you are impartial. As soon as you take on the role of investigator or attorney, you become an advocate and lose your ability to be impartial.

You may not use outside electronic devices such as cell phones or computers nor the internet, social media, news reports, maps, legal texts, or dictionaries to learn things outside of what is presented here.

You may not discuss this case with anyone, not even with your fellow jurors. You must not talk to anyone about this case in person, by telephone, the internet, email, or social media. This includes family and friends.

I know that you will try this case according to the oath that you have taken as jurors in which you promised that you would well and truly try the issues between the plaintiff and the defendant according to the evidence and the law. If you follow that oath and you try the issues in this case without fear, prejudice, bias, or sympathy, I am

confident that you will arrive at a true and just verdict.

7. *Optional: notetaking by jurors*. **Members of the jury, the court officer has distributed to each of you a note pad and a pen. Sometimes jurors find it helpful to jot down names of witnesses, dates, times, distances, things like that. If you feel that it would be helpful to you to write notes, feel free to do so. However, you are not required to write notes.**

If you do choose to take notes, I instruct you that you should be very sparing in your note taking. A lot of what happens during a trial is not just *what* is said but *how* it is said and how people appear on the witness stand. If you are too focused on your notebook, you may miss critical evidence and important observations of the witnesses, whose credibility you must ultimately judge.

Your notes are for your own personal use as jurors and are not part of the record of this trial. They will not be reviewed by anybody and will be destroyed at the conclusion of the trial.

Judge. **Attorney** *[plaintiff's counsel]* , **you may present your opening statement.**

NOTES:

1. Extraneous publicity. If a caution on extraneous publicity is appropriate, the judge may use instruction contained in Criminal Model Jury Instruction 1.120, Preliminary Instruction to Jury Before Trial or 1.260, Extraneous Publicity.

2. **Implicit bias instructions.** On September 29, 2021, the Supreme Judicial Court promulgated two model jury instructions on implicit bias to "be given at all criminal and civil trials, during the preliminary charge following empanelment and during the final charge prior to deliberations." The SJC "recommended that trial judges use the language of the Instructions unless the judge determines that different language would more accurately or clearly provide comparable guidance to the jury or better promote the fairness of the trial." In March of 2019, prior to the release of the SJC's instructions, the District Court Committees on Racial and Ethnic Fairness and Criminal Proceedings collaborated to issue three instructions with language about implicit bias to be given at empanelment, in preliminary instructions after empanelment, and in final instructions on evaluating the evidence. The language within this instruction is modeled on District Court Model Instructions 1.100, 1.120 and 2.120. The trial judge should evaluate, with input from the parties, whether to use the SJC's proposed Model Instructions, these District Court instructions or a combination of the two. The SJC's instructions are available on mass.gov: Supreme Judicial Court Model Jury Instructions on Implicit Bias | Mass.gov.