TERMS OF A CONTRACT

If you determine that a binding contract was formed, then you must decide the terms of the contract, that is, the conditions and promises that the parties have mutually agreed upon. All words in the contract should be given their ordinary and commonly understood meaning unless the contract expressly defines them.

DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795, 804 (2013).

I. IMPLIED CONVENANT OF GOOD FAITH AND FAIR DEALING

In every contract there is an implied covenant, a promise, that the parties will act in good faith and deal fairly with each other. This implied covenant of good faith and fair dealing is automatically in every contract, even if there are no words that expressly mention it.

The implied covenant of good faith and fair dealing means that a party cannot do anything that will destroy or injure the right of the other party to receive the benefits of the contract. It does not create rights or obligations beyond what the contract itself provides and it does not extend to matters outside of the scope of the contract. The implied covenant does, however, require that the parties deal honestly and in good faith when they perform the terms of their

contract. A party does not have to show that the other party acted in bad faith but rather, must show that the other party lacked good faith when (he / she / they / it) performed (his / her / their / its) obligations under the contract. This showing can be inferred from the totality of the circumstances.

> *Clinical Tech., Inc. v Covidien Sales, LLC*, 192 F. Supp. 3rd 223, 237 (D. Mass. 2016); A.*L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transportation Authority*, 479 Mass. 419, 434-35 (2018); *Robert and Ardis James Foundation v. Meyers*, 474 Mass. 181, 189 (2016); *T.W. Nickerson, Inc. v. Fleet Nat'l Bank*, 456 Mass. 562, 570 (2010); *Eigerman v. Putnam Investments, Inc.*, 450 Mass. 281, 289 (2007) (the implied covenant does not relate to matters occurring before the contract was made: "In sum, the implied covenant of good faith and fair dealing cannot create rights and duties that are not already in the contractual relationship. The covenant concerns the manner in which existing contractual duties are performed."); *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 385 (2004); *Anthony's Pier Four, Inc. v HBC Assocs*, 411 Mass. 451, 471-477 (1991), citing *Drucher v. Roland Wm. Jutras Assocs*, 370 Mass. 383, 385 (1976); *Warner Inc. Co. v. Comm'r of Ins.*, 406 Mass. 354, 362 n.9 (1990); *Fortune v. National Cash Register, Co.*, 373 Mass. 96, 105 (1977).

II. MODIFICATION

The terms of a contract can be changed when all the parties agree to modify it. One party alone cannot modify it. A modification can add terms, delete terms, or change terms of a contract. A modification can be established through words, spoken or written, or through action or by a combination of words and actions.

A party claiming there was a modification to a contract must prove the same elements that created the contract in the first place. This means the party must prove a mutual agreement to the modified terms and conditions.

If a sale of goods is not alleged. **Another term of contract formation that must be shown is consideration, that is, that the parties each exchanged something of value or promised to exchange something of value.**

If a sale of goods is alleged. **As you already know, in order to prove the existence of a contract, three elements must be proven. First, that an offer was made; second, that the offer was accepted; and third, that the parties each gave up something of value, that is, there was consideration. This case, however, involves the sale of goods. Consideration is not required for an agreement modifying a contract for the sale of goods to be binding**.

Supplemental instruction for when the contract includes a requirement that modifications be in writing:

This contract includes a term that all modifications must be in writing and signed by the parties. This does not necessarily bar a modification of the contract by words or conduct. Mutual agreement to modify the requirement of a writing may be inferred from the words and actions of the parties and from the circumstances of the case. This evidence of a modification, however, must be strong

enough to overcome the assumption that the contract, which requires written agreement to a modification, is the ultimate intent of the parties.

Findlen v. Winchendon Housing Authority, 28 Mass. App. Ct. 977, 978 (1990) ("Parties to a written contract may, of course, alter it subsequently, by oral modification, by their joint conduct, or, ideally, by a writing subscribed to by the persons to be bound…[w]ords and actions of parties, such as statements in letters, may effect a waiver or modification of a provision in a contract.") (citations omitted).

Modification by verbal agreement: *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 439 (1992) ("It is a settled principle of law that the mode of performance required by a written contract may be varied by a subsequent oral agreement upon a valid consideration"; "a provision in a contract that it cannot be modified verbally does not bar a verbal modification of the contract"); *Sea Breeze Estates, LLC v. Jarema*, 94 Mass. App. Ct. 210, 216-17 (2018) ("an agreement to modify a contract may be express, or may be inferred from the attendant circumstances and conduct of the parties…notwithstanding, a party asserting that an oral modification occurred must present evidence that the parties reached an agreement as to its terms.")

But see G.L. c. 106 § 2-316A(2); *Jacobs v. Yamaha Motor Corp., U.S.A.,* 420 Mass. 323 (1995) (implied warranties of merchantability and fitness for a particular purpose cannot be modified in consumer contracts).

For allegation of a sale of goods: Uniform Commercial Code, § 2-209 (G.L. c. 106, § 2-209).

III. PAROL EVIDENCE

Practice Note: Whether the terms of a contract are ambiguous is a question of law for the judge to decide. The court should decide whether the terms of the contract are ambiguous and determine which of the following instructions to give. If the terms of the contract are completely unambiguous, give instruction A. If the contract contains an ambiguous provision, give instruction B.

Parol evidence is admitted only if a contract is ambiguous and not fully integrated. A fully integrated agreement is a "'statement which the parties have adopted as a complete and exclusive expression of their agreement.'" *Chambers v. Gold Medal Bakery, Inc.*, 83 Mass. App. Ct. 234, 242 (2013) (citations and quotations omitted). "Whether an agreement in integrated 'is an issue of fact for the decision of the trial judge, entirely preliminary to any application of the parol evidence rule.'" *Green v. Harvard Vanguard Medical Assoc., Inc.,* 79 Mass. App. Ct. 1, 10 (2011) (citation omitted).

A. UNAMBIGUOUS TERMS

Whether contract terms are ambiguous is a question of law for a judge to decide. I have determined that the terms of this contract are unambiguous, meaning they are clear and complete. When the terms of a contract are unambiguous, you cannot consider any other evidence when interpreting the meaning of the contract, including any other alleged conversations or negotiations between the parties. When interpreting the terms of this contract, you must interpret and enforce them according to the plain meaning of the words.

> *NTV Management, Inc. v. Lightship Global Ventures, LLC*, 484 Mass. 235, 241 (2020) ("absent ambiguous provisions, we look solely to the language of the contract and do not consider extrinsic evidence… moreover, we construe a contract as a whole, so as to give reasonable effect to each of its provisions.") (citations and quotations omitted); *DeWolfe v. Hingham Centre, Ltd.*, 464 Mass. 795, 804 (2013) ("Where there is no ambiguity… construe the words of a contract in their usual and ordinary sense. Wherever practicable… interpret a contract so that every word is given effect.") (citations and quotations omitted); *Massachusetts Mun. Wholesale Elec. Co. v. Danvers*, 411 Mass. 39, 48 (1991); *Chase Comm. Corp. v. Owen*, 32 Mass. App. Ct. 248, 253 (1992).

B. AMBIGUOUS TERMS

Sometimes the terms of a contract are ambiguous, meaning they are not clear and complete. Terms are ambiguous when they are open to more than one meaning and reasonably intelligent people could differ as to which meaning is the proper one. Whether contract terms are ambiguous is a question of law for a judge to decide. In this case, I have determined that a contract term is ambiguous.

[Explain the ambiguity to the jury]. **Determining the meaning of this ambiguous term, however, is a question of fact for you the jury to decide.**

In deciding this question of fact, remember that a written contract is to be interpreted as a whole, in a reasonable and practical way, consistent with the contract's language, background and purpose. All parts of the contract should be interpreted together, and every word should be given effect so far as practicable. When interpreting the terms of this contract, you must interpret and enforce them according to the plain meaning of the words.

You may consider the contract words used, the agreement as a whole, other documents relating to the transaction, and what the parties said and did during their negotiations in order to determine what the terms were intended to mean.

In addition, when the terms are ambiguous, and the parties have different reasonable interpretations, then those terms are interpreted against the party who drafted them. This is because the party who wrote the language in the contract had the opportunity to be clear and therefore bears the risk of any unclear language that (he / she / they / it) chose.

However, if interpreting ambiguous language against the party who drafted it leads to an unreasonable or impractical conclusion, then you are to interpret the contract to reflect the true intentions of the parties as you determine them to be, based on my instructions.

What to consider: *Fairfield Clarendon Trust v. Dwek*, 970 F.2d 990, 993-994 (1st Cir. 1992).; *Massachusetts Mun. Wholesale Elec. Co. v. Danvers*, 411 Mass. 39, 45-46 (1991).

Interpret against the drafter: *DeWolfe v. Hingham Centre, Ltd.*, 464 Mass. 795, 804 (2013); *Canam Steel Corp. v. Bowdoin Constr. Corp.*, 34 Mass. App. Ct. 943, 944 (1993); *Wood v. Roy Lapidus, Inc.*, 10 Mass. App. Ct. 761, 764 (1980).

Parole Evidence: The parole evidence rule is a rule of substantive law that bars evidence of prior or contemporaneous agreements where the terms of the contract are final and complete. *Kobayshi v. Orion Ventures, Inc.*, 42 Mass. App. Ct. 492, 496 (1997). For parole evidence in U.C.C. cases, see G.L. c. 106 § 2-202.

IV. EXPRESS WARRANTIES IN THE SALE OF GOODS
(Uniform Commercial Code)

The plaintiff is claiming that the defendant violated an express warranty or guarantee that *[describe the alleged promise or affirmation and the alleged breach]*. **To prove the existence of an express warranty, the plaintiff must prove three things:**

First: **that the defendant, by written or spoken words, made a clear and definite promise or statement of fact;**

Second: **that the defendant's promise or statement of fact concerned an essential quality of the product; and**

Third: **that the promise or statement of fact was part of the basis of the bargain between the plaintiff and the defendant.**

Any description of the product, or any sample or model of the product that is made part of the basis of the plaintiff's bargain with the defendant creates an express warranty that the product will conform to the description, the sample, or the model. An express warranty can be made by written or spoken words.

A party to a contract does not have to actually use the words "guarantee," "warranty," or "promise" to create an express warranty. However, express warranties are not made by mere statements of opinion or recommendations. For example, statements such as "this product is wonderful" and "you will like this product" are merely "sales talk" or "puffery" and do not create an express warranty.

If you find the defendant made an express warranty, then you must consider whether the product has the essential qualities that the defendant expressly promised or represented. If not, then the defendant has breached an express warranty.

This instruction is designed for claims based on G.L. c. 106 §§ 2-313 through 3-318, Sales.

G.L. c. 106, § 2-313, comment 3 ("No specific intention to make a warranty is necessary if any of these [promises or affirmations are] made part of the basis of the bargain. In actual practice, affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear

affirmative proof. The issue normally is one of fact."); *Alcan Aluminum Corp. v. Carlton Aluminum of New England, Inc.*, 35 Mass. App. Ct. 161, 167-68 (1993).

For sales language:

G.L. c. 106 § 2-313(1)(b), (c) and (2). *O'Connell v. Kennedy*, 328 Mass. 90, 94 (1951). In general, the presumption is that any sample or model shown by the seller to the buyer is intended to become the basis of the bargain. Affirmative proof is required to show otherwise, and the issue is normally one of fact. G.L. c. 106, § 2-313, comment 6; *Regina Grape Products Co. v. Supreme Wine Co.,* 357 Mass. 631, 635 (1970) (defendant breached express warranty after failing to deliver wine that had the same quality as the samples provided to plaintiff and which were relied upon by plaintiff in entering purchase agreement.)

See *Hannon v. Original Gunite Aquateck Pools, Inc.*, 385 Mass. 813, 823 (1982) for examples of "puffery" that do not become bases of the bargain: statements that product is wonderful, that merchandise is "very good, very popular, you will like it, we sell a great deal of it and people don't find fault with it, they seem satisfied with it.") See also *Axion v. G.D.C. Leasing Corp.*, 359 Mass. 474, 481 (1971) (prediction of good performance is not a promise). But see *Aluminum Corp. v. Carlton Aluminum of New England, Inc.,* 35 Mass. App. Ct. 161, 167-68 (1993) (statement that seller would back up statement one hundred percent is express warranty, not puffery).

V. IMPLIED WARRANTIES IN THE SALE OF GOODS
(Uniform Commercial Code)

A. CLAIM OF BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
G.L. c. 106, § 2-214

The plaintiff claims that the defendant violated an implied warranty of merchantability. The term "implied warranty of merchantability" has a precise meaning. It refers to a promise that is automatically made by the seller when a product is sold, that the product is "merchantable." A merchantable product has the following three characteristics, even if the buyer and seller did not specifically discuss them:

First: **that the product is of at least average quality;**

Second: **that the product is fit to be used for any purpose that the seller intends such products to be used for, as well as for any other ordinary or reasonably foreseeable uses of the product; and**

Third: **that the product conforms to any statement of fact or promise made on its label, or its container, or in any written or spoken communication made by the seller.**

To put this another way, the seller automatically promises that the product is reasonably safe and fit for the purposes (he / she / they / it) intends or for purposes that (he / she / they / it) could reasonably foresee.

The implied warranty of merchantability does not guarantee the product is the best quality, or even a very high quality. Rather, the seller violates the implied warranty of merchantability if at the time of the sale, the product did not meet the seller's implied promises that it was reasonably safe and fit for the purposes the seller intended or for purposes that the seller could reasonably foresee.

G.L. c. 106 § 2-314 governs the implied warranty of merchantability and states that unless excluded or modified (see G.L. c. 106 § 2-316), "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind". Merchantable goods are specifically defined in G.L. c. 106 § 2-314(2)(a)-(f). Other implied warranties of merchantability may arise from the "course of dealing or usage of trade." G.L. c. 106 § 2-314(3). See also G.L. c. 106, § 2-104(1) for the definition of merchant and *Ferragamo v. Massachusetts Bay Transp. Auth.*, 395 Mass. 581, 586 (1985) (a "merchant" is defined by the circumstances of each case; the MBTA is a merchant when it sells disabled subway cars for scrap.)

Where the claim of breach of implied warranty of merchantability relates to injuries sustained by a substance in food consumed by a plaintiff the "reasonable expectations test" is used. *Phillips v. Town of West Springfield*, 405 Mass. 411, 412-13 (1989) ("The reasonable expectations test…considers whether the consumer reasonably should have expected to find the injury-causing substance in the food.")

A warranty of merchantability requires a sale, lease, or a contract for future sale of goods. *Mason v. General Motors Corp.*, 397 Mass. 183, 189 (1986) (no warranty of merchantability found where decedent took motor vehicle for a permitted test drive resulting in fatal accident where there was no contract to purchase vehicle); *Marques v. Bellofram Corp.*, 28 Mass. App. Ct. 277, 281 (1990) (A bailment or loan is not a sale, and the implied warranty of merchantability does not apply.)

In order for a customer to prevail in an action for breach of implied warranty of merchantability, he or she must demonstrate that the commodity was not reasonably suitable for the ordinary uses for which good of that kind are sold. *Walsh v. Atamian Motors, Inc.*, 10 Mass. App. Ct. 828, 829 (1980). Fitness for use by a normal person is the often stated test. *Casagrande v. F.W. Woolworth Co., Inc.*, 340 Mass. 552, 555 (1960) (allergic reaction to deodorant that would not affect more than one in 2,000 people does not breach implied warranty).

The implied warranties of merchantability may arise under the sale of used as well as new products. *Fernandes v. Union Bookbinding Co.*, 400 Mass. 27, 34 (1987); *Ferragamo v. Massachusetts Bay Transp. Auth.*, 395 Mass. 581, 585 (1984). The buyer must prove that the defect existed at the time of the sale. *Hayes v. Ariens Co.,* 391 Mass. 407, 412-13 (1984); *Collins v. Sears, Roebuck & Co.,* 31 Mass. App. Ct. 961, review denied, 411 Mass. 1106 (1992).

A breach of the implied warranty of merchantability in Massachusetts is comparable to the strict liability standard of other states and "'congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)).'" *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 746 (2006) (citations omitted); *Commonwealth v. Johnson Insulation*, 425 Mass. 650, 653 (1997) ("Although the notion of warranty is grounded in contract, we have recognized that breach of this implied warranty provides a cause of action in tort where the harm is a physical injury to person or property rather than an 'economic' loss of value in the product itself (for which contractual remedies must still be pursued).").

A breach of implied warranty of merchantability can be brought for a products liability claim – which can also be the grounds of negligence claim, although they are separate claims - and a defendant can be found not liable of negligence while liable for breach of the implied warranty of merchantability. *Hayes v. Ariens*, 391 Mass. 407, 412 (1984), abrogated in part on other grounds *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 22-23 (1998) ("A defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true. A defendant cannot be found to have been negligent without having breached the warranty of merchantability.")

B. CLAIM OF BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY – DUTY TO WARN

G.L. c. 106 § 2-214

The seller of a product is presumed to have been informed of all risks associated with the foreseeable use of the product. A seller or manufacturer has a duty to warn or provide instructions about risks that are reasonably foreseeable at the time the product is sold or could have been discovered by reasonable testing prior to marketing the product. In order for a product to be fit for ordinary use, the seller must address the dangers associated with the product's use by providing adequate warnings of danger or adequate instructions for proper use. However, where the danger associated with the product is obvious, there is no duty to warn.

With regard to a seller's or manufacturers' duty to warn of risks or provide adequate instructions, "a defendant will not be held liable under an implied warranty of merchantability for failure to warn or provide instructions about risks that were not reasonably foreseeable at the time of sale or could not have been discovered by way of reasonable testing prior to marketing the product." *Vassallo v. Baxter Healthcare Corp*., 428 Mass. 1, 22-23 (1998), abrogating *Hayes v. Ariens*, 391 Mass. 407, 412 (1984); *Bavuso v. Caterpillar Indus. Inc.*, 408 Mass. 694, 699 (1990). Moreover, a "manufacturer will be held to the standard of knowledge of an expert in the appropriate field, and will remain subject to a continuing duty to warn (at least purchasers) of risks discovered following the sale of the product at issue." *Vassallo*, 428 Mass. at 23.

C. CLAIM OF BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

G.L. c. 106 § 2-215

The plaintiff claims that the defendant violated an implied warranty that the product was fit for a particular purpose. This implied warranty is automatically established in a contract when:

First: **the seller had reason to know that the buyer was looking for an item for a particular purpose;**

Second**: the seller had reason to know that the buyer was relying on the seller's skill or judgment in selecting an item suitable to that purpose; and**

Third**: the buyer actually relied on the defendant's selection or recommendation of an item for that purpose.**

If those conditions are met, the contract or sale also included an implied warranty that the item is fit for that particular purpose.

As an example, shoes are generally used for walking on ordinary ground. As part of every sale of shoes by a merchant, there is a warranty that the shoes are fit for walking on ordinary ground. That is the warranty of fitness for ordinary purposes. However, if the seller knows that a particular pair of shoes is being selected to be used for climbing mountains, and that the buyer is relying on the seller's

expertise in selecting or recommending a pair of shoes for that purpose, then there is also a warranty that the shoes are fit for the particular purpose of mountain climbing.

In this case, the plaintiff claims that the [product] was fit for the particular purpose of *[insert the purpose].* **By law, the sale included a warranty by the defendant that the item was fit for that particular purpose if the defendant knew or had reason to know that the plaintiff wanted the item for this purpose, that the defendant knew that the plaintiff was relying on the (his / her / their / its) skill to guide the selection, and that the plaintiff actually relied on the defendant's selection or recommendation of the item for a particular use.**

G. L. c.106 § 2-315 governs the implied warranty that the goods are fit for the purpose for which they were sold and states, "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under [G.L. c. 106 § 2-316] an implied warranty that the goods shall be fit for such purpose."

Haglund v. Philip Morris, Inc., 446 Mass. 741, 746-47 (2006) ("'A seller breaches its warranty obligation when a product that is "defective and unreasonably dangerous,' …for the '[o]rdinary purposes' for which it is 'fit' causes injury. 'Ordinary purposes' refers to a product's intended and foreseeable uses… 'Fitness' is a question of degree that primarily, although not exclusively, concerns reasonable consumer expectations… Both "ordinary purposes" and "fitness" are concepts that demand close attention to the actual environment in which the product is used. The plaintiff in a design liability warranty case must prove that, at the time he was injured, he was "using the product in a manner that the defendant seller, manufacturer, or distributor reasonably could have foreseen.") (citations omitted).

If the buyer does not rely on the seller's skill and judgment in selecting the goods, and specifies in detail to the seller the type of goods sought, then the seller has not made a warranty of fitness for a particular purpose. *Commonwealth v. Johnson Insulation*, 425 Mass. 650, 655-656 (1997).

This warranty applies to new or used goods. *Fernandes v. Union Bookbinding Co.*, 400 Mass. 27, 34 (1987). The sale of shoes example comes from G.L. c. 106, § 2-315, comment 2.

The buyer need not inform the seller of the particular purpose for which the goods are intended or her or her reliance on the seller's skill and judgment if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. G.L. c. 106 § 2-315, comment 1; *Fernandes v. Union Bookbinding Co.*, 400 Mass. 27, 34 (1987).

VI. WARRANTY DISCLAIMERS AND MODIFICATIONS FOR IMPLIED WARRANTIES

G.L. c. 106, §§ 2-316 and 2-316A

The defendant contends that (he / she / they / it) effectively (disclaimed) (modified) the implied warranty of (merchantability) (fitness for a particular purpose) and thus made (no such implied warranty) (only a limited warranty) at the time the goods were sold. The law permits a seller of goods to (disclaim) (modify) implied warranties under certain circumstances. By this, I mean that a seller can (avoid making) (limit) implied warranties by making specific spoken or written statements. The seller has the burden of proof by a preponderance of the evidence that the implied warranty was (disclaimed) (modified).

Consumer Goods - Implied Warranty G.L. c. 106 §2-316A(2)

However, any language, either spoken or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular

purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. When I use the term "Consumer Goods" I mean goods and services that are used and bought primarily for personal, family or household purposes.

Consumer Goods - Express Manufacturer's Warranty
G.L. c. 106 §2-316A(3)

However, any language, either spoken or written, used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for the manufacturer's breach of express warranties, is unenforceable, unless you find that the manufacturer maintains facilities within Massachusetts that could reasonably and promptly perform the warranty obligations. When I use the term "Consumer Goods" I mean goods and services that are used and bought primarily for personal, family or household purposes.

Personal Injury - G.L. c. 106 §2-316A(3)

However, any language, either spoken or written, used by a seller or manufacturer of goods and services,

which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify remedies for breach of those warranties concerning a claim of personal injury, is unenforceable.

G.L. c. 106 § 2-316 governs exclusions or modifications to express and implied warranties. G.L. c. 106 § 2-316A(2) governs where any modification or limitation of a warranty concerning consumer goods is unenforceable; G.L. c. 106 § 2-316A(4), where any exclusion or modification of the implied warranties of merchantability or fitness for a particular purpose are unenforceable with respect to personal injury claims. Language used by a manufacturer of consumer goods that modifies or limits a consumer's remedies for breach of express warranty is unenforceable unless the manufacturer maintains facilities within Massachusetts sufficient to provide reasonable and expeditious performance of the warranty obligations. G.L. c. 106 § 2-316A(3).

For disclaimer of Express Warranties, see G.L. c. 106 § 2-316(1): "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable."

A. DISCLAIMER OR MODIFICATION OF IMPLIED WARRANTY OF MERCHANTABILITY

G.L. c. 106, § 2-316(2)

If the (disclaimer) (limitation) is in writing, it must also be conspicuous. Whether a term like this is sufficiently conspicuous is a decision a judge must make. I have determined that the (disclaimer) (limitation) [*was / was not*] conspicuous. Therefore, the (disclaimer) (limitation) [*is / is not*] legally enforceable.

If the seller seeks to (disclaim) (limit) the warranty of merchantability the seller must use the word "merchantability" as part

of the (disclaimer) (limitation). For example, the seller must say something like, "I disclaim the warranty of merchantability."

Written disclaimers of merchantability must mention merchantability. G.L. c. 106 §§ 2-316(2). If the disclaimer is in writing, it must also be conspicuous. *Id.* See G.L. c. 106 § 1-201(b)(10) for a definition and examples of "conspicuous". Whether or not a term or clause is conspicuous is a decision for the court. *Hunt v. Perkins Machinery Co.*, 352 Mass. 535, 539 (1967). See G.L. c. 106 § 1-201(b)(10):

> "Conspicuous", with reference to a term, means so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:
> (A) a heading in capitals equal to or greater in size than the surrounding text or in contrasting type, font or color to the surrounding text of the same or lesser size; and
> (B) language in the body of a record or display in larger type than the surrounding text or in contrasting type, font or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

B. DISCLAIMER OR MODIFICATION OF IMPLIED WARRANTY OF FITNESS OF PURPOSE

G.L. c. 106 § 2-316(2)

If the seller seeks to (disclaim) (limit) the warranty of fitness of purpose, the (disclaimer) (limitation) must be in writing and conspicuous.

Whether a term like this is sufficiently conspicuous is a decision a judge must make. I have determined that the (disclaimer) (limitation) [*was / was not***] conspicuous. Therefore, the (disclaimer) (limitation) [***is / is not***] legally enforceable.**

The language would be sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

C. ADDITIONAL WAYS TO DISCLAIM OR MODIFY IMPLIED WARRANTIES FOR CASES THAT DO NOT INVOLVE CONSUMER GOODS

G.L. c. 106 § 2-316(3)

All implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes it plain that there is no implied warranty, unless the circumstances indicate otherwise.

In addition, when the buyer before entering into the contract has examined the goods or the sample or model as fully as (he / she / they / it) desired or has refused to examine the goods, then there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to (him / her / them / it).

Finally, an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

Hunt v. Perkins Machinery Co., 352 Mass. 535, 540 (1967) (it is a question of law for the court as to whether a disclaimer is "conspicuous"); see G.L. c. 106 § 1-201(b)(10) for a definition and examples of "conspicuous". See also *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 739-40 (2000) (holding that disclaimer that was in capital letters on the face of the standard warranty was sufficiently conspicuous and that the disclaimer applied to subsequent purchasers).

Fernandes v. Union Bookbinding Co., Inc., 200 Mass. 27, 38 (1987) (inspection of printing press before purchase did not prevent recovery for injuries sustained from crushed hands where the inspection would not have revealed the defects that caused the injury.)

G.L. c. 106 § 2-316(1). Implied warranties other than those of fitness and merchantability may arise as a result of usage of trade or course of dealings, G.L. c. 106 § 2-314(3), and all warranties, including those of merchantability and fitness, may be modified or excluded in the same way. G.L. c. 106 § 2-316(3)(c).

Written disclaimers of merchantability must mention merchantability. If the disclaimer is in writing, it must be conspicuous; that is, it must be written in such a way that a reasonable person against whom it is to operate would notice it. G.L. c. 106 §§ 2-316(2), 1-201(10). Whether or not a term or clause is conspicuous is a decision for the court. *Id.*

NOTE: See G.L. c. 106 § 2-316(5): The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs. Such blood, blood plasma or tissue or organs are considered medical services, not commodities.