DEFENSES [1, 2]

A defendant may argue that (his / her / their / its) refusal or failure to perform was not a breach of contract because there was a legally justified reason not to perform. Such legal reasons are called "defenses." If the defendant claims a defense, then the defendant has the burden of proving it to you by a preponderance of the evidence.

"'[N]on-performance of a contract, if justified, is not a breach.'" *Realty Developing Co., Inc. v. Wakefield Ready-Mixed Concrete Co., Inc.,* 327 Mass. 535, 537 (1951), quoting Restatement, Contracts § 312, comment a.

I. MISPRESENTATION / FRAUD

The defendant claims that the contract is unenforceable because the plaintiff made [a fraudulent misrepresentation] [negligent misrepresentation] [misrepresentation] during their dealings.

Shaw's Supermarkets, Inc. v. Delgiacco, 410 Mass. 840, 842 (1991); *Barrett Assocs., Inc. v. Aronson*, 346 Mass. 150, 152 (1963); *Cherry v. Crispin*, 346 Mass. 89, 92 (1963); *Fogarty v. Van Loan*, 344 Mass. 530, 532 (1962); *Nat'l Shawmut Bank v. Johnson*, 317 Mass. 485, 488 (1945); *Metropolitan Life Ins. Co. v. Burno*, 309 Mass. 7, 8-9 (1941); *Cassano v. Gogos,* 20 Mass. App. Ct. 348, 353 (1985); *Nat'l Car Rental Sys., Inc. v. Mills Transfer Co.,* 7 Mass. App. Ct. 850, 852 (1969); Restatement (Second) of Contracts §§ 159, 162(1) (1981).

[1]For defenses relating to UCC Warranties, see the instruction for Terms of a Contract, VI. Warranty Disclaimers and Modifications (G.L. c. 106 § 2-316)

[2] In the 2024 edits to this instruction, the Civil Committee replaced the word "voidable" with "unenforceable" because "voidable" is a confusing term to a layperson. When the plaintiff is attempting to enforce a contract, the terms "unenforceable" and "voidable" are meant to be interchangeable in the context of explaining these defenses raised by the defendant.

A. FRAUDULENT MISREPRESENTATION

A defendant who claims that a contract is unenforceable because the plaintiff made a fraudulent misrepresentation must prove by a preponderance of the evidence that,

First: **The plaintiff falsely represented a material fact to the defendant intending that the defendant rely on it;**

Second: **The plaintiff knew that the material fact was false;**

Third: **The defendant relied on the representation and acted upon it to the defendant's detriment; and**

Fourth: **The defendant's reliance was reasonable under the circumstances.**

A misrepresentation is material to the transaction if it was one of the main reasons, but not necessarily the only reason, that caused the defendant to enter into the contract. It must be a statement of fact, not an opinion, belief, or judgment.

The plaintiff's declarations and conduct do not need to be direct to meet this standard – it is enough if the declarations and conduct were calculated to mislead and in fact did mislead the defendant who was acting reasonably.

H1 Lincoln, Inc. v. S. Washington St., LLC, 489 Mass. 1, 18 (2022); *468 Consulting Group, LLC v. Agritech, Inc.*, 99 Mass. App. Ct. 758, 765 (2021), review denied, 488 Mass. 1105 (2021); *Masingill v. EMC Corp.*, 449 Mass. 532, 540 (2007).

B. NEGLIGENT MISREPRESENTATION

A defendant who claims that a contract is unenforceable because the plaintiff made a negligent misrepresentation must prove by a preponderance of the evidence that,

First: **the plaintiff failed to exercise reasonable care or competence in obtaining or communicating information and supplied false information to the defendant in the transaction;**

Second: **the false information was material to the transaction;**

Third: **the defendant relied on the information and acted upon it to the defendant's detriment; and**

Fourth: **The defendant's reliance was reasonable under the circumstances.**

A misrepresentation is material to the transaction if it was one of the main reasons, but not necessarily the only reason, that caused the defendant to enter into the contract. It must be a statement of fact, not an opinion, belief or judgment.

Gossels v. Fleet Nat'l. Bank, 453 Mass. 366, 371-72 (2009); *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 59-60, n. 25 (2004); *Golber v. Baybank Valley Trust Co.*, 46 Mass. App. Ct. 256, 257 (1999).

C. INNOCENT MISREPRESENTATION

A defendant who claims that a contract is unenforceable because the plaintiff made a misrepresentation must prove by a preponderance of the evidence that,

First: **the plaintiff communicated and supplied false information to the defendant as the plaintiff's own knowledge;**

Second: **the false information was material to the transaction and susceptible of knowledge;**

Third: **the defendant relied on the information and acted upon it to the defendant's detriment; and**

Fourth: **the defendant's reliance was reasonable under the circumstances.**

A misrepresentation is material to the transaction if it was one of the main reasons, but not necessarily the only reason, that caused the defendant to enter into the contract. It must be a statement of fact, not an opinion, belief or judgment.

Yorke v. Taylor, 332 Mass. 368, 371 (1955); *Zimmerman v. Kent*, 31 Mass. App. Ct. 72, 77 (1991).

II. CONDITIONS PRECEDENT

The defendant claims that (he / she / they / it) is not liable because (his / her / their / its) obligation to perform under the contract was conditioned upon the occurrence of a particular event and that event did not occur. If such a condition was not fulfilled, then the contract may not be enforced.

The event or condition may be within the control of either party, or both parties, or it may be beyond their control. Performance may be subject to the occurrence of several events or conditions. In determining whether the contract contained the requirement of an event or a condition, you should determine the intention of the parties from the terms of the contract language.

> *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 420-21 (2005); *Massachusetts Mun. Wholesale Elec. Co. v. Danvers*, 411 Mass. 39, 45 (1991); *Tilo Roofing Co., Inc. v. Pellerin*, 331 Mass. 743, 746 (1954); *Malden Knitting Mills v. Unites States Rubber Co.*, 301 Mass. 229, 233 (1938); *Superior Mechanical Plumbing & Heating, Inc. v. Ins. Co. of West*, 81 Mass App. Ct. 584, 589 (2012); *Hanover Ins. Co. v. Cape Cod Custom Home Theater, Inc.*, 72 Mass. App. Ct. 331 335-36 (2008) (an insurer's reasonable request for an insured to undergo an examination under oath is a condition precedent to the insurer's liability under the insurance policy); *Wood v. Roy Lapidus, Inc.*, 10 Mass. App. Ct. 761, 764 n. 5 (1980).

III. MISTAKE

A. MUTUAL MISTAKE

The defendant claims that the contract is unenforceable because there has been a mutual mistake or misunderstanding about an

essential element of the contract. As I instructed earlier, to form a contract, the parties must have had a "meeting of the minds" when they entered into it; that is, they must have mutually agreed to the terms and conditions of their promises and had those same terms and conditions in mind when they entered into the contract.

If there has been a mistake between the parties relating to the subject matter of the contract, then there has been no "meeting of the minds," and the contract is unenforceable. The defendant must prove by clear and convincing evidence that the mistake,

First: **was shared by both parties;**

Second: **was related to an essential element of the agreement;**

Third: **involved a fact capable of being learned at the time the contract was entered into; and**

Fourth: **did not involve a mere expectation or opinion about future events.**

"Clear and convincing evidence" is a different burden of proof than the "preponderance of the evidence" standard that I talked about at the beginning of these instructions. "Clear and convincing evidence" means that the evidence must persuade you that the defendant's claim of mistake is highly likely to be true. Proof of the

mistake must be full, clear, and decisive. Proving a claim by clear and convincing evidence is a higher burden than the "preponderance of the evidence" standard, which is met when the evidence shows a party's claim to be more probably true than not true. The defendant does not have to convince you that (his / her / their / its) claim is certainly true, or even that it is almost certainly true, or that it is true beyond a reasonable doubt. But, the defendant must do more than show that (his / her / their / its) facts are probably true. Clear and convincing evidence exists only if you believe with a high degree of probability that the claimed facts are true.

LaFleur v. S.S. Pierce Co., 398 Mass. 254, 257-58 (1986); *Gloucester Landing Assoc. Ltd. Partnership v. Gloucester Redev. Auth.*, 60 Mass. App. Ct. 403, 414 (2004); *Maloney v. Sargisson*, 18 Mass. App. Ct. 341, 345 (1984); *Covich v. Chambers*, 8 Mass. App. Ct. 740, 749-50 (1979) ("While it is clear that a party seeking rescission need not show even an innocent misrepresentation of some material assumption which forms the basis of his bargain in order to make out a case of mutual mistake of fact…it is also elementary that both parties must share the erroneous state of mind as to the basic assumption on which the contract was made."). See also *Shawmut-Canton, LLC v. Great Spring Waters of America*, Inc., 62 Mass. App. Ct. 330, 337 (2004) ("As stated in Restatement (Second) of Contracts, *supra* at § 152 comment c, a party cannot avoid a contract merely because the parties are mistaken as to an assumption, even though significant, on which the contract was made. 'Relief is only appropriate in situations where a mistake of both parties has such a material effect on the agreed exchange of performances as to upset the very basis for the contract.'")

Burden of Proof: *Coolidge v. Loring*, 235 Mass. 220, 224 (1920) ("It is settled that an instrument will not be reformed on the ground of mistake, except upon full, clear and decisive proof of the mistake.") (quotations and citations omitted); *Ward v. Ward*, 70 Mass. App. Ct. 366, 368 (2007).

B. UNILATERAL MISTAKE

The defendant claims that the contract is unenforceable because of a unilateral mistake. Generally, where only one party has made a mistake as to the subject matter of the contract and has been adversely affected by it, the contract still remains valid and can be enforced. However, a defendant may cancel a contract on the basis of (his / her / their / its) unilateral mistake if you find by clear and convincing evidence the defendant did not assume the risk of the mistake and,

First: **the plaintiff had reason to know of the mistake, or**

Second: **the plaintiff's fault caused the mistake, or**

Third: **the effect of the mistake is such that enforcement of the contract would be unconscionable.**

In this instance, enforcement of the contract would be unreasonable and unfair if enforcing it would, in good conscience, result in too hard of a bargain.

Proof by "clear and convincing evidence" is a different burden of proof than the "preponderance of the evidence" standard that I talked at the beginning of these instructions. "Clear and convincing evidence" means that the evidence must persuade you that the

defendant's claim of mistake is highly likely to be true. Proof of the mistake must be full, clear, and decisive. Proving a claim by clear and convincing evidence is a higher burden than the "preponderance of the evidence" standard, which is met when the evidence shows a party's claim to be more probably true than not true. The defendant does not have to convince you that (his / her / their / its) claim is certainly true, or even that it is almost certainly true, or that it is true beyond a reasonable doubt. But the defendant must do more than show that (his / her / their / its) facts are probably true. Clear and convincing evidence exists only if you believe with a high degree of probability that the claimed facts are true.

It bears repeating that the defense of unilateral mistake is not available if the defendant assumed the risk of the mistake. A party bears the risk of a mistake when (he / she / they / it) knows that (he / she / they / it) has only limited knowledge of the facts at the time the contract is made and enters into the contract anyway.

LaFleur v. C.C. Pierce Co., Inc., 398 Mass. 254, 257-8 (1986); *First Safety Fund Nat'l Bank v. Friel*, 23 Mass. App. Ct. 583, 588 (1987); *Covich v. Chambers*, 8 Mass. App. Ct. 740, 749 n. 13 (1979) ("[A] contract was determined unenforceable because unconscionable when the sum total of its provisions drives too hard a bargain for a court of conscience to assist.") (quotations and citations omitted).

Burden of Proof: *Coolidge v. Loring*, 235 Mass.220 (1920) ("It is settled that an instrument will not be reformed on the ground of mistake, except upon full, clear and decisive proof' of the mistake."); *Ward v. Ward*, 70 Mass. App. Ct. 366, n.5 (2007).

IV. WAIVER

The defendant claims that the plaintiff "waived" (his / her / their / its) rights under the contract. The defense of "waiver" states that a plaintiff cannot sue for breach of contract where the plaintiff has waived the breach. A waiver happens when a party intentionally gives up a known contractual right. Waiver can be shown by an express or affirmative act or by an inference from conduct that communicates no other reasonable conclusion but that the plaintiff knew of the defendant's breach and intended to voluntarily relinquish a contractual right. The defendant must show this by a preponderance of the evidence.

> *Psychemedics Corp. v. City of Boston*, 486 Mass. 724, 745 (2021); *Dynamic Mach. Works, Inc. v. Machine & Elec. Consultants, Inc.*, 444 Mass 768, 771-72 (2005); *Cueroni v. Coburnville Garage*, 315 Mass. 135, 139 (1943); *Russo v. Charles I. Hosmer, Inc.*, 312 Mass. 231, 234 (1942) (holding that plaintiff did not waive breach where it did not know that a breach had occurred); *Wildland Trust of Southeastern Massachusetts, Inc. v. Cedar Hill Retreat Center, Inc.*, 98 Mass. App. Ct. 775, 785 n.12 (2020).

V. DURESS

The defendant claims that (he / she / they / it) is not liable to the plaintiff because (he / she / they / it) was forced to enter the contract under "duress". To avoid the enforcement of a contract on the theory of duress, the defendant must prove, by a preponderance of the evidence,

First: **that (he / she / they / it) did not voluntarily accept the plaintiff's terms;**

Second: **that the circumstances permitted no other alternative; and**

Third: **that those circumstances were created by the plaintiff's unfair and coercive acts.**

The defendant must prove more than that (he / she / they / it) was reluctant to enter into the contract, that there was unequal bargaining power between the parties, or that the plaintiff drove a hard bargain or took advantage of the defendant's financial difficulty. The plaintiff must have committed a wrongful act or threat that created the circumstances that stopped the defendant from exercising (his / her / their / its) free will and caused the defendant to act against (his / her / their / its) own values.

If economic distress is alleged. **The defendant must prove that his financial difficulty was contributed to or caused by the plaintiff, and that the duress resulted from the plaintiff's wrongful and oppressive conduct and not by the defendant's own needs.**

Definition of duress: *Boston Med. Ctr. Corp. v. Secretary of Executive Office of Health and Human Serv.*, 463 Mass. 447, 468 (2012); *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 637-38 (2007), quoting *Int'l Underwater Contr., Inc. v. New England Tel. & Tel. Co.*, 8 Mass. App. Ct. 340, 342 (1979); *Fleming v. Dane*, 298 Mass. 216, 218 (1937); *Okoli v. Okoli*, 81 Mass. App. Ct. 381, 388 (2012); *Delaney v. Chief of Police of Wareham*, 27 Mass. App. Ct. 398, 406, review denied, 405 Mass. 1204 (1989); 28 Williston on Contracts § 71,7 (4th ed.)

VI. MENTAL CAPACITY

The defendant claims that (he / she / they / it) is not liable to the plaintiff because (he / she / they / it) was mentally ill or lacked proper mental capacity when (he / she / they / it) entered into the contract.

There are two alternative ways to prove mental incapacity. The first way is to prove, by a preponderance of the evidence, that because of mental illness or a mental condition when the contract was formed, the defendant did not understand the contract's meaning or effect; lacked the ability to understand the nature and quality of the transaction; or was unable to understand the significance and the consequences of the transaction.

Note that when you consider this issue you will evaluate the defendant's mental incapacity only at the time that the parties entered into the contract. The defendant does not have to prove that (his / her / their / its) mental incapacity lasted for a significant period of time or was permanent. Even if the plaintiff acted fairly and did not know about the defendant's inability to enter into the contract, the

defendant cannot be held liable for breach of contract if they have proven mental incapacity. However, it is not enough for the defendant to simply prove that (he / she / they / it) had some intellectual limitations at the time the contract was formed. If you find that they understood the nature, meaning, significance, and consequences of the transaction then the defendant has not proved mental incapacity.

Alternatively, if you find that the defendant understood the meaning, nature, significance, and consequences of the contract, the second way the defendant may establish the defense of a lack of mental capacity is by proving, by a preponderance of the evidence, that when the contract was formed, a mental illness or a mental condition made them unable to act reasonably. To prove this, the defendant must show that (he / she / they / it) had a mental illness or mental condition at the time the contract was formed; that this condition or illness made them unable to act in a reasonable manner with regard to the transaction; and that the plaintiff had reason to know of the defendant's mental illness or condition at the time.

In evaluating whether the defendant was unable to act in a reasonable manner because of an alleged mental illness or condition,

you should consider whether a reasonably competent person might have made this transaction. You should also consider whether an independent, competent attorney represented the defendant's interests in this matter when the contract was formed.

You may also consider any testimony you've heard about the defendant's physical appearance, condition, acts, or statements at the relevant time. Under Massachusetts law, a lay witness is not allowed to give an opinion as to mental condition and you may not rely on your own understanding of mental illness or mental condition. Medical evidence is necessary to establish that a person lacked the capacity to enter into a contract due to mental illness or a mental condition. In this case, medical [records/ reports/ testimony] has (have) been introduced concerning the defendant's mental capacity. You should evaluate this evidence according to the instruction I gave you on expert testimony.

Once again, if the defendant has proven by a preponderance of the evidence that when the contract was formed, (he / she / they / it) was unable to act in a reasonable manner because of mental illness or a mental condition, and that the plaintiff had reason to know of the

defendant's mental illness or condition at the time, the defendant cannot be held liable for breach of contract.

In *Sparrow v. Demonico*, 461 Mass. 322, 327-30 (2012), the Supreme Judicial Court acknowledged two alternative tests to determine mental capacity:

Cognitive Test – "Competence to enter into a contract presupposes something more than a transient surge of lucidity. It involves not merely comprehension of what is "going on," but an ability to comprehend the nature and quality of the transaction, together with an understanding of its significance and consequences." *Farnum v. Silvano*, 27 Mass. App. Ct. 536, 538 (1989), citing *Sutcliffe v. Heatley*, 232 Mass. 231, 232-33 (1919).

Volitional Test – "[T]he contract would still be voidable where, "by reason of mental illness or defect, [the person] is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition." *Krasner v. Berk*, 366 Mass. 464, 468 (1974). "This modern test—also described as an "affective" or "volitional" test—recognizes that competence can be lost, not only through cognitive disorders, but through affective disorders that encompass motivation or exercise of will…Under this modern, affective test, '[w]here a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.'" *Sparrow v. Demonico*, 461 Mass. 322, 327-28 (2012), quoting *Krasner*, 366 Mass. at 469.

Evidence of contractual incapacity should focus "on the party's understanding or conduct only at the time of the disputed transaction". *Sparrow*, 461 Mass. at 331.

VII. RESCISSION

A. MUTUAL RESCISSION

The defendant claims that (he / she / they / it) was not obligated to perform under the contract because the contract had been rescinded by the parties. "Rescission" is a term that refers to the cancellation of the contract by both of the parties. A rescission is not just a termination of the contract but amounts to the unmaking of a contract or the undoing of a contract from the very beginning.

In order to establish a mutual rescission, the defendant must prove, by a preponderance of the evidence, that each party released the other from further obligations under the contract, and each party restored the other to the position that (he / she / they / it) was in before entering into the contract. That is, each party returned to the other everything that (he / she / they / it) received under the contract.

A mutual rescission does not need to be made in a formal manner. It may be made orally, in writing, or it may be implied by the surrounding circumstances. In order for a mutual rescission to be implied, there must be conduct by both parties that is positive, unequivocal, and inconsistent with the continued existence of the contract. The failure by either party to take any steps to enforce or perform the contract may justify an inference that there was a mutual agreement to rescind. The mere fact that one or both parties returned some of the subject matter involved in the agreement is not determinative that a rescission has taken place. It is merely one factor to be considered, together with all other relevant factors in attempting to assess the true intent of the parties.

Bellefeuille v. Medeiros, 335 Mass. 262, 266 (1957); *Jurewicz v. Jurewicz*, 317 Mass. 512, 517 (1945); *Colil v. Massachusetts Sec. Corp.*, 247 Mass. 30 33 (1923); Hobbs v. Columbia Falls Brick Co., 157 Mass. 109 (1892); *Chang v. Winklevoss*, 95 Mass. App. Ct. 202, 214 (2019); *Puma v. Gordon*, 9 Mass. App. Ct. 489, 495 (1980).

B. UNILATERAL RESCISSION

The defendant claims that (he / she / they / it) was not obligated to perform under the contract because the defendant rescinded or canceled the contract. A defendant is entitled to cancel a contract only if the plaintiff committed a substantial or material breach of the contract. A material breach is one that is so substantial and fundamental that it defeats the purpose of the contract.

A defendant who rescinds a contract must offer to restore or return to the plaintiff everything (he / she / they / it) received under the contract. If you find by a preponderance of the evidence that what is returned to the plaintiff has been diminished in value by natural causes or in the course of its ordinary use by the defendant, then the plaintiff is responsible for the loss of value. However, if you find by a preponderance of the evidence that what is returned to the plaintiff has been damaged or diminished because of some act or omission that you find was the defendant's fault, then the defendant is responsible for the loss in value.

Any rescission must be done within a reasonable time after discovering the facts that give rise to the right to rescind or cancel.

Bellefeuille v. Medeiros, 335 Mass. 262, 266 (1957); *Jurewicz v. Jurewicz*, 317 Mass. 512, 517 (1945); *Worcester Heritage Soc'y, Inc. v. Trussell*, 31 Mass. App. Ct. 343, 345 (1991).

Snow v. Alley, 144 Mass. 546, 551 (1887) (responsibility for loss in value).

Newell v. Rosenberg, 275 Mass. 455, 457 (1931) (the rescission must be within a reasonable time of discovering the factual basis).

VIII. IMPOSSIBILITY OF PERFORMANCE

The defendant claims that (he / she / they / it) is not liable to the plaintiff because it was impossible or impracticable for (him / her / them / it) to perform (his / her / their / its) obligations under the contract. Sometimes an event occurs after the formation of a contract that makes it impossible or impracticable to perform a contractual promise. The defendant's performance under a contract may be excused if the contract was based on an essential assumption that did not exist when the defendant's performance was due. To put this another way, the unanticipated event would have made the defendant's performance vitally different from what the parties should have reasonably contemplated when they formed the contract.

In order to prove this defense, the defendant must establish three things, by a preponderance of the evidence:

First: **that after the contract was formed, an event occurred or a circumstance changed, making the defendant's performance impossible or unreasonably difficult;**

Second: **that the parties did not anticipate this event or change in circumstances when they made the contract and, in fact, it was a basic assumption of the contract that the event or circumstance would not occur; and**

Third: **that the defendant is not at fault for the event or change in circumstances.**

When considering whether the event or change in circumstances was anticipated by the parties, you should consider: could the parties have reasonably foreseen that this event or change in circumstances would affect performance? Was the event or change in circumstances a risk that the parties were impliedly assigning to the defendant? If you find by a preponderance of the evidence that there was an implied agreement between the parties that the defendant would bear the risk that the event or change in circumstances might occur, then the defendant cannot claim that performance was impossible.

Finally, the defendant cannot rely on this defense if you find by a preponderance of the evidence that the defendant was responsible for bringing about the event or changed circumstance or could have prevented it and failed to do so. A party to a contract cannot prevent

the performance of a contract from happening and then seek an advantage from (his / her / their / its) own action or inaction.

Temporary impossibility **A temporary impossibility or impracticability of performance suspends a party's duty to perform while the impossibility or impracticability exists, but it does not excuse performance after the impossibility or impracticability ends, unless you find by a preponderance of the evidence that performance at a later time would be materially more burdensome than it would have been without the temporary impossibility or impracticability.**

Le Fort Enterprises, Inc. v. Lantern 18, LLC, 491 Mass. 144, 152-154 (2023); *Chase Precast Corp. v. John J. Paonessa Co., Inc.*;, 409 Mass. 371, 373 (1991); *Bowser v. Chalifor*, 334 Mass. 348, 352 (1956); *Winchester Gables, Inc. v. Host Marriot Corp.,* 70 Mass. App. Ct. 585, 595-96 (2007); *Republic Floors of New England, Inc. v. Western Racquet Club, Inc.*, 25 Mass. App. Ct. 479, 485 (1988).

IX. FRUSTRATION OF PURPOSE

The defendant claims that (he / she / they / it) is not liable to the plaintiff because, after the contract was formed, there was an event or change in anticipated circumstances that frustrated the object or purpose of the contract. In order to establish the defense of

frustration of purpose, the defendant must prove three things, by a preponderance of the evidence:

***First*: that, after the contract was formed, a superseding extreme event occurred or the circumstances surrounding the contract changed such that a principal purpose or object of the contract was frustrated, or in other words, was destroyed;**

***Second*: that the parties did not anticipate the event or change in circumstances when they made the contract and the contract was based on a basic assumption that the event or change would not occur; and**

***Third*: that the event or change in circumstances occurred without the fault of the defendant.**

The purpose of a contract is not frustrated merely because performance has become inconvenient or more expensive. Mere difficulty of performance is not enough. The unanticipated event or changed circumstance must make performance of the contract vitally different from what was reasonably to be expected.

The defendant cannot rely on this defense if you find by a preponderance of the evidence that, at the time the contract was formed, the defendant knew or should have known that there was a

risk that the event or change in circumstances could occur. Nor can a defendant rely on this defense if you find by a preponderance of the evidence that the defendant was responsible for bringing about the event or changed circumstance, or could have prevented it and failed to do so. A party to a contract cannot prevent the performance of a contract from happening and then seek an advantage from (his, her, their, its) own action or inaction.

Le Fort Enterprises, Inc. v. Lantern 18, LLC, 491 Mass. 144, 152-154 (2023); *Chase Precast Corp. v. John J. Paonessa Co., Inc.*, 409 Mass. 371, 374 (1991); *Karaa v. Kuk Yim*, 86 Mass. App. Ct. 714, 717-18 (2014).

X. ILLEGALITY

The defendant claims that the contract is unenforceable because its performance is illegal. A contract is unenforceable if you find by a preponderance of the evidence that the contract calls for illegal conduct.

Alternative language: **In this case, under Massachusetts law,** *[describe conduct]* **is unlawful pursuant to** *[statute / regulation / ordinance / common law]***.**

Adamsky v. Mendes, 326 Mass. 603, 607 (1950); *Tocci v. Lembo*, 325 Mass. 707, 710 (1950); *McLaughlin v. Amrisaleh*, 65 Mass. App. Ct. 873 (2006).

XI. UNDUE INFLUENCE[3]

The defendant claims that the contract is unenforceable because the plaintiff exerted an undue influence over the defendant to coerce the defendant to enter into the contract. In order to prove this defense, the defendant must establish four things, by a preponderance of the evidence:

***First*: that the defendant was susceptible to undue influence;**

***Second*: that the plaintiff had an opportunity to exercise undue influence and used that opportunity improperly to persuade the defendant to enter into a contract which the defendant otherwise would not have made;**

***Third*: that the defendant entered into the contract as a result of the plaintiff's undue influence; and**

***Fourth*: that the contract gave the plaintiff an unfair advantage over the defendant.**

I will explain some of these terms. First, undue influence occurs when a plaintiff, by means of coercion, overpowers the mind of the defendant and causes the defendant to enter into a contract that

[3] If the defendant is a corporation, this instruction will require modification.

embodies the plaintiff's dominating purpose rather than the wishes of the defendant. Put another way, undue influence creates a situation where the defendant's own free will is destroyed or overcome such that what the defendant does, or how the defendant acts, are contrary to the defendant's true desire and free will.

A person may be susceptible to undue influence when (he / she / they / it) is in a weakened or vulnerable state. On this question, you may consider such things as the defendant's age and the defendant's physical or mental condition. In considering whether the plaintiff had an opportunity to exercise undue influence on the defendant and used that opportunity, you may consider whether there was a relationship between the parties and whether the plaintiff was in a position to dominate the will of the defendant.

Finally, there are a number of means by which undue influence may be exerted upon an individual. The means may be obvious or subtle. Undue influence may be caused by physical force, by duress, or by threats. It may arise from persistent and unrelaxed efforts to improperly pressure another person. Any means of coercion, whether physical, mental, or moral, that undermines the sound judgment and genuine desire of the individual, is undue influence.

So, with these definitions in mind, the defense of undue influence requires the defendant to prove the following four things by a preponderance of the evidence:

***First*: that the defendant was susceptible to undue influence;**

***Second*: that the plaintiff had an opportunity to exercise undue influence and used that opportunity improperly to persuade the defendant to enter into a contract which the defendant otherwise would not have made;**

***Third*: that the defendant entered into the contract as a result of the plaintiff's undue influence; and**

***Fourth*: that the contract gave the plaintiff an unfair advantage over the defendant.**

Howe v. Palmer, 80 Mass. App. Ct. 736, 740-41 (2011); *Collins v Huculak*, 57 Mass. App. Ct. 387, 394 n. 8 (2003) ("Undue influence is that which destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammeled desire.…Undue influence cases generally involve a plaintiff in a weakened state of body or mind…or who lacks that strength of character required to resist the overpowering will of another.") (internal quotations and citations omitted).

In cases where the plaintiff had a fiduciary relationship with the defendant, the burden of proof may shift to the plaintiff to show a lack of undue influence. See e.g., *Cleary v. Cleary*, 427 Mass. 286, 290 (1998).

XII. BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

The defendant claims that the plaintiff failed to act in good faith and breached the implied covenant of good faith and fair dealing. If

you find that the defendant has established this by a preponderance of the evidence, then the plaintiff cannot recover for a subsequent breach of contract by the defendant.

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.")