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Contract Claim – General Instructions

PLF claims that DFT breached a contract by [insert allegations]. A contract exists when two [or more] [people] [companies] agree to bind themselves by promises they make to each other. That agreement may be written or oral [or it may arise from actions the [people] [companies] took]. To prove breach of contract, PLF must prove that four [three, two] things are more likely true than not true:

1. <***only if contested***> There was a valid contract [with the terms that PLF alleges];
2. <***only if contested***> PLF substantially performed his/her/its obligations under the contract [IF APPLICABLE: or DFT failed to perform his/her/its obligations before PLF had to perform];
3. DFT violated the contract or in other words, breached the contract; and
4. PLF suffered damages because of DFT's breach.

I will now explain these elements in more detail.[1]

(a) Existence of Contract

<***only if existence or terms of the contract are contested***> First, PLF must show that PLF and DFT had a contract [and must show the terms of that contract] by proving that each of the following three things is more likely true than not true:

- one person/company made an offer to the other person/company;
- the other person/company accepted the offer; and

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[1] *Vacca* v. *Brigham & Women's Hospital, Inc.,* 98 Mass. App. Ct. 463, 467 (2020). See also *Kauders* v. *Uber Technologies, Inc.,* 486 Mass. 557, 572 (2021) (the party seeking to enforce a contract through an online app must prove "[1] reasonable notice of the terms and [2] a reasonable manifestation of assent to those terms").

- each person/company gave up money or something of value, or promised to give up money or something of value. [The law refers to this exchange of value as "consideration."]
- [<*ALTERNATE third bullet; reliance instead of consideration*> one side relied on the offer to its disadvantage and the other side should reasonably have expected that reliance.]

Each of these three items has a more precise definition, which I will discuss in a minute.

<*if alleged unwritten contract*> Offers and acceptances do not have to be in writing. Spoken words can create a valid contract. Even an act or failure to act may communicate the offer or acceptance. What matters is that the person/company **communicates** his/her/its intention to make an offer or acceptance. Sometimes, a combination of writings, spoken words and actions express the terms of the contract. With that, let me define what an offer is.

(1) Offer.

An offer must do three things:

- express a willingness to enter into a contract,
- state the terms of the proposed contract with reasonable certainty, and
- make clear that a contract will bind both sides if the other person/company accepts the offer.

To state the proposed contract with reasonable certainty, the offer must communicate the essential[2] terms of the contract. A term is "essential" if it is an essential part of the proposed contract. In other words, an essential term

[2] This instruction uses the familiar word "essential" instead of the arguably more precise, but more legalistic, word "material." The cases appear to use the words "essential" and "material" interchangeably. See, e.g., *Situation Management Systems, Inc.* v. *Malouf, Inc.,* 430 Mass. 875, 878 (2000); *Novel Iron Works, Inc.* v. *Wexler Construction Company, Inc.,* 26 Mass. App. Ct. 401, 408, further appellate review denied (1988). A judge may, however, choose to substitute "material" or "important" for the word "essential" throughout this instruction.

is something that makes a difference to one side or the other when they form their contract.[3]

<*if applicable – implied term of reasonableness*> Sometimes an offer does not explicitly address a particular matter, such as when or how to perform the contract. That omission does not matter if the parties intended to promise to perform under the contract within a reasonable time or manner or if they intended to be bound by established business or professional practices].[4] On the other hand, if you find that they failed to agree upon an essential term, there is no contract.

<*Revocation of Offer—If Applicable*> A person who makes an offer may revoke the offer before the other side accepts it.[5] To revoke an offer, the person must communicate to the other side that he/she/it no longer intends to enter into the contract. The communication does not have to use any particular words, and may be in writing, through spoken words or by conduct that is inconsistent with an intent to enter into a contract. For example, a person revokes an offer if s/he offers to sell her car to a potential buyer, but the buyer learns that the person sold the car to someone else before the buyer accepted the seller's offer.

(2) Acceptance

To accept an offer, the person/company must communicate to the other person/company that he/she/it agrees to all the essential terms of the offer.[6] Acceptance may occur in writing, through spoken words, or by conduct that reasonably conveys an intent to accept the offer.

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[3] *Vacca* v. *Brigham & Women's Hospital, Inc.,* 98 Mass. App. Ct. 463, 468 (2020).

[4] *Duff* v. *McKay,* 89 Mass. App. Ct. 538, 544-545 (2016).

[5] The judge should fashion a case-specific instruction if the offeror attempted to revoke an offer, such as an option, which obligated the offeror to keep the offer open for a specific period of time, or until a particular event occurred.

[6] Lack of agreement on "subsidiary matters [does not] not preclude the formation of a binding contract." *McCarthy* v. *Tobin,* 429 Mass. 84, 86 (1999), citing *Lafayette Place Assocs*. v. *Boston*

If someone signs a written agreement or accepts it in some other way, s/he is bound by its terms whether or not s/he reads and understands it.[7]

No acceptance occurs if a person/company responds to an offer by changing any of the essential terms. For instance, there is no contract if someone offers to sell a car for $5000 and you respond by saying "I accept your offer to sell the car but I'll pay $4000".[8]

<*Timeliness of Acceptance—If Applicable*> Acceptance must occur before any deadline set forth in the offer. If the offer had no deadline, acceptance must occur within a reasonable time, considering the nature of the contract, any prior dealings between the parties, any applicable commercial customs, and any other circumstances that help you determine when it was reasonable to accept the offer.

<*If Acceptance is Disputed*> Here, the parties dispute whether PLF/DFT accepted DFT/PLF's offer. <*Instruct Only On The Following Items That Are In Dispute*:>

- If the acceptance did not agree to all essential terms of the offer, then there is no contract.
- No acceptance occurs if the response rejects the offer entirely or communicates an unwillingness to enter into a contract.
- If the response to an offer rejects one or more of the offer's essential terms, that counts as a rejection of the entire offer.

Redevelopment Auth., 427 Mass. 509, 516 (1998) and *Blomendale* v. *Imbrescia,* 25 Mass. App. Ct. 144, 147 (1987).

[7] Omit this sentence in favor of an instruction on fraud, if alleged. "The general rule is that, in the absence of fraud, one who signs a written agreement is bound by its terms whether he reads and understands it or not or whether he can read or not." *Cohen* v. *Santoianni*, 330 Mass. 187, 193 (1953); see also *St. Fleur* v. *WPI Cable Systems/Mutron,* 450 Mass. 345, 355 (2008) (absent fraud in the inducement," [t]ypically, one who signs a written agreement is bound by its terms whether he reads and understands them or not.") (citations omitted). But see *Genovesi* v. *Nelson,* 85 Mass. App. Ct. 43, 47-48 (2014) (presumption inapplicable where alleged that plaintiff never had the opportunity to review the account documents because defendant withheld them from him).

[8] See, e.g., G.L. c. 106 §2-207 (Uniform Commercial Code).

- The response rejects the offer if it adds new terms that are "essential," according to the definition I just gave you.

On the other hand, simply asking questions is not, by itself, a rejection. For example, one person/company may ask the other person/company questions about the offer to clarify the terms or to inquire about a willingness to consider possible new terms.

It is up to you to decide whether, by words or actions, the responding party communicated an intent to reject the original offer. If the responding party rejects an offer, he or she cannot later accept it unless there is a new offer.

<*Counteroffer—if applicable*> Even if the response rejects the original offer, the response may itself offer to enter into a different contract. We call this a counter-offer. A counter-offer happens when the response proposes a contract with a new essential term, or rejects an essential term in the original offer. A counter-offer must meet all the requirements for an offer, which I described earlier. It does not create a contract unless the other side accepts it, using the definition of acceptance I described earlier.

<*Variation of Terms—UCC Sale of Goods between Merchants*>
A person/company's statement [communication] that s/he/it accepts the offer is an acceptance even if it states new or different terms from the offer [unless the responding party expressly conditions its acceptance upon agreement to the new or different terms].[9]

The new or different terms are proposals for additions to the contract. They become part of the contract [between merchants] unless one of three situations exists: (1) the offer expressly limits acceptance to the terms of the offer, (2) the new or different terms significantly[10] alter the original offer or (3) the other party objects within a reasonable time after learning of them.

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[9] G.L. c. 106, § 2-207.

[10] Here, to promote comprehension, the model uses "significantly" in place of "materially," because "essentially" would be awkward. See footnote 2 above.

(3) Consideration <Reliance>

<*if plaintiff alleges consideration*> Finally, the two parties must exchange value. [The lawyers may refer to this agreed exchange of value as "consideration"] Each person/company must provide something of value to the other person/company or must promise to provide something of value.[11]

[<*If Applicable*> The exchange may involve money, a physical object, or an asset, such as ownership of a company, but other types of exchanges are also valid. The exchange may involve the transfer of rights or permission to do something. For example, your neighbors may agree to let you to use their pool next summer if you promise to fix their car. A promise to do something in the future counts as something of value for this purpose. So does a promise not to do something.]

<*If plaintiff alleges reliance instead of consideration*> Finally, PLF must prove that s/he/it took action [decided not to take action] because s/he/it reasonably relied on DFT's offer or promise. To do this PLF must show that four things are more likely true than not true:

- DFT made an offer or promise to PLF;
- DFT reasonably should have expected PLF to act [or not to act] because of the offer or promise;
- PLF in fact acted [or decided not to act] because of DFT's offer or promise; and
- PLF suffered some loss or disadvantage because of that action [or inaction].[12]

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[11] *Vacca* v. *Brigham & Women's Hospital, Inc.,* 98 Mass. App. Ct. 463, 469 (2020).

[12] To make out a claim for promissory estoppel, one must prove that "(1) [Defendant] made a representation [to Plaintiff] intended to induce reliance on the part of [Plaintiff]; (2) an act or omission by [Plaintiff] in reasonable reliance on the representation; and (3) detriment [on the part of Plaintiff] as a consequence of the act or omission." *Anzalone* v. *Admin. Office of the Trial Court,* 457 Mass. 647, 661 (2010) (citations omitted).

(4) Verdict Slip—Existence of Contract

That brings me to the first question on the verdict slip, which asks: "Was there a valid contract between PLF and DFT?" You answer "yes," if PLF has proven all three ingredients of a contract—offer, acceptance and an agreed exchange of value. Otherwise, you answer "no."

(b) Plaintiff's Substantial Performance <*only if contested*>

First, [Second,] PLF must show that s/he/it substantially performed his/her/its obligations under that contract.[13] S/he/it does not have to prove that s/he/it performed every last detail of the contract as long as s/he/it has performed the contract's essential features.

<*If applicable*> However, once DFT breaches an essential feature of the contract, PLF no longer has to perform his/her/its contractual obligations.[14] [If applicable:] On the other hand, PLF cannot refuse to perform a contract simply because s/he/it knew that, in the future, DFT was going to breach his/her/its obligations under the contract.[15]

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[13] "When a party to an agreement commits an immaterial breach of that agreement, the injured party is entitled to bring an immediate action for damages; it may not stop performing its obligations under the agreement." *Lease-It, Inc.* v. *Massachusetts Port Authority,* 33 Mass. App. Ct. 391, 396 (1992). See also *Previews, Inc.* v. *Everets*, 326 Mass. 333, 335 (1950) ("The burden was upon the plaintiff to prove at least substantial performance of the contract on its part."); *Casavant* v. *Sherman*, 213 Mass. 23, 26 (1912) ("It is settled that, while inadvertent or unimportant departures would not defeat the right of recovery, the plaintiff became bound to a substantial performance in furtherance of the objects intended to be accomplished.").

[14] "'[O]nly a material breach of a contract . . . justifies a party thereto in rescinding it.'" *Lease-It, Inc.* v. *Massachusetts Port Authority,* 33 Mass. App. Ct. 391, 396 (1992), quoting 6 Williston, Contracts § 829 (3d ed. 1962).

[15] In rare instances, the trial judge should not include this paragraph, but should fashion a case-specific charge on anticipatory repudiation. "With few exceptions, '[o]utside of the commercial law context, Massachusetts has not generally recognized the doctrine of anticipatory repudiation, which permits a party to a contract to bring an action for damages prior to the time performance is due if the other party repudiates.'" *K.G.M. Custom Homes, Inc.* v. *Prosky,* 468 Mass. 247, 253 (2014) (citations omitted). See also *Cavanagh* v. *Cavanagh,* 33 Mass. App. Ct. 240, 243-244 (1992) (listing exceptions, particularly regarding real estate sales). Where applicable, the court may instruct that repudiation of a contract requires "a definite and unequivocal manifestation of intention not to render performance." *Coviello* v.

<*Add Insert From (d), Below re Particular Contract Terms, If Applicable*>

(c) Breach.

First [Second] [Third] PLF must prove that DFT breached – in other words, violated – the contract. DFT breached the contract if s/he/it failed comply with one or more essential terms of the contract. In order to make this determination, you will have to refer to the terms of the parties' contract as expressed in their offer and acceptance.

(d) Meaning of the Contract/Warranty – See Contracts – Special Issues

(e) Contract Modification – See Contracts – Special Issues

(f) Contract Defenses - See Contracts – Defenses.

(g) Damages.

If DFT breached the contract, PLF must prove the amount of damages resulting from that breach. By instructing you on damages, I am not suggesting anything about your answers to questions x or y.

The purpose of contract damages is to award PLF the benefit of the contractual bargain. You must determine an amount that will compensate PLF for the loss of that bargain. You should ask: "Would PLF have benefited if DFT had fully performed the contract?" If so, you should award money damages to compensate PLF for the value of the contract benefits that PLF lost because of DFT's breach. Contract damages do not, however, include emotional distress. Also, you may not award damages for the purpose of rewarding PLF or punishing DFT.

As with the other elements of the claim, PLF must prove that DFT's conduct more likely than not caused the damages. You should not award damages for any harm that PLF or someone other than DFT caused.

Richardson, 76 Mass. App. Ct. 603, 609 (2010). For rules applicable to UCC installments and contracts for the sale of goods, see G.L. c. 106, § 2-610.

(1) Mitigation. <*if applicable*>

In addition, PLF had the duty to take all reasonable steps to reduce the damages he/she incurred because of the breach of contract. On this issue [—called mitigation of damages—] it is DFT, and not PLF, who has the burden to prove that, more likely than not, PLF could have prevented or reduced some of the damages by reasonable measures.

PLF may not recover damages which he/she/it reasonably could have avoided incurring. This rule applies to all types of damages in this case, including [list applicable items]. You must not include in your damages award any damages you find PLF could have prevented or reduced by reasonable efforts.

(2) Interest and Taxes

You must not consider any interest upon your damages award. The court will calculate interest on any award. In addition, you may not consider federal or state income taxes, because any damages in this case may or may not be subject to taxation. Someone else will have to address any tax considerations depending on what you decide. In other words, just follow my instructions on what issues to consider. If you go beyond what I have outlined, your verdict may well have consequences that you did not intend.

(3) How to Estimate Contract Damages.

I'll conclude with a few general instructions about the damages that I have mentioned in this case.

First, some damages are difficult to prove with certainty. Sometimes you have little evidence to work with. But you can still award full and fair compensation, if the evidence allows you to determine damages in a reasonable way. The important thing is that you cannot determine damages by guessing. You must base your decision on fair and reasonable conclusions based on the evidence. If you decide to award damages, the amount of damages you award is up to your judgment as jurors.

[Second, 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.]

Finally, once you have calculated damages [for each type of damage that I described], you should add each of these types of damages to arrive at a total award. The total sum must not exceed fair compensation for the entire injury. You must avoid duplication or double counting of any elements of damages. When you have determined the amount of damages, using the instructions I have just given, you should write down an amount both in numbers and in words.

(4) Specific Measures of Contract Damages – See Contracts – Special Issues