

## Contract Damages and Other Special Contract Issues

### (a) Meaning of the Contract<sup>1</sup>

#### (1) Applying Unambiguous Contract Terms < *if applicable* >

You must interpret the contract's language by giving its words their plain and ordinary meaning.<sup>2</sup> < *If the contract is unambiguous, the court should so instruct and state what the court has determined that the contract means.* > You may not consider what the parties may have said in negotiations or in other discussions or writings when you interpret the contract's language. In other words, the parties' bargain is what the contract itself says.

#### (2) Ambiguous Terms. < *If Applicable.* >

In this case, the parties disagree about the meaning of certain language in the contract, namely [quote or summarize the contested language]. This language has more than one reasonable and logical meaning.

You will have to decide what the parties intended when they agreed to this language. You may consider the meaning of the words that the parties used and what they said during negotiations or in other discussions or writings. [The parties' words or actions while they were performing the contract may show how they interpreted the contract's words.] [< *if applicable* > You may also consider any prior dealings between PLF and DFT, and any standard practices of the [profession] [or trade].] You should consider the context. You should also consider, the entire contract, because sometimes one part of the contract can shed light on another part. You should give the words a reasonable meaning that best reflects the parties' intent. PLF has proven

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<sup>1</sup> See also *Kauders v. Uber Technologies, Inc.*, 486 Mass. 557, 572 (2021) (the party seeking to enforce a contract through an online application must prove "[1] reasonable notice of the terms and [2] a reasonable manifestation of assent to those terms.").

<sup>2</sup> *Balles v. Babcock Power, Inc.*, 476 Mass. 565, 571-572 (2017).

breach of contract if you find that DFT has violated the language of the contract as you interpret it.

**(3) Contract Modification < *if applicable* >**

The fact that a term appears in the offer and acceptance may or may not reflect what the final agreement is. That is because the parties have the ability to modify their contract if they both agree to modify it. The party claiming a modification must prove the same elements that created the contract in the first place. In other words, s/he/it must prove that both parties agreed to the modification and that each received money or something else of value (that is to say, consideration) for the modification. A modification can add terms, delete terms, or change the terms of a contract. A modification may occur orally, in writing, or through actions.<sup>3</sup>

< *UCC Variation for Sales of Goods—use instead if applicable* > The fact that a term appears in the offer and acceptance may or may not reflect the terms of the final agreement because the parties may modify their contract if they both agree.<sup>4</sup> A modification can add terms, delete terms, or change the terms of a contract. A modification may occur through words, in writing, or through actions. If you find there was a contract, that PLF performed his/her obligations under the contract, that DFT breached the contract, and that PLF suffered damages because DFT breached the contract, you will answer “Yes” to Question \_\_, which asks: “Did DFT breach a contract with PLF?” If your response is “Yes,” you will move on to Question \_\_. Otherwise, you answer “No” and go to Question \_\_.

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<sup>3</sup> The judge should fashion a case-specific instruction if the contract says that any modification must be in writing, because, very often, there is a question whether the parties, by words or conduct, have waived the written modification requirement. Under Massachusetts law, a binding oral modification may occur even if the contract specifies that a modification must be in writing. See, e.g., *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 439 (1992); *First Pennsylvania Mortg. Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 625 (1985).

<sup>4</sup> G.L. c. 106, § 2-209.

**(4) Workmanlike Manner. < if applicable >**

PLF claims that DFT violated the contract by failing to provide goods [services] in a workmanlike manner. If DFT entered into a contract to provide goods or services to PLF, then DFT must exercise reasonable care to provide such goods or services in accordance with the terms of the contract and in a good and workmanlike manner. DFT breached the contract if s/he/it failed to exercise reasonable care, and as a result, PLF sustained damage, which was the reasonably predictable<sup>5</sup> result of such failure. If DFT performed the specifications set forth in the contract negligently, then you may find in favor of PLF on the breach of contract claim against DFT.<sup>6</sup>

**(5) Time for Performance. < if applicable >**

< **No Time Specified** > When a contract does not specify the time for performance, a party must perform within a reasonable time. Reasonableness depends on all the transaction's circumstances, including the parties' past dealings, custom of the industry, and the type of transaction involved.<sup>7</sup>

< **Time is of the Essence (See also: Breach of Real Estate Purchase and Sales Contract Instructions)** > When a contract states in writing that time is "of the essence," the parties have imposed a strict deadline upon themselves. The law holds them to that deadline.<sup>8</sup> If PLF/DFT failed to meet that deadline,

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<sup>5</sup> The case law uses the more formal term "foreseeable," which the judge may substitute, if desired.

<sup>6</sup> *Previews, Inc. v. Everets*, 326 Mass. 333, 335-336 (1950) ("The law can supply no standard of performance beyond the bare statement of the rule that a contract for services must be performed in a reasonably diligent, skilful, workmanlike, and adequate manner. Whether the requirement of the rule has been met in a particular instance is commonly a question of fact, even if the evidence as to what was done is undisputed.").

<sup>7</sup> *Powers, Inc. v. Wayside, Inc. of Falmouth*, 343 Mass. 686, 690-91 (1962); *Alexander v. Berman*, 29 Mass. App. Ct. 458, 461 (1990); *Charles River Park, Inc. v. Boston Redev. Auth.*, 28 Mass. App. Ct. 795, 814 (1990).

<sup>8</sup> *McCarthy v. Tobin*, 429 Mass. 84, 88 (1999). *Owen v. Kessler*, 56 Mass. App. Ct. 466, 469 (2002), quoted in *Coviello v. Richardson*, 76 Mass. App. Ct. 603, 608 (2010).

then s/he/it has violated the contract.

< ***add one or more of the following exceptions, if applicable***>

[unless DFT/PLF extends the deadline in a manner that the contract provides.]

[unless DFT/PLF proves that PLF/DFT:

- agreed to extend the deadline;
- waived the deadline;<sup>9</sup> or
- violated the deadline.<sup>10</sup>

**(6) Performance to Plaintiff's Satisfaction. < if applicable >**

Where, as here, the contract requires DFT to render performance to PLF's satisfaction, DFT must perform well enough to satisfy a reasonable person in view of all of the circumstances<sup>11</sup>

**(7) Express Warranty.<sup>12</sup>**

PLF claims that DFT violated an express warranty by [describe alleged action]. The violation of an express warranty is a breach of contract.

To prove the existence of an express warranty, PLF must prove that three things are more likely true than not true:

- DFT made a clear and definite promise or statement of fact;

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<sup>9</sup> *McCarthy v. Tobin*, 429 Mass. 84, 89 (1999).

<sup>10</sup> *Owen v. Kessler*, 56 Mass. App. Ct. 466 , 469 (2002), quoted in *Coviello v. Richardson*, 76 Mass. App. Ct. 603, 608 (2010). See also *Kurkev. Shoestring Properties Ltd. Partnership*, 68 Mass. App. Ct. 644 , 654 n.11 (2007) ("The final OTP also contained the phrase '[t]ime is of the essence hereof,' but the judge correctly determined that the timeliness of the purchase and sale execution was not an issue because it was waived by the parties through their continuing contact and activities with respect to the purchase and sale agreement"). See also *Lafayette Place Assocs. v. Boston Redev. Authy.*, 427 Mass. 509 , 527 (1998), cert. denied, 525 U.S. 1177 (1999) (where neither party tendered performance, neither was in breach or default).

<sup>11</sup> *Strauss v. Teachers Ins. & Annuity Ass'n of Am.*, 37 Mass. App. Ct. 357, 361–62 (1994); see also *Rooney v. Weeks*, 290 Mass. 18, 27 (1935); 9 *Mass. Jurisprudence* § 5:16 (1993).

<sup>12</sup> Violations of warranty resulting in personal injury are addressed in the Products Liability instruction.

- DFT's promise or statement concerned an essential quality of the [describe item sold], and
- DFT's promise or statement was part of the basis of the bargain between PLF and DFT.

Any description of the [item sold] that is part of the basis of PLF's bargain with DFT creates an express warranty that the [item] will conform to the description.

A warranty does not have to be in writing. It may result from an oral statement or promise. However, an express warranty arises only from statements of fact or promises. Mere expressions of opinion or recommendations do not qualify.

If DFT made an express warranty, then you must consider whether [describe the goods] had the essential qualities that DFT promised or represented. If not, then DFT has breached an express warranty and you should answer Question \_\_ "Yes." Otherwise, you answer Question \_\_ "No."

### **(8) Good Faith and Fair Dealing.**

PLF claims that DFT violated the obligation of good faith and fair dealing by [describe alleged act or omission].

Every party to a contract must act in good faith and deal fairly with the other party in matters governed by the contract.<sup>13</sup> Neither party may do anything that will have the effect of destroying or injuring the other party's right to receive the contract benefits.<sup>14</sup> The parties have that obligation automatically even if the contract does not mention it. DFT has breached the contract if s/he/it violated this obligation.

For example, suppose that two companies have a contract that requires one company to obtain the other's approval before performing the contract. The second company breaches its duty to act in good faith and deal fairly if

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<sup>13</sup> *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 471 (1991).

<sup>14</sup> *Id.* at 471-472, quoting *Drukerv. Roland Wm. Jutras Assocs.*, 370 Mass. 383, 385 (1976).

it unreasonably refuses to grant approval without any legitimate reason, just to force the first company to make additional payments that the contract never required.

This obligation of good faith and fair dealing does not, however, extend to matters outside the contract's scope. Nor does it create rights and duties beyond what the contract itself provides.<sup>15</sup>

If PLF has proven that DFT violated the obligation of good faith and fair dealing, then you answer Question \_\_\_ "Yes." Otherwise, you answer "No."

### **(9) Implied Warranty of Merchantability—UCC Goods.**

PLF claims that DFT breached the implied warranty of merchantability. That phrase may sound new, but the idea is probably very familiar to you. Suppose that someone is buying shoes at a store. If the store sells her the shoes, the law says that, automatically, the store makes a warranty that the shoes are fit for walking on ordinary ground. The law automatically creates this warranty even if the buyer and seller did not discuss it.

The warranty of "merchantability" has a precise meaning. It means that every seller promises three things:

- First: that the quality of the [described goods] is at least average.
- Second: that the [described goods] are fit to be used for any purposes that the seller intended, as well as for any ordinary or predictable uses of [describe goods]; and
- Third: that the [describe goods] conform to any statement of fact or promises made on the [label] [container] [that the seller made].

DFT has violated the warranty of merchantability if PLF proves that more likely than not, the [described goods] did not live up to any or all of these three promises.

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<sup>15</sup> *Uno Rests., Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 385 (2004).

The warranty of merchantability does not guarantee that the [described goods are] best quality or even very high quality. But, it does guarantee that the [described goods] are reasonably safe and fit for the purposes that the seller intended or reasonably could foresee.

If you find that DFT breached the implied warranty of merchantability, then you answer Question \_\_ “Yes” and otherwise, you mark “No.”

[For breach of warranty causing personal injury see Products Liability instruction \_\_]

#### **(10) Warranty of Fitness for Particular Purpose—UCC Goods.**

PLF claims that DFT violated the implied warranty of fitness for a particular purpose. That phrase may sound new, but the idea is probably very familiar to you. Suppose that someone is buying shoes at a store. Suppose also that the store knows or should know two things about this person’s needs: First that the person is buying shoes to use for mountain climbing and, second, that the person is relying on the store’s expertise to select or recommend shoes for that purpose. In those circumstances, under the law, the store makes a warranty that the shoes are fit for mountain climbing. The law automatically creates this warranty even if the buyer and seller did not discuss it.

In this case, PLF alleges that DFT warranted that [describe the goods] was fit for the particular purpose of use as [describe particular purpose]. To prove that this warranty existed, PLF must show that three things are more likely true than not true:

- DFT had reason to know that PLF was looking for a [describe goods] for a particular purpose;
- DFT knew that PLF was relying on DFT’s skill or judgment in selecting a suitable [describe goods] for that purpose; and
- PLF actually relied on DFT’s selection or recommendation of a [describe goods] for that purpose.

DFT has made a warranty that [describe the goods] was fit for the particular purpose if PLF has proven these three things.

DFT has violated the warranty of merchantability if PLF proves that the [described goods'] did not live up to these three promises and you should answer Question \_\_\_\_ "Yes." Otherwise, you answer "No."

### **(11) Warranties - Disclaimer**

DFT claims that s/he/it has disclaimed the warranty, which means that the warranty does not apply or is limited. The law allows a seller, such as DFT, to disclaim implied warranties. The issue of disclaimer is an exception to the usual rule that PLF has the burden of proof, because on the issue of disclaimer, DFT has the burden to prove that, more likely than not that s/he/it disclaimed the warranty. PLF has no burden on the disclaimer issue.

To disclaim an implied warranty by conduct,<sup>16</sup> DFT must give PLF an opportunity to examine the [describe goods] before the buyer and seller agree on the sale of the [describe goods]. If DFT gave PLF an opportunity to inspect the [describe goods], and PLF either inspected the [describe goods] or declined to do so, then DFT made no warranty of merchantability or fitness with respect to any defects in the product that PLF should have observed during the inspection.

### **(b) Damages – Specific Measures Of Contract Damages**

#### **(1) Contract Price.**

PLF is entitled to damages equal to the contract price, less any payments that DFT proves s/he/it made under the contract. You also should deduct any expenses that PLF saved because of DFT's breach. In addition, PLF is entitled to damages for any out-of-pocket charges or expenses that PLF

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<sup>16</sup> Note that most other types of disclaimer are likely to involve pure questions of law for the court, under G.L. c. 106, § 2-316.



incurred because of the breach, such as delivery, storage, or shipping costs after the breach.

### **(2) Failure to Complete Work.**

The measure of damages for breach of a construction contract due to failure to complete the work is the reasonable cost of completing the work.

### **(3) Defective Workmanship.**

The measure of damages for defective workmanship depends on whether it is possible to repair the work within the boundaries of reasonableness. You may consider the time, expense and added value of making repairs, along with any other facts that help you determine whether repairing the defects would be reasonable. If so, you should base your damages award on the market price of repairing the job. If not, you should award damages equal to the difference between the value of the work in disrepair and the value of the [premises] [item] if DFT had satisfactorily completed the work according to the contract.

### **(4) Contract to Sell Real Estate.**

< *if plaintiff is seller* > PLF's damages are the difference between the contract price and the property's market value at the time DFT breached the contract.

< *if plaintiff is buyer* > PLF's damages are the difference between the contract price and the property's market value at the time PLF was entitled to take ownership of the property.

### **(5) Failure to Deliver Stock**

PLF is entitled to damages equal to the fair market value of the stock at the time DFT failed to deliver it. Fair market value is [amount listed on the stock

exchange on the day DFT should have delivered it] [the highest amount that a willing buyer would sell a willing seller on the open market].<sup>17</sup>

< *If plaintiff later decided to accept the stock* ><sup>18</sup> You should award money damages for the difference between the market value of the stock when DFT took it and the market value when it was returned. Fair market value is the highest price that a willing buyer would pay to a willing seller in a free and open market.

You should also award damages for loss of use of stock during that period. Damages for loss of use are the fair rental value of stock during the time when DFT possessed the stock. Fair rental value is the highest price that a willing buyer would pay to a willing seller for the stock in a free and open market.

#### **(6) Lost Profit.**

PLF is entitled to the lost profit from the contract that DFT breached. There are four steps to determining the amount of lost profits, if any.

- First you determine the parties' agreed contract price.
- Next, you determine how much, if any, payment DFT made.
- Third, you determine what labor or materials costs or other expenses PLF would have had to pay in order to complete his/her/its obligations under the contract.
- Finally, you calculate the amount of lost profits. To do this, you take the agreed contract price and then subtract the amount DFT paid and any labor or materials costs or other expenses that PLF

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<sup>17</sup> *George v. Coolidge Bank & Trust Co.*, 360 Mass. 635, 641 (1971) ("In an action for damages for the conversion of stock, or for breach of a contract to deliver stock, the measure of damages is the fair market value at the time of conversion or failure to deliver, with interest.").

<sup>18</sup> *George*, 360 Mass. at 641 ("The owner is not bound to accept a return of his property, but if he retakes it he may recover as damages the difference between the value of the property when converted and when returned, plus damages for loss of use during the period of wrongful detention.").

would have had to pay in order to complete his/her/its end of the contract. The result is PLF's lost profit.

### **(7) Lost Profits – Special Damages<sup>19</sup>**

PLF also seeks damages for lost profits [or – describe other special damages<sup>20</sup>] s/he/it would have earned from [describe activity]. To prove lost profits, PLF must prove two things. First, PLF must prove that DFT's breach of contract caused the loss of those profits. Second, PLF must prove that, when the parties entered into the contract, they knew of special circumstances or conditions that would give rise to the profits.

If PLF has proven both of these items, then you should determine the amount of profits that s/he/it lost because of DFT's breach of contract. You may consider, among other things, PLF's established earnings record, evidence of monthly sales, expenses, profit margins [and any expert opinions.]<sup>21</sup>

### **(8) Delay Damages.**

If DFT's breach of contract caused a delay in the performance, then PLF may recover damages resulting from that delay. If PLF contributed to any portion of the delay, then s/he/it may not recover damages for that portion. Damages for delay depend upon the circumstances and may include rental value, value of the use of the property, interest on the value of the property, or the increased cost of labor and materials.

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<sup>19</sup> See also "lost profit" paragraph in "Seller's UCC Damages" instruction, below. More complicated lost profits scenarios can arise, in which case the judge may need to resolve matters in the court's gate-keeper role, or fashion a case-specific instruction if the matter goes to the jury. See, e.g. *Lightlab Imaging, Inc. v. Axsun Technologies, Inc.*, 469 Mass. 181, 193-194 (2014)

<sup>20</sup> If plaintiff claims special damages, the trial judge should replace the phrase "lost profits" with a description of the element(s) of alleged special damages.

<sup>21</sup> See, e.g. *Kobayashi v. Orion Ventures, Inc.*, 42 Mass. App. Ct. 492 (1997).

## (9) UCC Damages

[See Damages – Contract Price, *above*, if the buyer failed to pay for goods delivered. G.L. c. 106, § 2-709]

### (10) Seller's UCC Damages for Non-Acceptance.

< *if seeking market price* > PLF seeks damages for DFT's refusal to accept the goods. To determine those damages, you should start by determining the market price of the goods at the time and place for delivery. You then calculate the difference between that market price and the contract price. Next, you deduct any expenses that PLF saved because of DFT's breach. Finally, you add any charges and expenses that PLF incurred because of the breach, such as costs for stopping delivery of the goods, or for transporting, returning, reselling, or caring for the goods after the breach.

< *if seeking lost profit* > PLF claims that the market price does not put PLF in as good a position as s/he/it would have obtained through full contract performance. If so, PLF is entitled to recover the amount of profit s/he/it would have achieved upon performance of the contract with allowance for costs that PLF reasonably incurred and credit to DFT for payments PLF received, including proceeds of resale. Finally, you add any charges and expenses that PLF incurred because of the breach, such as costs for stopping delivery of the goods, or for transporting, returning, reselling, or caring for the goods after the breach.

To calculate profit [see "Lost Profit" instruction, above]]

< *if plaintiff resold unfinished goods* > PLF seeks damages for DFT's refusal to accept the goods. If the goods were not finished at the time of the breach, PLF had the right, in the exercise of reasonable commercial judgment, to complete manufacturing and to sell the goods to another purchaser, to avoid loss.<sup>22</sup> If PLF acted reasonably, PLF is entitled to damages equal to the difference between the parties' contract sales price

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<sup>22</sup> G.L. c. 106, § 2-711.

and the price that the new purchaser paid. You must deduct any expenses that PLF saved because of DFT's breach of contract. Finally, you add any charges and expenses that PLF incurred because of the breach, such as costs for stopping delivery of the goods, or for transporting, returning, reselling, or caring for the goods after the breach. *< if plaintiff resold finished goods >* PLF seeks damages for DFT's refusal to accept the goods. PLF had the right to sell the goods, in good faith and in a commercially reasonable manner, to another purchaser. If PLF acted reasonably, PLF is entitled to damages equal to the difference between the parties' contract sales price and the price paid by the new purchaser. You must deduct any expenses that PLF saved because of DFT's breach of contract. Finally, you add any charges and expenses that PLF incurred because of the breach, such as costs for stopping delivery of the goods, or for transporting, returning, reselling, or caring for the goods after the breach. Buyer's UCC Damages.

*< if seeking market price >* PLF seeks damages for DFT's failure to deliver goods that conformed to the contract. To determine those damages, you should start by determining the market price of the goods at the time and place for delivery. You then calculate the difference between that market price and the contract price. Next, you deduct any expenses that PLF saved because of DFT's breach. Then, you add any charges and expenses that PLF incurred because of the breach, such as costs for inspecting, transporting, shipping, or caring for the goods after the breach.

You should also award damages for loss resulting from any particular requirements and needs if DFT knew of those needs at the time of contracting, and if PLF could not reasonably address those needs by purchasing substitute goods.

*< if seeking cover damages >* PLF seeks damages for DFT's failure to deliver goods that conformed to the contract. You should award damages equal to the difference between the contract price and the cost of buying reasonable substitute goods. You should deduct any expenses that PLF

saved because of the breach. You should award damages for any charges and expenses PLF incurred because of the breach, such as costs for inspecting, transporting, shipping, or caring for the goods after the breach.

You should also award damages for loss resulting from any particular requirements and needs, if DFT knew of those needs at the time of contracting and if PLF could not reasonably address those needs by purchasing substitute goods.

### (11) Liquidated Damages.

Section \_\_\_ of the contract provides for a specific amount of damages, [namely \$ \_\_\_] [summarize or read provision, if appropriate] for breach of contract. [We call this type of provision a “liquidated damages clause.”] As one of its defenses, DFT claims that this provision is invalid. To prove this defense, DFT has the burden to prove that at least one of two things was true at the time the parties made their contract:

First, that the parties could easily determine what damages would actually flow from a breach of contract; or

Second, that the contractual amount of damages was not a reasonable forecast of the likely damages that would result from a breach of contract. That is, the defendant must show that the amount was grossly out of proportion to the actual damages that the parties reasonably expected.<sup>23</sup>

When assessing each of these items, keep in mind that you must consider only the circumstances that existed at the time of contract formation. You may not use hindsight or consider evidence that the parties did not have when they reached their contract.<sup>24</sup>

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<sup>23</sup> *George v. Nat’l Water Main Cleaning Co.*, 477 Mass. 371, 375-76 (2017), quoting *NPS, LLC v. Minihane*, 451 Mass. 417, 420 (2008); *NRT New Eng., Inc. v. Moncure*, 78 Mass. App. Ct. 397, 400-401 (2010).

<sup>24</sup> *NPS, LLC v. Minihane*, 451 Mass. 417, 420 (2008), citing *Kelly v. Marx*, 428 Mass. 877, 878 (1999).

If DFT does not prove that the damages provision was invalid in the manner I just described, PLF is entitled to recover the amount of damages provided in section \_\_\_ of the contract. You do not reduce that amount even if you find that PLF failed to mitigate his/her/its damages.<sup>25</sup>

PLF cannot recover the amount stated in section [] of the contract If DFT proves at least one of the items I described. In that case, PLF is entitled to recover only those damages s/he/it has proven actually resulted from the breach of contract.

### **Implied Contract.**

PLF claims that DFT owes him/her/it for the reasonable value of his/her/its services/materials, even without a contract.

[< *If the jury will decide an overlapping contract claim.*> If you find that a contract covers the provision of these services [materials], then PLF cannot recover on this claim and you should find for DFT on Question \_\_\_\_.<sup>26</sup> If you find that no contract applied to these services, [materials] you should consider this claim.]

To succeed on this claim, PLF must prove, more likely than not, that the following things are true:

1. PLF provided services [materials] to DFT;
2. When PLF provided those services [materials], s/he/it reasonably expected that DFT would pay for them;
3. DFT allowed PLF to render services [provide materials] without objection; and

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<sup>25</sup> *NPS, LLC v. Minihane*, 451 Mass. 417, 423 (2008).

<sup>26</sup> "A plaintiff is not entitled to recovery on a theory of quantum meruit where there is a valid contract that defines the obligations of the parties." *Boston Medical Center Corp. v. Secretary of the Executive Office of Health & Human Services*, 463 Mass. 447, 467 (2012). See *MCI WorldCom Communications, Inc. v. Department of Telecommunications & Energy*, 442 Mass. 103, 116 (2004), quoting *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241, 250 (1993) ("[T]he provisions of the express contract address the disputed issue, and '[r]ecovery in quantum meruit presupposes that no valid contract covers the subject matter of a dispute.'").

4. When PLF provided those services [materials], DFT had reason to believe that PLF expected payment.<sup>27</sup>

Please note that the question is whether DFT had reason to believe that PLF expected payment. You do not have to find that DFT actually knew what PLF expected. It is enough to prove that a reasonable person in DFT's position should have realized that PLF expected payment.

If PLF proves these four things, you should answer Question \_\_ "Yes." Otherwise, you answer "No."

If you answered "Yes" to Question \_\_, you should award damages. You do that by determining the reasonable market value of the services [or materials] at the time PLF provided them, and then deducting any payments that DFT made to PLF.

### **Contract—Third-Party Beneficiary.<sup>28</sup>**

PLF claims that DFT breached a contract to [pay him/her/it money; other obligation]. 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. Even though PLF is not a party to the contract, s/he/it can still prove breach of contract if PLF proves that, more likely than not, the following five things are true:

1. [CP = Name of contracting party] and DFT had a contract;
2. The contract gave PLF an enforceable right to receive a payment [benefit] from DFT;
3. CP performed his/her/its obligations under the contract,
4. DFT breached the contract, and
5. DFT's breach of contract caused PLF to suffer loss or damage.

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<sup>27</sup> See *Finard & Company, LLC & another v. Sitt Asset Management & another*, 79 Mass.App.Ct. 226, 229 -230 (2011).

<sup>28</sup> *Markel Service Ins. Agency, Inc. v. Tifco, Inc.*, 403 Mass. 401, 405-406 (1988); *The James Family Charitable Foundation v. State Street Bank and Trust Company*, 80 Mass. App. Ct. 720, 723-727 (2011).



I will now explain these elements in more detail.

First, PLF must prove that CP and DFT had a contract.

[and must show the terms of that contract] by proving each of the following three things:

1. one side made an offer to the other side;
2. the other side accepted the offer; and
3. each side gave up money or something of value, or promised to give up something of value. [The law refers to this exchange of value as "consideration."]

[ALTERNATE item 3; reliance in lieu of consideration: one side relied on the offer to its detriment, if the other side reasonably should have expected that reliance]

Each of these three items has a more precise definition.

[REFER TO CONTRACT INSTRUCTIONS FOR OFFER, ACCEPTANCE, CONSIDERATION AND RELATED CONCEPTS]

Second, PLF must show that one term of the contract made PLF an intended beneficiary of the contract. That is important, because PLF was not a party to the contract. Usually, you cannot sue for breach of the contract unless you are a party to that contract. There is an exception if the parties to the contract specifically agreed to provide a direct benefit to PLF.

To come within this exception, PLF must show that CP and DFT intended for performance of the contract to benefit PLF. If so, then PLF is what we call an "intended beneficiary" and may sue. By contrast, sometimes performance of a contract happens to benefit someone else in some incidental way, but the parties did not intend to benefit that person directly. PLF cannot sue if the contract benefits PLF only incidentally.

< *Examples, if desired* > For example, if I buy life insurance, the insurance contract requires the company to pay [my spouse/other] or other designated beneficiary when I die. If the company refuses to pay when I die,

[my spouse/other] may sue for payment. The insurance policy makes [my spouse/other] an intended beneficiary because the company and I intend to give [my spouse/other] his/her own benefits directly and therefore gave him/her/it right to sue for breach of contract.

On the other hand, the stockholder of a corporation benefits only indirectly from the corporation's contracts. The stockholder cannot sue a customer for breach of contract because the stockholder is not an intended beneficiary of the corporation's contracts with its customers.

Using these principles, you must decide whether PLF was an intended beneficiary of CP's contract with DFT and therefore entitled to sue for breach of contract.

< *if substantial performance is contested* > Third, PLF must show that CP completely or substantially performed his/her/its obligations under contract. PLF does not have to prove that CP performed every last detail of the contract. It is enough that s/he/it has s/he/it has performed the contract's essential features.

< *performance after defendant's material breach, if applicable* > However, once DFT breaches an essential feature of the contract, CP no longer has to perform his/her/its contractual obligations.<sup>29</sup>

< *anticipatory breach, if applicable* > On the other hand, CP 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.<sup>30</sup>

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<sup>29</sup> "[O]nly a material breach of a contract . . . justifies a party thereto in rescinding it." *Lease-It v. Massachusetts Port Authority*, 33 Mass. App. Ct. 391, 396 (1992), quoting 6 Williston, Contracts § 829 (3d ed. 1962). See *Central Ceilings, Inc. v. Suffolk Construction Company, Inc.*, 91 Mass. App. Ct. 231, 236-237 (2017).

<sup>30</sup> 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*,

Moreover, if and when DFT fails to perform substantially his/her/its obligations, CP no longer has to perform his/her/its contractual obligations.

On the other hand, the CP cannot refuse to perform a contract simply because it knew that, in the future, DFT was going to breach its obligations under the contract.<sup>31</sup>

Fourth, PLF must prove that DFT breached that contract. Breach of contract occurs if DFT failed to comply with one or more terms of the contract. There is no breach of contract if DFT fully performed his/her/its obligations under the contract.

Finally, PLF must show that s/he/it suffered loss of money or tangible benefits because of the breach. For this element, you apply the same rules you applied on the first claim to determine whether the breach of contract caused damages to DFT.

If PLF has proven her contract claim, then you answer "Yes," to Question 4 which asks: "Did DFT breach a contractual obligation to an intended beneficiary, namely PLF?" and answer Question 5. Otherwise you answer "No" and follow the instructions.

[Damages – see above or insert general "benefit of the bargain" instruction from the Contract Claims instruction]

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*Inc. v. Prosky*, 468 Mass. 247, 253 (2014) (citations omitted) (listing some exceptions); *Cavanagh v. Cavanagh*, 33 Mass. App. Ct. 240, 242 (1992) (listing exceptions, particularly regarding real estate sales). For instance, the court may instruct that repudiation of a real estate contract requires "a definite and unequivocal manifestation of intention not to render performance." *Coviello v. Richardson*, 76 Mass. App. Ct. 603, 609-610 (2010). As to UCC installments and contracts for the sale of goods see G.L. c. 106, § 2-610.

<sup>31</sup> See footnote 30 above for exceptions to the Massachusetts rule against anticipatory repudiation.