UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

BRUCE MERRITT, GLORIA MERRITT, and MASTERMEDIA COMMUNICATIONS, INC., Plaintiffs, v. AMS ANLAGENPLANUNG GmbH & CO. Defendant. and GUENTHER HUEHNERJAEGER, Counterclaim-Plaintiff	:	No. 2:96-cv-44

JURY CHARGE

Now that you have heard all the evidence and the arguments of counsel, you must consider these instructions on the law applicable to your decision. As an initial matter, I will review for you the parties to this lawsuit and their respective positions. Plaintiffs in this case are Bruce and Gloria Merritt and their company, Mastermedia Communications, Inc. Mastermedia has brought a "Breach of Contract" claim and the Merritts have brought the following claims against the defendant: (1) Estoppel; (2) Fraud; (3) Quantum Meruit; and (4) Violation of the federal Civil RICO Act, 18 U.S.C. § 1962(c),(d). Although these claims differ, the basic contention of the plaintiffs is that Christian Hölscher acted as defendant's agent in forming Green Mountain Beverage Holding Co. ("GMBH") and in obtaining and utilizing the services of the Merritts. The plaintiffs claim that GMBH was operated by Hölscher for the benefit of the defendant. The plaintiffs claim that Hölscher and the defendant kept this arrangement secret from plaintiffs, allegedly so that plaintiffs would be led to believe that GMBH was a "legitimate, independent business entity," capable of providing a

return on or preservation of investor's capital and capable of paying service providers, such as plaintiffs, for the work they performed. Plaintiffs claim that, because of the alleged undisclosed agency relationship between Hölscher, GMBH, and defendant, GMBH never had a fair opportunity to succeed or to pay the plaintiffs for their services.

Defendant in this case is AMS Anlagenplanung ("AMS"). Defendant denies plaintiffs' allegations, and contend (1) that Christian Hölscher and GMBH were not defendant' agent; and (2) the Merritts have not been damaged by defendant' actions but rather by their own lack of success in promoting the Vermont brewery project in which they voluntarily participated. Defendant contends that it does not owe plaintiffs for their services, whether under contract or otherwise, because it was Christian Hölscher and GMBH who independently entered into such agreements and accepted the plaintiffs' services, not defendant. AMS also asserts that it did not defraud plaintiffs in any manner. AMS states that it did not misrepresent its relationship with Christian Hölscher and GMBH; furthermore, its asserts that plaintiffs did not reasonably rely to their detriment on their allegedly mistaken understanding regarding Christian Hölscher's agency.

In addition to the claims of the plaintiffs, you must consider the counterclaim of Mr. Hühnerjäger. Mr. Hühnerjäger has brought a counterclaim against the Merritts for violation of Section 10(b) of the federal Securities Act and Section 4224(a) of the Vermont Securities Act, based upon alleged misrepresentations that induced Mr. Hühnerjäger to invest $20,000 in the Merritts' companies, Classic Brewers, Inc. and Hubbard Investment Partners, LLC, after the GMBH project fell through.

During the course of these instructions, I will first provide you with general instructions applicable to all claims. I will then address the law regarding first the plaintiffs' claims and then the counterclaim of Mr. Hühnerjäger.

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony that has been presented to you. Now you must pass upon and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" for you and instruct you on how to assess it, including how to appraise the credibility or, to put it another way, the believability of the witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

EVIDENCE IN THE CASE

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation and regard that fact as proved.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

The evidence includes any stipulated facts, the sworn testimony of the witnesses and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

Also, during the course of the trial I occasionally made comments to the lawyers, asked questions of a witness, or admonished a witness concerning the

manner in which he or she responded to the questions of counsel. Do not assume from anything I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which, in terms of common experience, one may reasonably infer the ultimate fact sought to be established.

The following anecdote is a simple example of circumstantial evidence. Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether

or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining. That is all there is to circumstantial evidence.

Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

BURDEN OF PROOF

This is a civil case and as such, with the exception of the fraud claim, the Plaintiffs have the burden of proving every element of their claims, and Mr. HUEHNERJAEGER has the burden of proving the counterclaim, by a "preponderance of the evidence." In the fraud claim, the plaintiffs have the burden of proving their case by clear and convincing evidence. The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses,

regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If, after considering all of the testimony, you are satisfied that the plaintiffs have carried their burden of proof on each element of their claims, or Mr. Huehnerjaeger has carried his burden of proof on each element of his claim, then you must find for the plaintiffs or Mr. Huehnerjaeger on that claim. If, after such consideration you find the evidence of both parties to be in balance or equally probable, then plaintiffs or Mr. Huehnerjaefer have failed to sustain their burden and you cannot find for the plaintiffs or Mr. Huehnerjaeger on that claim.

WITNESS CREDIBILITY

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's knowledge, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to plaintiffs or the defendant; any interest he or she may have in the outcome of the case; and the extent to which, if at all, each

witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and people naturally tend to forget some things or remember other things inaccurately. Innocent misrecollection, like failure to recall, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you should give the testimony of each witness such weight, if any, as you may think it deserves. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

A witness may be discredited or impeached by contradictory evidence; or by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed

to say or do something, which is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Ordinarily, under the rules of procedure governing the preparation of a case for trial, the parties are permitted to take and record the testimony of witnesses, under oath, in the same manner as you have seen witnesses sworn and questioned here before you; and, under certain conditions, that testimony, which is called a "deposition," may then be offered as evidence before the jury at the trial. You should consider such deposition testimony, and evaluate the weight or credibility to which it is entitled, in the same way you consider and evaluate all the other testimony in the case.

EXPERT WITNESSES

Our rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify and state an opinion concerning such

matters. You should consider each opinion of an expert received in evidence in this case, and give it only such weight as you think it deserves, in light of your personal experience as members of the community and the expert's qualifications. In considering the weight to be given to testimony by experts, you should carefully determine whether the factual assumptions underlying their opinions are supported by the evidence. If you decide that the opinion of an expert witness is not based upon sufficient education or experience, that the reasons given in support of the opinion are not sound, that any assumptions made in reaching those opinions are not supported by the evidence, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

You have heard expert testimony from both sides regarding several issues in this case. The experts disagree on many issues. It may seem strange to you that you are called upon to resolve a conflict between experts who disagree. But you must remember that you are the sole trier of the facts and their testimony relates to questions of fact. It is your job to resolve any disagreement by weighing the experts' testimony in the same manner you weigh the testimony of any other witness, taking into consideration the qualifications, opinions, and assumptions of the experts. The determination of the facts in this case rests solely with you.

I have given you the general rules by which you are to consider the evidence in this case. I will now turn to the questions you must answer and the law you are to use regarding the specific claims made by the plaintiffs against AMS and the counterclaim made by Mr. Hühnerjäger against the Merritts.

AGENCY

Plaintiffs allege as part of their claim that Christian Hölscher was acting as the agent of the defendant, and that the defendant is bound by those acts. Agency is defined under Vermont law as a "relationship by which a party confides to another the management of some business to be transacted in the former's name or on his account, and by which such other assumes to do the business and render an account of it." The person whose business is being conducted is referred to as the "principal"; the person actually conduct the business is known as the "agent."

An agency relationship may be created by law or by agreement between the parties. I instruct you that where it is alleged that the agency was created by agreement, Plaintiffs need not show that there was an express contract which created the principal/agent relationship. Instead, the existence of an agency may be implied from the circumstances surrounding these transactions, or from the conduct of the parties.

You should also keep in mind that two people may create an agency which is temporary or narrow in scope. Thus, Plaintiffs need not prove that Christian Hölscher was entrusted with all of defendant's business, but only that portion of defendant' business involving the Plaintiffs.

The test you must apply in considering Plaintiffs' claim is this: Was the act in question performed by Christian Hölscher for the defendant with the defendant's knowledge and assent, either expressly or implied? Again, remember that you need not find that the defendant specifically requested that the act be performed.

If you find by a preponderance of the evidence that Christian Hölscher was acting as an agent for the defendant, then I instruct you that you may consider all of the actions of the agent within the scope of his agency as being those of the defendant, as if the defendant had done them itself. By way of example only, if Brown is the agent of Jones, and Brown defrauds Smith, then Smith may bring an action for fraud against Jones for the actions of Jones's agent, Brown.

Plaintiffs allege that Christian Hölscher and GMBH acted as the agents of defendant, and that the defendant is bound by the acts of GMBH and Christian Hölscher, including the contracts executed in GMBH's name, the alleged statements Christian Hölscher made, and the actions he undertook. I instruct you that you may not hold the defendant liable for any fraud, breach of contract, or other acts or omissions of Christian Hölscher or GMBH, if you find such acts occurred, unless you also find that Christian Hölscher and GMBH were, in fact, the agents of the defendant and were authorized to act on its behalf.

If you find that false statements, breach of contract, or other unlawful acts were done by Christian Hölscher and GMBH, but that these acts were performed by Christian Hölscher and GMBH entirely on their own behalf, and for their own gain, and not within the scope of any authority granted by defendant, you must return a verdict for the defendant.

AGENCY -- UNDISCLOSED PRINCIPAL

Plaintiffs claim that they had no knowledge that Christian Hölscher and GMBH were, as they allege, the agents of the defendant. In legal terms, plaintiffs claim

that the defendant was the "undisclosed principal" of Christian Hölscher and GMBH. Even if you find the defendant acted as an undisclosed principal here under the standards given below, you cannot automatically find defendant liable for the acts of Christian Hölscher or GMBH. An undisclosed principal is only liable in those cases where it is proved that (1) the undisclosed principal agreed that the agent should act on the principal's behalf; (2) the agent did act; and (3) the agent intended to benefit the principal when he acted.

AGENCY -- SCOPE OF AGENCY

If you find that Christian Hölscher and GMBH were the undisclosed agents of defendant in accordance with the law I have provided, then you must determine the scope of that agency and whether the agents' knowledge and acts may be counted against the defendant. The scope of an agency agreement encompasses all acts of the agent to which the principal gave consent, directly or indirectly. Like the existence of the agency relationship itself, the extent of an agent's authority is a question of fact for your sole determination, in light of all the evidence presented.

The test that you must apply in considering plaintiffs' claims is this: Were the acts in question performed by Christian Hölscher or by GMBH for the defendant and with its knowledge and assent, either express or implied? "Implied" here means that you need not find that the defendant specifically or expressly requested that a certain act be performed. However, you must be able to infer from the all the facts presented by a preponderance of the evidence, that the defendant made such an agreement.

AGENCY -- ACTS OF A CORPORATION

Plaintiff Mastermedia Communications and GMBH are both corporations. Defendant AMS is a German limited liability company that, for legal purposes, operates like a corporation. In considering all the claims of the parties, including plaintiffs' agency allegations, you must carefully consider what acts constitute acts of a corporation. A corporation is liable for the acts of an officer only if the acts are within the scope of their duty and in furtherance of corporate business. These standards apply to your consideration of evidence as to the acts or omissions of any officer, director, or employee of any of the corporate parties involved in this action.

AGENCY -- STATEMENTS OF AGENT TO PRINCIPAL

I instruct you that you must not consider statements that Christian Hölscher made solely to the defendant in determining whether Christian Hölscher acted as the agent of the defendant and whether the acts were unlawful. Statements by an agent to his or her principal are not admissible against the principal as an admission. Such statements may be admissible in evidence under other rules of evidence and for other purposes.

BREACH OF CONTRACT -- INTRODUCTION

Plaintiff Mastermedia alleges that it suffered damages as the result of a breach of contract regarding services the it agreed to perform for GMBH. Specifically, Mastermedia Communications, Inc., through the Merritts, entered into a written contract with GMBH for numerous services, for a monthly fee of $14,000. The terms of this contract have been discussed during the course of this trial and you have been given

the contract as an exhibit in this case. In order to prevail on their breach of contract claim, the plaintiff first must prove that GMBH, which entered into this written contract with Mastermedia, was an undisclosed agent of the defendant, in accordance with the law I have provided. The parties do not dispute that the contract at issue was, on its face, entered into by Mastermedia and GMBH. If you determine that GMBH was not an agent of the defendant when it entered into the contract with Mastermedia, you need not consider Mastermedia's breach of contract claim.

BREACH OF CONTRACT -- ELEMENTS

If you do find that an agency relationship existed and that GMBH entered into the service contracts with Mastermedia on behalf of defendant, Mastermedia has the burden of proving the following essential elements of their breach of contract by a preponderance of the evidence:

1. that a contract existed between the plaintiffs and defendant;
2. the terms of any such contract;
3. that a breach of any such contract occurred;
4. that damages resulted from any such breach; and
5. the amount of any damages.

In order to establish a breach of contract, plaintiffs must first establish that a contract existed between the parties. In order to do so, plaintiffs must prove both that there was a meeting of the minds between plaintiffs and defendant and that there was consideration for the agreement. A "meeting of the minds" occurs when two or more parties reach agreement on a particular issue under negotiations between them.

Put another way, plaintiffs must prove that both parties to the contract understood what was being negotiated and assented to it. Plaintiffs must make this showing for each aspect of the contract under which they claim relief.

If you find that a contract existed between the parties, then your next task is to determine the terms of the contract. Again, the burden is on plaintiffs to prove by a preponderance of the evidence each term on which they rely.

Once you have determined the terms of the contract, the next step is to determine if defendant has in fact breached one or more of the terms. I instruct you that a person breaches a contract when his or her conduct does not comply with the terms of the contract as agreed to by the parties.

Next, Mastermedia must prove by a preponderance of the evidence that it suffered damages as a proximate result of defendant's breach. Injuries or damages are proximately caused by the act of another whenever it appears by a preponderance of the evidence that the act played a substantial part in bringing about or actually causing the harm. Proximate cause is shown when you can find by a preponderance of the evidence that Mastermedia's damages were either a direct result or a reasonably probable consequence of defendant's breach of contract.

Lastly, plaintiff must prove the amount of its damages by a preponderance of the evidence.

If you find that Mastermedia proved each of these elements, then you must find defendant liable for breach of contract, and assess damages in the amount proved. If, however, you find that plaintiffs have failed to prove any one of these

essential elements, then you should enter a verdict on behalf of defendant.

BREACH OF CONTRACT -- MEASURE OF DAMAGES

I will instruct you on the measure of damages for breach of contract in the event you find that a contract existed, that the contract was enforceable, and that defendant breached the contract. The fact that I will now instruct you on the measure of damages for a breach of contract claim should not be seen by you as an indication of the Court's view, one way or the other, toward Mastermedia's contract claim. The instructions are for your use only in the event that you find that Mastermedia proved that defendant breached a contract with it. In considering this instruction, you must also follow all of the general damages instructions set forth at the end of these instructions.

If you decide that Mastermedia is entitled to damages for breach of contract, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates it for its loss of the contract's benefits. A party who suffers damages from breach of contract is entitled to recover compensatory damages -- that is, damages which compensate the party in the amount the party would have received under the contract if the contract had been performed. If you find that defendant breached a contract with Mastermedia, you shall calculate an award based upon compensatory damage, the amount Mastermedia should have received under the contract based upon the work performed, unless you find that such damages are too speculative to calculate. If the damages are too speculative, you may award Mastermedia only the amount of damages actually incurred by undertaking

performance of the contract. In calculating damages here, you must take into account all of the compensation Mastermedia already received under the contract. You must also consider the terms of the contract and award Mastermedia the amount, if any, it should have received beyond the amounts already paid.

In considering the terms of the contract, you should take into account when the contract ended. In considering this issue, you should consider whether the parities agreed to terminate the contract or whether the plaintiffs waived their rights under the contract. A contract may be terminated by agreement of the parties. The agreement to terminate may be express or implied. Further, a party may waive their rights under a contract. Waiver is the knowing relinquishment of a right.

MITIGATION OF DAMAGES

In determining the amount of any damages, you must also consider that the law imposes a duty on the plaintiffs to mitigate, or minimize, damages. This means that a person who has suffered a loss has a duty to take protective or preventive measures in an effort to reduce the harm or prevent its increase or continuance in the future. The burden is on the defendant to prove this claim. If you find the plaintiffs could have reasonably avoided some of their damages, if any, or could avoid future injuries, if any, by taking any reasonable action to minimize such damages -- by, for example, taking other work or ceasing to work and incur expenses on the GMBH project -- you must reduce your award of damages, if any, by an amount equal to the damages that the plaintiffs could have avoided, or could avoid in the future, by taking such action.

ESTOPPEL -- INTRODUCTION

The plaintiffs' second claim is known as "estoppel." The plaintiffs allege what is known as a promissory estoppel claim, to the effect that they relied to their detriment on representations they allege were made by the defendant. As with the contract claim, you must first determine whether any of the representations or promises alleged by the Merritts were actually made by the defendant. This will again require you to turn to the principles of agency law, to determine whether any promises made by Christian Hölscher or by GMBH may be considered the statements of the defendant. If you determine that Christian Hölscher and GMBH were not acting as the defendant's agents when such statements or promises were made, then the defendant may not be held liable for such statements.

The defendant also may not be held liable for this claim if you find that the alleged promises were part of a contract between the parties. In other words, you must be careful to distinguish between your findings regarding Mastermedia's breach of contract claim and this claim. Either an alleged promise was made as a part of a bargained-for contract -- in which case the elements of breach of contract must be fulfilled, or it was not -- in which case you should consider whether plaintiffs have fulfilled the elements of estoppel stated below.

ESTOPPEL -- ELEMENTS

To establish a promissory estoppel claim, the plaintiffs must prove by a preponderance of the evidence:

1. that the defendant made a promise;

2. that the defendant should reasonably have expected such promise to cause the plaintiffs to do or not do something;

3. that the plaintiffs in fact did what the defendant should reasonably have expected;

4. that the plaintiffs took such action in reliance on the claimed promise;

5. that the plaintiffs were reasonable in relying on the promise, and reasonable in taking the action they did in reliance on the promise;

6. that the plaintiffs suffered some detriment as a proximate result of any such reasonable reliance;

7. and that injustice can be avoided only by enforcement of the promise.

If you find that the plaintiffs have proven each of these elements by a preponderance of the evidence, then you may return a verdict for the plaintiffs on their promissory estoppel claim. If on the other hand you find that they have failed to establish any of these elements, you must return a verdict for the defendant on this claim.

ESTOPPEL – "REASONABLE RELIANCE"

In order to find that the plaintiffs suffered harm as a result of their reasonable reliance on defendant' statements or promises, you must find that the plaintiffs actually and legitimately believed that the promises would be honored, that their belief was "reasonable," and that plaintiffs acted on that belief. In other words, if

you find that the plaintiffs would have engaged in the activity or services anyway, or that the alleged promises had no effect upon their decision to act, then there was no reliance and there can be no recovery.

Furthermore, you must find, by a preponderance of evidence, that any reliance by plaintiffs was reasonable. This requires you to find that a reasonable person in plaintiffs' position would have acted in reliance on the stated promises. Factors that demonstrate "reasonable" reliance include whether plaintiffs exercised due care in acting on the alleged promise, and whether plaintiffs considered all the facts at their disposal prior to acting.

The law also requires that the plaintiffs suffer some detriment or harm from their reliance. Plaintiffs not only must have relied on the representations of defendant, but that reliance must have caused harm to plaintiffs.

ESTOPPEL -- MEASURE OF DAMAGES

I will now instruct you on the measure of damages for a promissory estoppel claim. The fact that I do so should not be seen by you as an indication of the Court's view, one way or the other, toward plaintiffs' promissory estoppel claim. The instructions are for your use only in the event that you find that the plaintiffs have proven the other elements of a promissory estoppel claim under the standards stated above. You must also follow the general instructions regarding damages located at the end of these instructions if you determine that damages are appropriate for this claim.

The damages for a promissory estoppel claim should be limited to what are known as reliance damages. Reliance damages are the damages that would place

a plaintiff in the position he or she would have been in had the promise at issue never been made such as damages for the value of the services rendered by plaintiff which were provided in reasonable reliance upon defendant's promises. In determining whether to award damages, you may also consider whether the plaintiffs in fact substantially profited from their relations with the defendant, in the form of, for example, compensation in exchange for their working for the defendant. In addition to these factors, as with the contract claim, you must not award damages that are speculative. Also, you may award only damages for detriment that the plaintiffs prove were proximately caused by any reasonable reliance on their part, and you must reduce any award to account for damages that could have been avoided if the plaintiffs had taken reasonable steps to mitigate or minimize their alleged damages.

QUANTUM MERUIT

Plaintiffs have claimed that they are entitled to recover compensation for any work they performed for defendant that was not covered by a contract and was not otherwise compensated. This claim is known as a "quantum meruit" claim, which literally means "as much as one deserves." In order for plaintiffs to prevail under this theory, you first must determine whether the plaintiffs performed any work that was not covered by a contract and was not otherwise compensated. If you find that all of the work performed by plaintiffs for the GMBH project was covered by a contract or was compensated, either by the transfer of shares of stock to the Merritts or otherwise, then you need not consider this claim.

If you find that the Merritts performed work that was not covered by a

contract or otherwise compensated, then you must determine whether this work was done for Hölscher or GMBH on behalf of the defendant, applying the principles of agency law that I explained earlier. Only if you find that the Merritts performed work for the defendant that was not covered by contract, or otherwise compensated, may you then turn to the elements necessary to prove a quantum meruit claim.

In order to recover under their quantum meruit claim, plaintiffs must prove by a preponderance of the evidence that:

(1) the work they performed conferred a benefit on the defendant or was done on the defendant' behalf;

(2) the plaintiffs reasonably expected to be compensated for the work they performed; and

(3) the work was performed at the express or implied request of the defendant.

If you find that plaintiffs have proven all three elements, you must award them the amount of damages equal to the amount of the detriment suffered by plaintiffs in performing the work without compensation. In reaching an amount of damages under this claim, you must follow the general instructions regarding damages at the end of these instructions.

FRAUD -- INTRODUCTION

Plaintiffs' next claim against the defendant is for fraud. The plaintiffs allege that they were defrauded by the defendant to their detriment. The following are elements of fraud that must be proved against the defendant. First, I want to explain to

you that the fraud claim involves a different standard of proof than the "preponderance of the evidence" standard that governs the other claims. On the question of fraud, the plaintiffs have a higher burden of proof. They must prove their fraud claim by "clear and convincing evidence." While not as strict as the standard in criminal cases of "beyond a reasonable doubt," it is nevertheless a standard substantially higher than the "preponderance of the evidence" standard. You must be clearly convinced of the proof of fraud before you can find for the plaintiffs on that basis. Clear and convincing evidence is substantial evidence. It is such proof as will produce in your minds a firm belief that the claims of the plaintiffs are valid. Furthermore, you must find that each of the essential elements is proved by clear and convincing evidence.

Plaintiffs must prove by clear and convincing evidence each of the following essential elements of a fraud claim:

(1) that the defendant misrepresented an existing fact to affect the essence of a transaction with the plaintiffs;

(2) that the defendant did so intentionally;

(3) that the misrepresentation was false when made and known at the time to be false by the defendant;

(4) that the correct information was not available to the plaintiffs; and

(5) that the plaintiffs relied on the misrepresentation to their detriment.

(6) that the misrepresentation must have caused harm to the plaintiffs.

If the plaintiffs have proven each of these elements by clear and convincing evidence, then you must find that the defendant defrauded the plaintiffs. If,

however, the plaintiffs have failed to prove any one of these elements, then you must enter a verdict for the defendant on this claim.

FRAUD -- DAMAGES

If you find that plaintiffs have sustained their burden of proof on the misrepresentation count, then you will determine the amount of damages they have suffered, which are computed as follows:

The recipient of a fraudulent misrepresentation is entitled to recover as damages the actual loss which, because of its falsity, they sustained through their action or inaction in reliance on the false representation.

In considering whether plaintiffs' reliance was justifiable, I advise you that the recipient of a fraudulent misrepresentation is justified in relying upon its truth, although he or she might have ascertained the falsity of the representation had he or she made an investigation. He or she is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him or her.

RICO -- INTRODUCTION

Plaintiffs have alleged that the defendant violated a federal law known as the Racketeering Influenced and Corrupt Organization ("RICO") Act, which is contained in Title 18 of the United States Codes. Specifically, plaintiffs claim that defendant violated two separate sections of the RICO act, Sections 1962© and 1962(d). I will address each of these in turn, but I first want to caution you about this claim. The words "racketeering" and "RICO" have certain implications in our society. Use of those terms in this statute and in this courtroom should not be regarded as having anything to

do with your determination of whether the plaintiffs have established the elements of this claim.

RICO -- ELEMENTS OF A SECTION 1962© VIOLATION

Section 1962© of the RICO statute provides that:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...."

To show that a defendant has violated section 1962(c), plaintiffs must prove each of the following elements by a preponderance of the evidence:

1. The existence of an "enterprise" which affects interstate or foreign commerce;
2. That a defendant was employed by or associated with the enterprise;
3. That the defendant participated in the conduct of the enterprise's affairs; and
4. that the defendant's participation was through a "pattern of racketeering activity."

I will now define these elements for you.

RICO -- "ENTERPRISE" WHICH AFFECTS INTERSTATE OR FOREIGN COMMERCE

Plaintiffs claim that GMBH was an enterprise which affected interstate or foreign commerce, and that defendants participated in this enterprise through a pattern

of racketeering activity, as that term will be defined for you.

An "enterprise" includes any individual, partnership, corporation, association or other legal entity. An enterprise may also be any group of individuals associated in fact although not a legal entity. Proof that an entity has a legal existence, such as a corporation or a partnership, satisfies the definition of an enterprise.

An enterprise "affects interstate or foreign commerce" if the enterprise either engages in or pursues activities affecting commerce between the states or between the states and foreign countries.

Thus, if you find that GMBH was an entity with a legal existence that engaged in commerce between the states or between the states and a foreign nation, you may find that it was an enterprise within the meaning of the law. If you find that plaintiffs have fulfilled this element, then you must consider whether the other elements of the statute have been proven by plaintiffs.

RICO -- ASSOCIATED WITH "ENTERPRISE"

"Employed by or associated with" means that the defendant must have at least some association with the enterprise. A defendant cannot be associated with or employed by an enterprise if he does not know of the enterprise's existence or of the nature of its unlawful activities. A defendant must know something about the enterprise's activities as they relate to the racketeering activity, but it is not necessary that the defendant be aware of all racketeering activities of each of the participants in the enterprise.

To "participate in the conduct of the enterprise's affairs" means to perform

activities necessary or helpful to the operation of the enterprise, whether directly or indirectly.

RICO – "PATTERN OF RACKETEERING ACTIVITY"

"Racketeering activity" includes mail fraud, Section 1341 of Title 18, United States Code; and wire fraud, Section 1843 of Title 18, United States Code.

"A pattern of racketeering activity" means at least two acts of racketeering activity occurring within ten years of this date.

Acts of racketeering activity may include, as plaintiffs allege in this case, violations of the federal mail fraud and wire fraud statute

Now I will define the term "pattern of racketeering" activity. Whether a pattern of racketeering activity exists depends upon both the continuity of the defendant's acts and the relationship among those acts. You must find that at least two of the alleged predicate acts are related to one another by a common scheme, plan or motive. In determining whether a pattern of racketeering activity exists, you should consider the following factors.

1. The number of participants and people affected;
2. Whether the alleged predicate acts occurred over a substantial period.
3. The number and separateness of "transactions," "schemes," or "episodes;"
4. The number of purposes underlying the alleged predicate acts; and
5. The threat of continuing criminal activity.

In this case, plaintiff contends that the activities of the defendant in wiring funds from Germany to Vermont to fund GMBH, and in using the mails and facsimile transmissions to conduct GMBH's activities, constituted a pattern of racketeering activity as that term is defined later in these instructions.

RICO -- ACTS OF AGENTS IMPUTABLE TO THE DEFENDANTS

As is with the other claims of the plaintiffs, one issue you will face in determining whether plaintiffs have met their burden of proving the RICO claim is whether Christian Hölscher was an agent of the defendant. I have already provided you with the law regarding proof of agency. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort. Mail fraud and wire fraud as racketeering activities thus may be established without proof that the defendant did every act constituting the mail fraud or wire fraud, if plaintiffs prove agency.

Therefore, in order to find defendants liable for any of the acts of Christian Hölscher, you must first determine that Christian Hölscher performed such acts as defendant's agent.

RICO UNDERLYING OFFENSES

The mail fraud statue, Section 1341 of Title 18 United States Code, provides in pertinent part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...for the

purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, [shall be guilty of an offense against the laws of the United States.]"

The wire fraud statue, Section 1343 of Title 18 of the Unites States Code, is substantially similar to the mail fraud statue, except that it prohibits the use of the wires – as alleged in this case, interstate or international telephone or fax lines. In order to establish that defendants have committed mail fraud or wire fraud for purpose of this case, plaintiff must show by a preponderance of the evidence that:

First, some person or persons willfully and knowingly devised a scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations or promises, and

Second, some person or persons used the United States Postal Service by mailing or causing to be mailed some matter or thing for the purpose of executing the scheme to defraud, or by using or causing to be used interstate or international telephone or fax lines for the purpose or executing the scheme to defraud.

RICO – "SCHEME" AND "ARTIFICE"

In order to establish fraudulent intent on the part of the defendant, it must be established that a defendant knowingly and intentionally attempted to deceive another. One who knowingly and intentionally deceives another is chargeable with fraudulent intent notwithstanding the manner and form in which the deception was attempted.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to

another or bringing about some financial gain to one's self.

The words "scheme" and "artifice" in the wire fraud statutes include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived.

RICO – FALSE OR FRAUDULENT REPRESENTATION

A statement or representation is "false" or "fraudulent" within the meaning of the mail and wire fraud statutes if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud, under the standard I just gave to you. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud. A "material fact" is a fact that would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction. Good faith constitutes a complete defense to mail fraud.

It is not necessary that plaintiffs prove all of the details concerning the precise nature and purpose of the scheme; or that the material was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mail or wires was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be shown by a preponderance of the evidence is that the defendant knowingly and willfully devised or intended to devise a scheme to defraud

substantially the same as the one alleged by plaintiff; and that the use of the U.S. mail or interstate or international wires was closely related to the scheme in that the defendant either mailed something, placed a telephone call or sent a fax, or caused someone else to do so in an attempt to execute or carry out the scheme. To "cause" the mails or the wires to be used is to do an act with knowledge that the use of the mails or the wires will follow in the ordinary course of business or where such use can reasonably be foreseen.

RICO -- CONSPIRACY (18 U.S.C. § 1962(d))

Plaintiffs allege that the defendant engaged in a conspiracy along with Christian Hölscher to violate the Racketeer Influenced and Corrupt Organizations Act. This is a separate claim from plaintiffs' claim that the defendant violated RICO, and it must be separately considered by you. A conspiracy to violate RICO is itself a violation of Section 1962(d) of the Act.

RICO -- CONSPIRACY

The plaintiff must prove by a preponderance of the evidence that a defendant knowingly and willfully became a member of a conspiracy to violate RICO. This means that in order to meet their burden of proof, the plaintiffs must show that a defendant agreed to participate, directly or indirectly, in the affairs of the enterprise through a pattern of racketeering activity. However, to find a conspiracy to violate RICO, you do not have to find that any racketeering acts were actually committed.

RICO CONSPIRACY -- PROOF OF THE AGREEMENT

There are different ways in which you can find that the defendant agreed

to participate in the affairs of the enterprise through a pattern of racketeering activity. You may find, but need not find, by a preponderance of the evidence that by actually committing two or more racketeering acts the defendant has shown that it agreed to participate in the affairs of the enterprise through a pattern of racketeering activity.

You may also find that the defendant agreed to participate in the affairs of the enterprise through a pattern of racketeering activity if you find that the defendant agreed personally to commit two or more racketeering acts to further the affairs of the enterprise. You need find only that the defendant agreed to commit these acts; you need not find that a defendant actually committed them.

RICO – PROXIMATE CAUSE

In order for the plaintiffs to recover from the defendants, plaintiffs must show by a preponderance of the evidence that defendant's RICO violations were the "proximate cause" of injury to plaintiffs' business or property.

An injury or damage is "proximately" caused by an act whenever it appears from the evidence in the case that the act played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

RICO -- UNANIMITY AS TO ACTS OF RACKETEERING ACTIVITY

The plaintiffs allege that the defendants committed several separate racketeering acts, as set forth above. The plaintiffs satisfy their burden if they prove by a preponderance of the evidence that at least two of the alleged racketeering acts are sufficiently related to constitute a pattern were committed by the defendant within the

prescribed time.

However, you may not find that plaintiffs have established this element unless you all agree that at least two particular racketeering acts were committed by the defendant. It is not enough if some of you think that only racketeering act A and B were committed by the defendant and the rest of you think that only acts C and D were committed by a defendant. There must be at least two specific racketeering acts which you unanimously find by a preponderance of the evidence were committed by the defendant in order to satisfy this element.

RICO -- MEASURE OF DAMAGES

In considering the issue of damages, if any, with respect to the RICO claim, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the damages to plaintiff in their business or property, no more and no less. Damages may not be based on speculation because it is only actual damages -- what the law calls compensatory damages -- that you are to determine.

You must consider the amount of damages, if any, with respect to the RICO claim separate and independent from the amount of damages, if any, with respect to any other claim. For example, and by way of example only, if you determine that damages should be awarded the plaintiff under its RICO claim you should award full, just, and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under any other claim.

COUNTERCLAIM

Guenther Hühnerjäger has brought a counterclaim against plaintiffs arising out of his $20,000 investment in their companies, Classic Brewers, Inc. and Hubbard Partners, LLC. Specifically, Mr. Hühnerjäger claims that the Merritts violated Section 10b-5 of the federal Securities Act and its implementing rules, as well as Section 4224(a) of the Vermont Securities Act, Title 9 of the Vermont Statutes Annotated, which is modeled on the federal act. I remind you that, with regard to this counterclaim, Mr. Hühnerjäger bears the burden of proof by a preponderance of the evidence.

Rule 10b-5 of the Securities and Exchange provides as follows:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> > "(A) to employ any device, scheme, or artifice to defraud,
> >
> > "(B) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> >
> > "(C) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale or any security."

Vermont's Securities Act, 9 V.S.A. § 4224a, is identical in all material respects to the federal act, except that the Vermont statute does not require that Mr. Hühnerjäger prove that the Merritts used "any means or instrumentality of interstate commerce" to effect their unlawful activity.

In order to prevail on his claim under Rule 10b-5 the federal law and Section 4224a of the Vermont law, Mr. Hühnerjäger must establish the following elements by a preponderance of the evidence:

(1) That the Merritts used the mails or an instrumentality of interstate commerce, or a facility of a national securities exchange, in connection with the purchase (sale) of securities;

(2) That in connection with such purchase (sale), the Merritts, either:

(a) employed a devise, scheme, or artifice to defraud, or

(b) made any untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements which were made, in light of the circumstances under which they were made, not misleading, or

(c) engaged in an act, practice or course of business which operated as a fraud or deceit upon any person in connection with the sale (purchase) of a security.

(3) That the Merritts acted knowingly, as that term is defined in these instructions;

(4) That Mr. Hühnerjäger justifiably relied upon the Merritts' conduct as the term "justifiably relied" is defined in these instructions; and

(5) That Mr. Hühnerjäger suffered damages as a result of the Merritts' conduct.

With regard to the first of the essential elements of Mr. Hühnerjäger's claim that an "instrumentality of interstate commerce" was used in some phase of the transaction -- the term "instrumentality of interstate commerce" means, for example, the use of the mails or the telephone. It is not necessary, however, that any misrepresentation or omission occur during the use of the mail or the telephone. What

is required is that the mails or the telephone be used in some phase of the transaction, but it need not be that part of the transaction in which the fraud occurs. In other words, it is not necessary that the misrepresentation be communicated by telephone or by mail, only that the telephone or mails be used at some stage of the negotiations.

COUNTERCLAIM -- "MISREPRESENTATION" of "MATERIAL FACT"

The second essential element Mr. Hühnerjäger must establish is that the Merritts conducted themselves in a manner prohibited by Rule 10b-5 and Section 4224a. Included in the list of prohibited acts in these laws is the making of any untrue statement of material fact, or the omission of a statement of a material fact, which would tend to mislead the prospective buyer or seller of securities.

In order to establish this element of his claim, therefore, Mr. Hühnerjäger must prove:

(1) That the Merritts made one or more misrepresentations of fact as alleged or omitted to state facts which would be necessary to make other statements by the Merritts not misleading to Mr. Hühnerjäger; and

(2) That the misrepresentation or omission involved "material" facts.

A "misrepresentation" is a statement that is not true.

A "material" fact or omission is a fact or omission relating to a matter that would be of some importance or significance in the decision making process of a reasonable investor, rather than simply a minor or trivial detail.

In considering the statements that Mr. Hühnerjäger alleges the Merritts expressed, you must distinguish between statements of fact and statements of opinion. In general, misrepresentations or omissions must relate to facts that either exist at the

time or before the time that the statement is made. Opinions about events that may or may not occur in the future generally do not constitute misrepresentations or omissions because they are not statements of fact. Statements about a company's present or past financial stability are considered expressions of fact. Statements about the prospects for a company's growth are considered expressions of opinion.

Mr. Hühnerjäger may not recover on his counterclaim based on the Merritts' expression of their opinion, unless he can prove that the Merritts did not believe that the opinion they expressed was true or unless he can show that the opinion was unfounded or that the Merritts made the statement recklessly or with the intent to mislead.

COUNTERCLAIM – KNOWLEDGE

Mr. Hühnerjäger, in order to recover on his counterclaim, must show that the Merritts acted knowingly, that is, with a mental state embracing intent to deceive, manipulate, or defraud. In order to establish this element, Mr. Hühnerjäger must prove by a preponderance of the evidence that the Merritts stated material facts which they knew to be false; or made statements with reckless disregard for their truth or falsity; or knew of the existence of material facts which were not disclosed and they should have realized their significance in the making of an investment decision; or knew of the existence of material facts which were not disclosed although they knew that knowledge of those facts would be necessary to make their other statements not misleading.

COUNTERCLAIM – RELIANCE

Mr. Hühnerjäger must prove that he relied upon the alleged misrepresentations or omissions and that he was justified in doing so.

In the case of misrepresentations, it must be proved that Mr. Hühnerjäger in fact relied upon the false statements. In other words; if you find that Mr. Hühnerjäger would have engaged in the transaction anyway, and that the misrepresentation had no effect upon his decision, then there was no reliance and there can be no recovery. Further, Mr. Hühnerjäger must prove that his reliance was justified; that he did not intentionally close his eyes and refuse to investigate, concerning the circumstances in disregard of a risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.

In the case of omissions or non-disclosures of material facts, if an omission is proved, then the element of reliance on the part of Mr. Hühnerjäger may be presumed. The law infers that Mr. Hühnerjäger would have relied upon the facts which are shown to be material and intentionally withheld. The Merritts, however, may rebut this presumption if they are able to prove, by a preponderance of the evidence, that even if the material facts had been disclosed, Mr. Hühnerjäger's decision as to the transaction would not have been different from what it was.

COUNTERCLAIM – DAMAGES

Mr. Hühnerjäger must prove that he suffered injury or damage as a proximate result of the misrepresentations or omissions of the Merritts. For damage to be the proximate result of a misrepresentation or omission, it must be shown that,

except for the misrepresentation or omission, such damage would not have occurred.

If you find for Mr. Hühnerjäger on his claim, then you will consider the issue of the amount of money damages to be awarded to Mr. Hühnerjäger. In that respect you should award to Mr. Hühnerjäger an amount of money shown by a preponderance of the evidence to be fair and adequate compensation for such loss or damage as proximately resulted from the Merritts' wrongful conduct.

Mr. Hühnerjäger can only recover for losses that naturally and directly followed from unlawful conduct by the Merritts. Thus, at the point where a reasonable person would have realized that he was suffering losses as a result of the Merritts' conduct, Mr. Hühnerjäger is required to take reasonable steps to limit his losses and protect himself from further injury. He cannot recover for losses suffered after the point at which he could have prevented those losses.

In this case, you must determine whether the facts show that a reasonable person in Mr. Hühnerjäger's position should have been alerted to the untruthfulness of representations previously made to him. The point at which he was alerted or should have realized what was occurring is the point at which you should cut off any further damages to him.

DAMAGES

I will now instruct you on some general matters regarding any award of damages that you find is required under the law as I have described it to you. Again, my instructing you on damages issues should not be viewed by you as any indication of the Court's view as to the merits of plaintiffs' claims. Rather, these instructions are

for your use only in the event you find that the plaintiffs are entitled to any award of damages.

DAMAGES FOR MULTIPLE CLAIMS

As you know, you have been instructed on a number of items or elements of damages under more than one theory of recovery. You may award damages to the plaintiffs for each item or element of damages which they have proven under the instructions I have given you, but you should be careful not to award damages under one theory of recovery which duplicates damages awarded under another theory of recovery. In other words, you should not award compensatory damages twice for the same injury. Any award of damages must in all respects be fair and reasonable in light of all the evidence that you find worthy of belief.

DAMAGES -- AMOUNT OF DAMAGES

You must be guided by the amount of loss which was actually incurred by plaintiffs and not by any feelings of sympathy, prejudice, or a desire to help the plaintiffs. It is never the purpose of compensatory damages to punish a defendant or to reward a plaintiff. Plaintiffs, furthermore, may not recover for any claimed injuries "which are contingent, speculative, or merely possible."

DAMAGES -- PUNITIVE DAMAGES

In this case, the plaintiffs are also seeking punitive damages from the defendant. The fact that I instruct you regarding the standards for an award of punitive damages should not be viewed by you as any indication of the Court's assessment of the merits of this claim. These instructions are given only for your guidance in

determining whether you feel that an award of punitive damages is appropriate.

Punitive damages differ from compensatory damages in that punitive damages are awarded not to compensate plaintiffs for any injury they may have suffered, but instead to punish the defendant for their conduct and to deter the defendant and others from acting in the same way. You may not consider punitive damages unless you find that plaintiffs are entitled to compensatory damages from the defendant, and you further find that defendant's conduct was shocking under the standard provided below.

The awarding of punitive damages is within your discretion -- you are not required to award them. Punitive damages are never recoverable as a matter of legal right. Punitive damages may be awarded only when the liability of the defendant for actual damages has been established. You must remember that whether punitive damages will be allowed and, if so, in what amount, is entirely within the discretion of the jury. In determining the amount of punitive damages to award, if any, you must consider the financial condition of the defendant. You may not award punitive damages unless the defendant is able to pay for such damages.

Defendant AMS is a corporation. Before you award punitive damages against AMS, you must determine whether the allegedly malicious and wanton act which supports punitive damages was committed by an officer or director of AMS, or by someone acting under their direction.

You may only award punitive damages on a proper showing that the alleged acts of the defendant are more than simply wrongful or unlawful. In order to

recover an award for punitive damages, the plaintiffs must persuade you by a preponderance of the evidence that the defendant's conduct was motivated by personal ill will toward the plaintiffs, or that the defendant's conduct showed a reckless or wanton disregard of the plaintiffs' rights. An act is reckless or wanton if it is done in such a manner, and under such circumstances, as to reflect utter disregard for the potential consequences of the act on the rights of others.

At this stage of the proceeding, you are to determine whether plaintiffs are entitled to the award of punitive damages. If you find that plaintiffs are entitled to an award of punitive damages, you inquiry ends at this point. You are not to address the amount of those damages.

DAMAGES -- NOMINAL DAMAGES

If you find, after considering all the evidence presented, that the defendant violated the plaintiffs' rights, but that the plaintiffs suffered no injury as a result of this violation, you may award the plaintiffs "nominal damages." Nominal damages are awarded as recognition that the plaintiffs' rights have been violated, without any resulting financial damage. You may also award nominal damages if, upon finding that some injury resulted from a given unlawful act, you find that you are unable to compute monetary damages except by engaging in pure speculation and guessing. You may not award both nominal and compensatory damages if you find defendant liable; either plaintiffs were injured, in which case you must award compensatory damages, or else plaintiffs were not measurably damaged, in which case you may award nominal damages. Nominal damages may not be awarded for more than a

token sum.

CONCLUSION

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A copy of this charge will go with you into the jury room for your use.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room.

Each of the interrogatories or questions on the special verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer, signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case other than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

The verdict you render must represent the considered judgment of each

juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with the other jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember, at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

DATED at Rutland, in the District of Vermont,
this 2nd day of December, 1998.

William K. Sessions III
United States District Court Judge