ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now it is my duty to give you the instructions of the Court as to the applicable law and your two general duties as the jury on this case.

Your first duty is to consider and decide the factual issues of this case. You are the sole and exclusive judges of the facts. You weigh the evidence, you determine the credibility or believability of the witnesses, you resolve any conflicts there may be in the evidence, and you draw any reasonable inferences or conclusions that you believe are justified by the facts as you find them. In a moment, I will define the word "evidence" and instruct you on how to assess it, including how to judge whether the witnesses have been honest and should be believed.

Your second duty is to apply the law that I give you to the facts. Do not single out one instruction alone, but consider the instructions as a whole. You should not be concerned with whether you agree with any instruction given by the Court. You may have a different opinion as to what the law ought to be, but it would be a violation of your sworn duty as jurors to base your verdict on any version of the law other than what is contained in the instructions given by the Court.

The lawyers may have referred to some of the governing rules of law in their argument. However, if you find any differences between the law as stated by the lawyers and the law as stated by me in these instructions, you must follow my instructions. It is the lawyers' job to point out the things that are most significant or most helpful to their side of the case. But remember that the statements and arguments made by the lawyers are not evidence in this case.

In addition, nothing I say in these instructions should 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; rather, that job is yours alone.

You must perform your duty as jurors with complete fairness and impartiality. You should consider the evidence carefully and without sympathy, bias or prejudice for or against any party. All parties expect that you will diligently examine all of the evidence, follow the law as it is now being given to you, and reach a just verdict regardless of the consequences

BURDEN OF PROOF — PREPONDERANCE OF EVIDENCE

In this civil case, the [Plaintiff/Defendant] has the burden of proving each essential element of [his/her/its] [claim/counterclaim] by a preponderance of the evidence. The party who has the burden must present the more convincing evidence.

To prove an element by a preponderance of the evidence simply means to prove that something is more likely than not. In other words, in light of the evidence and the law, do you believe that each element of [his/her/its] [claim/counterclaim] is more likely true than not? If so, you should decide in favor of [Plaintiff/Defendant]. If not, or if the evidence is equally balanced, then [Plaintiff/Defendant] has not carried [his/her/its] burden of proof on that element.

Stated another way, a preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, all the relevant exhibits received in evidence, regardless of who may have produced them, and any stipulations the parties may have entered into.

BURDEN OF PROOF — CLEAR AND CONVINCING EVIDENCE

To prove [his/her/its] claim of [nature of claim], the [Plaintiff/Defendant] in this case must prove [his/her/its] claim by clear and convincing evidence. [This is a different standard than the preponderance of evidence standard that you will use in evaluating the other claims.]

Clear and convincing evidence requires that the party asserting the claim convince you that the existence of each contested fact or element is highly probable, rather than merely more probable than not. To satisfy the clear and convincing evidence standard, there must be evidence indicating that the thing to be proven is highly probable. Clear and convincing evidence is a very demanding standard, requiring less than evidence beyond a reasonable doubt, but more than a preponderance of the evidence.

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. The credibility of the witnesses, and the weight to give their testimony, is up to you. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account, among other things, the following:

- the opportunity and ability of the witness to hear or know the things testified to;
- the witness's memory;
- the witness's manner while testifying;
- the witness's interest in the outcome of the case, and any bias or prejudice;
- whether other evidence contradicts the witness's testimony;
- the reasonableness of the witness's testimony in light of all of the evidence; and
- any other factors that bear on believability.

Inconsistencies or conflicts in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit that testimony. Two or more persons witnessing an event may see or hear it differently. In weighing the effect of inconsistencies or conflicts in the testimony, you should consider whether it involves a matter of importance or an unimportant detail, and whether it results from innocent error or intentional falsehood.

EXPERT WITNESSES

You have heard testimony from witnesses who are known as expert witnesses. An expert witness is a person who has special knowledge, experience, training, or education about a particular subject. Because of this expertise, an expert witness may offer opinions about one or more of the issues in this case.

In considering an expert witness's testimony, you should evaluate his or her credibility and statements just as you would with any other witness, giving the testimony as much weight as you think it deserves. You should also evaluate whether the expert's opinion is supported by the other evidence in the case, whether the reasons given by the expert in support of his or her opinion make sense, and whether the opinion is supported by the expert's knowledge, experience, training, or education.

You are not required to give the testimony of an expert any greater weight than you believe it deserves just because the witness has been referred to as an expert.

CORPORATION, ENTITY, OR INSTITUTION AS A PARTY

As you know, some of the parties in this case are [corporations/entities/institutions]. This should not affect how you view the case, however. You should consider the case to be an action between persons. A [corporation/entity/institution] is entitled to the same fair treatment and consideration that you would give a private individual. All persons, including [corporations/entities/institutions] are equal before the law.

CAUSATION

The next element is causation. The [Plaintiff/Defendant] must prove two things.[1] First, that but for [Plaintiff's/Defendant's] failure to act with reasonable care, the harm would not have occurred.

Second, that [Plaintiff's/Defendant's] conduct was a "proximate cause" of the harm. Proximate cause is a cause that results in an injury which flows directly and continuously from [Plaintiff's/Defendant's] conduct.

This does not mean that [Plaintiff's/Defendant's] conduct must be the only cause. On the contrary, many facts or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage. In such a case, each may be a proximate cause.[2]

[1] Recent Vermont cases have made it clear that the party must show both "but for" causation and "proximate" causation. *Collins v. Thomas*, 2007 VT 92, ¶ 8; *Harrington v. Rheaume*, 729-10-09 Rdcv, at 4 (Teachout, J. July 9, 2012). The court in *Collins* cited language from an earlier case that defined proximate cause as "all the injurious consequences that flow [from the defendant's negligence] until diverted by the intervention of some efficient cause that makes the injury its own." *Collins*, 2007 VT 92, ¶ 8. We find this language too legalistic and have opted for the more plain "directly" and "continuously."

[2] Vermont Supreme Court cases appear to suggest that it would be error to fail to instruct the jury, if requested, that there can be more than one proximate case. *Chater v. Central Vermont Hospital*, 155 Vt. 230, 236 (1990); *Mobbs v. Cent. Vt. Ry., Inc.*, 155 Vt. 210, 219-20 (1990).

BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Each party claims that the other party breached a duty of good faith and fair dealing. Parties in a contractual relationship have an obligation to treat each other in good faith and deal with each other fairly. This is known as the covenant of good faith and fair dealing and it is implied in every contract. You need not address this claim if you find that the parties did not enter into an agreement.

The definition of the "covenant of good faith and fair dealing" is broad.[1] It is an underlying principle implied in every contract that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement.[2] The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistently with the justified expectations of the other party.[3] The factual question in this case is whether each party acted in good faith and dealt fairly and consistently with the justified expectations of the other in the performance of their agreement.[4]

The covenant of good faith and fair dealing protects against conduct that violates community standards of decency, fairness, or reasonableness.[5] A complete list of the types of bad faith conduct is impossible, but the following types of conduct are among those which may violate the covenant: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.[6] Bad faith may also be found in harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, contractual dealing which is truthful but unfair, such as taking advantage of the needy circumstances of the other party, or an abuse of a power to determine compliance or to terminate the contract.[7] The covenant may be breached even though the actor believes [his/her/its] conduct is justified.

A party asserting this claim does not need to demonstrate a breach of the underlying contract to succeed on [his/her/its] claim for breach of the implied covenant of good faith and fair dealing.[8] However, the party must identify conduct separate from that which breached the underlying contract to form the basis for the breach of the implied covenant.[9] Stated differently, the party

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[1] See *Carmichael v. Adirondack Bottled Gas Corp.*, 161 Vt. 200, 208-09 (1993) (citing Restatement (Second) of Contracts § 205).

[2] *Id.* (citing *Shaw v. E.I. DuPont de Nemours & Co.*, 126 Vt. 206, 209 (1966)).

[3] *Id.* (quoting Restatement (Second) of Contracts § 205 comment a).

[4] *Id.*

[5] *Id.* (quoting Restatement (Second) of Contracts § 205 comment a).

[6] *Id.* at 1217 (quoting Restatement (Second) of Contracts § 205 comment d).

[7] *Id.* (quoting Restatement (Second) of Contracts § 205 comment e).

[8] *Id.* at 1216 (affirming jury award for breach of the implied contract of good faith and fair dealing even though no breach of express term in the underlying contract was alleged).

[9] See *Langlois v. Town of Proctor*, 2014 VT 130, ¶ 59; see also *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, ¶ 54 n.5.

cannot argue that the conduct that breached the underlying contract is the same conduct that breached the implied covenant of good faith and fair dealing.[10]

It is your obligation as jurors to judge the alleged bad faith conduct to determine whether either party violated the covenant of good faith and fair dealing. You should consider the totality of the facts and circumstances, including the terms of any agreement between the parties in making this determination.

If you find that the other party has breached the implied covenant of good faith and fair dealing, you may award the party asserting this claim damages. Punitive damages are available for breach of the implied covenant of good faith if the party can show that the other party's conduct demonstrates actual malice.[11]

[10] *Langlois*, 2014 VT 130, ¶ 59.

[11] *Monahan*, 2005 VT 110, ¶ 54 n.5. The court should give a separate instruction for punitive damages if warranted.

TORTIOUS INTERFERENCE WITH [CONTRACT/PROSPECTIVE BUSINESS RELATIONSHIP/PROSPECTIVE ECONOMIC ADVANTAGE]

[Plaintiff] is making a claim for tortious interference with a [contract/prospective business relationship/prospective economic advantage]. To prevail on this claim, [Plaintiff] must prove by a preponderance of the evidence that:

- [Plaintiff] had a [contract/business relationship/economic advantage] with [Third Party];[1]
- [Defendant] had knowledge of that [contract/business relationship/economic advantage];
- [Defendant] acted intentionally and improperly to interfere with that [contract/business relationship/economic advantage];
- [Plaintiff] suffered actual damages; and
- [Defendant's] interference was the cause of [Plaintiff's] damages.[2]

[First, in determining whether [Plaintiff] had a contract with [Third Party], both parties must have intended to be bound by an agreement. A contract is only formed when both parties had a "meeting of minds" and intended to enter into the same contract.[3] In order to determine what the parties intended, you may consider the words and actions of both parties.[4] A contract does not need to be written,[5] but if a written contract exists, you may presume that a clearly written contract reflects the parties' intent.[6]]

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[1] If there is any ambiguity regarding the independence of the third party from either the plaintiff or the defendant, add the following to the explanation of the first element: "The claim must involve three distinct parties – a plaintiff, a defendant, and a third party with whom the plaintiff wishes to deal." *Skaskiw v. Vermont Agency of Agriculture*, 2014 VT 133, ¶ 24.

[2] *Ernst v. Kauffman*, 50 F. Supp. 553, 569 (D. Vt. 2014), *appeal dismissed on other grounds*, 814 F. 3d 116 (2d Cir. 2016); *Skaskiw*, 2014 VT 133, ¶ 24.

[3] *Evarts v. Forte*, 135 Vt. 306, 309 (1977).

[4] *Bixler v. Bullard*, 172 Vt. 53, 58 (2001).

[5] *Catamount Slate Prod., Inc. v. Sheldon*, 2003 VT 112, ¶¶ 15-17.

[6] *Kelly v. Provident Life & Acc. Ins. Co.*, 695 F. Supp. 2d 149, 153 (D. Vt. 2010) (citing *State v. Philip Morris USA, Inc.*, 2008 VT 11).

Many tortious interference claims involve non-competition agreements with former employees. In such cases, consideration should be given to adding an instruction: [A non-competition agreement is valid only to the extent it protects an employer's legitimate business interests.] *Summits 7, Inc. v. Kelly*, 2005 VT 97, ¶ 7.

[First, in determining whether [Plaintiff] had a prospective business relationship or economic advantage with [Third Party], there must have existed a reasonable probability that a business or contractual relationship would have arisen, if not for the conduct of [Defendant].[7]]

Next, you must find that [Defendant] had actual knowledge of the [contract/business relationship/economic advantage].[8]

You must also find that [Defendant] acted intentionally to interfere. Intent to interfere exists if [Defendant] acted for the primary purpose of interfering with the [contract/relationship/ advantage], or if [Defendant] desired to interfere even if [he/she/it] acted with some other, additional purpose. Intent also exists if [Defendant] did not act with a desire to interfere but knew that interference would be substantially certain to occur as a result of [his/her/its] actions.[9]

You must also find that [Defendant's] interference was improper. To do so, [Plaintiff] must show that [Defendant] acted either: with the purpose to harm [Plaintiff]; or by means that were dishonest, unfair, or wrongful. You should consider: the nature of [Defendant's] conduct; [his/her/its] motives; the relations of the parties; the interests of [Plaintiff] with which the conduct interferes; the social interests in protecting [Defendant's] freedom of action and [Third Party's] rights; and the proximity or remoteness of [Defendant's] conduct to the interference.[10]

Finally, you must find that [Plaintiff] suffered actual damages and that these damages were caused by [Defendant's] interference. These concepts are explained [elsewhere].

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[7] *Ernst*, 50 F. Supp. at 569; *J.A. Morrissey, Inc. v. Smekjal*, 2010 VT 66, ¶ 22; *Mansfield Heliflight, Inc. v. Freestream Airtcraft USA, Ltd.*, 2017 WL 3393819, at *4 (Aug. 4, 2017, D. Vt.) (citing *Gifford v. Sun Data, Inc.*, 165 Vt. 161 (Vt. 1996)).

[8] *Ernst*, 50 F. Supp. at 569; *Williams v. Chittenden Trust Co.*, 145 Vt. 76, 81 (1984).

[9] *Williams*, 145 Vt. at 80-81 (citing Restatement (Second) of Torts § 766 comment j (1979).

[10] *In re Montagne*, 425 B.R. 111, 134-35 (Bkrptcy. D. Vt. 2009); *Howard Opera House Assoc. v. Urban Outfitters, Inc.*, 166 F. Supp. 2d 917, 930 (D. Vt. 2001) *aff'd*, 322 F. 3d 125 (2003); *Smekjal*, 2010 VT 66, ¶ 21.

Again, in a non-competition scenario, consideration should be given to adding an instruction: [A competitor is free to offer an employee more money to work for the competitor, but a competitor engaged in the same business as Plaintiff would not be justified in engaging the employee to work for the competitor in an activity that would mean violation of the agreement not to compete.] Restatement (Second) of Torts, §768 comment i.

FAILURE OF CONSIDERATION

[Defendant] asserts the defense of failure of consideration. Failure of consideration may be total or partial.

There is a total failure of consideration when a party has failed or refused to perform a substantial part of his or her contractual obligation thereby defeating the purpose of the contract. A total failure of consideration excuses the other party from his or her own duty to perform under the contract.

A partial failure of consideration exists when the failure to perform is not substantial and sufficient consideration remains to support the contract. When there is a partial failure of consideration, the other party is not excused from performance of the contract but is, instead, entitled to damages.[1]

[1] See *Kneebinding, Inc. v. Howell*, 2014 VT 51, ¶ 16; *Northern Aircraft, Inc. v. Reed*, 154 Vt. 36, 44 (Vt. 1990); *Stone v. Peake*, 16 Vt. 213, 215 (Vt. 1844); *Restatement (Second) of Contracts*, § 237 (1981).

ILLEGALITY

[Defendant] asserts the defense of illegality.[1] If the formation or performance of a contract is illegal then the contract is unenforceable. [Defendant] asserts that [choose one]:

- [Plaintiff] seeks to require [Defendant] to perform under the contract by [illegal alleged conduct]; OR
- Plaintiff engaged in [illegal alleged conduct] in performing under the contract; OR
- [Illegal alleged conduct] occurred in the formation of the contract.

If you find that Defendant has proven [illegal alleged conduct], then I instruct you that such conduct is illegal and therefore the contract is unenforceable.[2]

[1] This instruction is only given if the judge determines that the alleged conduct is illegal. It is then for the jury to find the facts, i.e., whether the plaintiff sought to require the alleged conduct or whether the alleged conduct occurred.

[2] *My Sister's Place v. City of Burlington*, 139 Vt. 602, 613 (1981) (A "contract whose formation or performance is illegal may be held void and unenforceable, but misconduct unrelated to the claim to which it is asserted as a defense will not invoke the doctrine."); see also *Pierce v. Kibbee*, 51 Vt. 559, 561 (1878) (illegal contracts "are void, and courts will neither aid in enforcing them, nor in the recovery of money paid in the performance of them"). A contract is not "illegal and void as being against public policy unless it [can] be said that [it] is injurious to the interests of the public or contravenes some established interest of society." *State v. Barnett*, 110 Vt. 221, 232 (1939); accord *Maska U.S., Inc. v. Kansa Gen. Ins. Co.*, 198 F.3d 74, 80 (2d Cir. 1999).

FRUSTRATION OF PURPOSE[1]

[Defendant] claims [he/she/it] should be excused from doing what [he/she/it] promised to do in the contract because [intervening event] frustrated the purpose of the contract. To prove this defense, [Defendant] must show:

- That [intervening event] occurred after the contract was formed;
- That at the time the contract was formed, it was a basic assumption of the parties that [intervening event] would not occur; and
- That the main reason Defendant entered into the contract is undermined by the occurrence of [intervening event].[2]

[1] The Vermont Supreme Court has not articulated the elements of the affirmative defense of frustration of purpose, but it has recognized the existence of such a defense in dicta. See *SKI, Ltd. v. Mountainside Properties, Inc.*, 2015 VT 33, ¶ 36, n. 9. This instruction is based on the Restatement (Second) of Contracts, which the Court has adopted in other contexts. See, e.g., *EverBank v. Marini*, 2015 VT 131, ¶¶ 22-25. Note also that "[a] party who created the circumstances that brought about the impossibility or frustration of purpose cannot raise these doctrines as defenses." *SKI, Ltd.*, 198 Vt. at 398 n.9.

[2] Restatement (Second) of Contracts § 265.

IMPRACTICABILITY/IMPOSSIBILITY OF PERFORMANCE[1]

[Defendant] claims [he/she/it] should be excused from doing what [he/she/it] promised to do in the contract because [event/fact] made [Defendant's] compliance with [his/her/its] promise impracticable or impossible. To prove this defense, [Defendant] must show:

- That [Defendant] had no reason to know of, or to anticipate [fact/event] at the time the parties agreed to the contract;
- That at the time the contract was formed, it was a basic assumption of the parties that [fact/event] did not and would not exist; and
- That requiring [Defendant] to fulfil [his/her/its] promise in the contract would be impossible or cause [him/her/it] extreme and unreasonable difficulty, expense, injury, or loss.[2]

[1] "A party who created the circumstances that brought about the impossibility or frustration of purpose cannot raise these doctrines as defenses." *SKI, Ltd. v. Mountainside Properties, Inc.*, 2015 VT 33, ¶ 36, n. 9.

[2] *Record v. Kempe*, 2007 VT 39, ¶¶ 17-18; *Agway, Inc. v. Marotti*, 149 Vt. 191, 193 (1988). See also Restatement (Second) of Contracts §§ 261, 266.

DURESS[1]

[Defendant] claims that the contract is not enforceable because [Defendant] entered into the contract under duress. To prove this defense, [Defendant] must show:

- That, in forming the contract, [Plaintiff] made a threat to do something that [Plaintiff] was not legally permitted to do;
- That [Defendant] only agreed to the contract because, in light of [Plaintiff's] threat, [he/she/it] believed [he/she/it] had no reasonable alternative; and
- The [Defendant] had no reasonable alternative to agreeing to the contract.[2]

[1] This instruction is for duress by improper threat, which makes a contract voidable and is the more common type of duress defense. (Note that while courts often use the word "voidable," we have substituted the term "not enforceable" for ease of understanding.) Note that the third prong (that the party had no reasonable alternative) is an objective standard.

Vermont also recognizes the defense of duress by physical compulsion, which renders a contract void. See *EverBank v. Marini*, 2015 VT 131, ¶¶ 18-20 (discussing the practical ramifications of the difference between void and voidable contracts). Vermont also appears to recognize the tort of economic duress. See *Ben & Jerry's Homemade, Inc. v. La Soul, Inc.*, 983 F. Supp. 504, 507 (D. Vt. 1997) ("In Vermont, to prevail on the issue of economic duress (1) the coercion must be directed toward economic interests; (2) one side must have involuntarily accepted the terms of another; (3) the coercive circumstances must have been the result of the acts of the opposite party; and (4) there must be some threat to do something harmful which the threatening party has no legal right to do." (citing *Kokoletsos v. Frank Babcock & Son, Inc.*, 149 Vt. 33, 36 (1987)).

[2] *EverBank*, 2015 VT 131, ¶¶ 21-27; see also Restatement (Second) of Contracts§§ 174–76.

FRAUDULENT INDUCEMENT

[Defendant] claims that the contract is not enforceable because [Plaintiff] fraudulently induced [him/her/it] into agreeing to the contract. To prove this defense, [Defendant] must show:

- That before or at the time the parties were agreeing to the contract, [Plaintiff] intentionally made a false statement about an existing fact;
- That [Plaintiff's] false statement went to the core or main point of the agreement between the parties, such that it substantially contributed to [Defendant's] decision to agree to the contract;
- That [Plaintiff] knew that the statement [he/she/it] made was false;
- That [Defendant] did not know, and could not have reasonably known, the truth about the fact;
- That [Defendant] relied on [Plaintiff's] false statement; and
- That [Defendant] was harmed because [he/she/it] relied on [Plaintiff's] false statement. [1]

[1] *Sarvis v. Vermont State Colleges*, 172 Vt. 76, 80 (2001) ("It is well established that a party induced into a contract by fraud or misrepresentation can rescind the contract and avoid liability for any breach thereon."); *Union Bank v. Jones*, 138 Vt. 115, 121 (1980). See also *Catamount Radiology, P.C. v. Bailey*, No. 1:14-CV-213, 2015 WL 5089104, at *2 (D. Vt. Aug. 27, 2015); *Ben & Jerry's Homemade, Inc. v. La Soul, Inc.*, 983 F. Supp. 504, 506 (D. Vt. 1997) (defining fraudulent inducement as: "an intentional misrepresentation of fact affecting the essence of the transaction, false when made and known to be false by the maker, not open to the defrauded party's knowledge, and relied upon by the defrauded party to its damage").

LACHES

[Defendant] claims [Plaintiff] is barred from recovery under the doctrine of laches. Laches is a defense that bars relief when a party fails to assert a right for an unreasonably long and unexplained period of time. In addition to proving that [Plaintiff] failed to assert a right for a long and unexplained period of time, [Defendant] bears the burden to prove that [he/she/it] suffered harm because of the delay. In other words, laches does not arise from delay alone, but from delay that causes harm to another.[1]

[1] *In re McCarty*, 2013 VT 47, ¶15; *Comings & Livingston v. Powell*, 97 Vt. 286 (1923).

WRONGFUL DEATH - GENERAL

When the death of a person is caused by a wrongful act of another, the deceased person's next of kin is entitled to compensation from the responsible party.[1] That is the type of claim made in this case. [Plaintiff] represents the next of kin. If you find for [Plaintiff], you should consider the following in awarding damages for this claim:

[Plaintiff] should receive compensation for reasonable medical expenses and reasonable funeral expenses as a result of [Decedent's] injury and death.[2]

[Plaintiff] should receive compensation for the loss of [Decedent's] income that would have benefited [the next of kin], and other economic support and services provided by [Decedent] that would have benefited [the next of kin] to the present and in the future if [Decedent] had not died.[3]

[Modify as necessary due to Decedent's status as child or adult, and next of kin's status as spouse, child, or parent.] [Plaintiff] should receive compensation for [the loss of love and companionship;] [care, nurture, and protection;] [the loss of the love and companionship of a child;] and [the destruction and/or loss of the parent-child relationship] that [the next of kin] would have enjoyed to the present and in the future if [Decedent] had not died as a result of the events described at trial.[4] [They also should receive compensation for the grief and mental anguish they have suffered to the present and probably will suffer in the future as a result of [Decedent's] death.][5]

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[1] Vermont's wrongful death statute, 14 V.S.A. §1492(b), limits recovery to the decedent's spouse and "next of kin." "Next of kin" is defined as in the state's descent laws. See *Mobbs v. Central Vt. Ry.*, 150 Vt. 311, 315 (1988). Because "next of kin" carries the same definition in wrongful death actions as in the descent laws, if the decedent leaves behind a spouse or children, those individuals, not the decedent's parents, recover. See *Quesnel v. Town of Middlebury*, 167 Vt. 252 (1997) (holding such limitation does not violate rights of due process or equal protection, for parents of adult decedent leaving spouse and child). *See generally* 14 V.S.A. §§ 1491-92.

[2] *Dubaniewicz v. Houman*, 2006 VT 99, ¶ 18 (holding funeral and burial expenses compensable as pecuniary injuries under Vermont's wrongful death statute). *See generally* 14 V.S.A. §§ 1491-92.

[3] *D'Angelo v. Rutland Ry. Co.*, 100 Vt. 135, 136-37 (1927); *Lazelle v. Town of Newfane*, 70 Vt. 440, 444 (1898) (both allowing loss of financial support as damages). "Other economic support and services" generally includes household labor. See *Woodcock's Adm'r v. Hallock*, 98 Vt. 284, 292 (1925) ("The word 'pecuniary' as here used does not imply that loss of money, alone, will satisfy the statute; services rendered and other benefits conferred that have a money value are within the legal sense of the term."). Specific categories of support and services should be named here, if such evidence is presented at trial. Also, the next of kin are entitled to the decedent's lost income that would have benefited them. This necessarily requires the jury to consider how much of a decedent's net income would have flowed to the next of kin, rather than to the decedent or elsewhere. *See generally* 14 V.S.A. §§ 1491-92.

[4] See *Dubaniewicz*, 2006 VT 99, ¶¶ 21-22; *Mears v. Colvin*, 171 Vt. 655, 658-59 (2000); *Clymer v. Webster*, 156 Vt. 614, 629–30 (1991); *Hartnett v. Union Mut. Fire Ins.*, 153 Vt. 152, 156 (1989); *Mobbs*, 150 Vt. at 315 (1988). See generally 14 V.S.A. §§ 1491-92.

[5] In *Hartnett*, 153 Vt. 152, the Vermont Supreme Court affirmed an award of grief and anguish damages to the mother of minor child decedents. The court has not yet expressly ruled on the availability of "grief and anguish" damages in the context of other wrongful death claimants and decedents. Therefore, judges are free to adopt the position they believe the Vermont Supreme Court is most likely to endorse. Trial court decisions allowing recovery for grief and anguish damages include: *Allen v. SVMC, Inc.*, 2011 Vt. Super. LEXIS 62 (Hayes, J., Vt. Super. Ct., Nov. 28, 2011); *Culnane v. Ultramar Energy, Inc.*, 13-1-05 Bncv (Suntag, J., Vt. Super .Ct., Mar. 19, 2009); *Nielsen v. Spaulding*, S1209-93 CnC (Bryan, J., Vt. Super. CT., Jan. 11, 1996). Trial court decisions denying such damages

There is no exact formula to calculate this compensation. You should make sure your calculation is fair in light of the evidence. You may consider the physical, emotional, and psychological relationship between [Decedent] and [the next of kin], the living arrangements of the family, the harmony of family relations, and their shared interests and activities.

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include: *Leach v. FAHC, Inc.*, 2004 Vt. Super. LEXIS 40 at 3 (Norton, J., Vt. Super. Ct., Nov.1, 2004); *Estate of Kennison v. Central Vt. Med. Center*, 616-9-08 Wncv (Crawford, J., Vt. Super. Ct., Oct. 26, 2010); *Bargeil v. Spring Lake Ranch*, 807-10-09 Rdcv (Teachout, J., Vt. Super. Ct., Dec. 15, 2010) (Entry Re: Motion); *Murphy v. Sentry Ins.*, S0653-06 CnC, at 4 (Toor, J., Vt. Super. Ct., Nov. 28, 2011). See generally, Joselson, Rodgers & Kramer, *Opposing Defense Motions to Exclude Evidence of Grief and Anguish in Wrongful Death Cases*, 39 Vt. L. Rev. 1005 (Spring 2015) (arguing such damages should be available in all wrongful death actions).

WRONGFUL DEATH -- SURVIVAL ACTION

[Plaintiff] represents [Decedent's] estate and is entitled to payment for [list as applicable]: conscious pain and suffering of [Decedent] from injury until death; medical expenses related to [Decedent's] injury and death; and lost income for the period from the date of [Decedent's] injury until [his/her] death.[1]

[1] A surviving plaintiff has a right to recover damages suffered by the decedent in the time between injury and death, including, for example, damages for medical bills and conscious pain and suffering. See *Whitchurch v. Perry*, 137 Vt. 464, 468-69 (1979). See generally 14 V.S.A. §§1451-53.

COMPARATIVE NEGLIGENCE

In this case, [Defendant] asserts the affirmative defense of comparative negligence. That is, [Defendant] asserts that [Plaintiff's] negligence was a cause of [his/her/its] injury. The law requires that [Plaintiff] act with reasonable care for [his/her/its] own safety and well-being.

If you find that [Defendant] was negligent and that the [Defendant's] negligence contributed to [Plaintiff's] injury, you must next decide whether [Defendant] has met [his/her/its] burden of proving by a preponderance of the evidence the following elements of its comparative negligence defense:

- [Plaintiff] [himself/herself/itself] was negligent by failing to act with reasonable care for [his/her/its] own safety and well-being at the time and place in question; and
- That [Plaintiff's] negligence was a direct and proximate cause of [his/her/its] injury.

As to the first element, [Plaintiff] had a duty to act with reasonable care for [his/her/its] own safety. Reasonable care is not the greatest possible care, such as might be employed by an unusually cautious person. Rather, it is ordinary care, given all the circumstances existing at the time and place of the event. Here, [Plaintiff's] conduct must be measured against that of a reasonable [to be designated, e.g., "eighteen year-old student"].

The second element is causation. [Defendant] must prove two things. First, that but for [Plaintiff's] failure to act with reasonable care, the harm would not have occurred.

Second, that [Plaintiff's] conduct was a "proximate cause" of the harm. Proximate cause is a cause that results in an injury which flows directly and continuously from [Plaintiff's] conduct.

This does not mean that [Plaintiff's] conduct must be the only cause. On the contrary, many facts or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage. In such a case, each may be a proximate cause.

If you find that [Defendant] has satisfied [his/her/its] burden on these issues, then you must next compare any negligence attributed to [Plaintiff] with any negligence you have attributed to [Defendant]. To do so, you must assign a percentage to the negligence of [Plaintiff] on one hand, and the negligence of [Defendant] on the other. The percentages you assign must add up to 100 percent. Let me suggest two hypothetical examples:

	Example 1	Example 2
[Plaintiff]	15%	60%
[Defendant]	85%	40%
Total negligence	100%	100%

Of course, these examples are for illustrative purposes only. They do not indicate in any way how you should decide the case.

If you determine that [Plaintiff's] share of the negligence is greater than 50%, then you should return a verdict for [Defendant] and you should not go on to consider damages. If [Plaintiff's] share of the negligence is 50% or less when compared to the negligence of [Defendant], then the total damages award, if any, must be reduced by the percentage of [Plaintiff's] negligence. I will provide you with a worksheet that will help you work through these questions during your deliberations.[1]

[1] 12 V.S.A. § 1036. See *Arroyo v. Milton Academy*, No. 5:10-cv-117 (D. Vt. Feb. 1, 2012) (Reiss, J.); *Barber v. LaFromboise*, 2006 VT 77, ¶ 15;*Vermont Jury Instructions*, § 7.28 (1993).

DAMAGES GENERALLY

If you decide in favor of [Defendant], you will not consider these instructions about damages. But, if you decide for [Plaintiff], you must determine the amount of money that will compensate [him/her/it] for each item of harm that was caused by [Defendant's] conduct. This compensation is called "damages."

Please keep in mind the following general principles as you deliberate. Remember that [Plaintiff] has the burden of proving damages by a preponderance of the evidence. Damages may not be based on sympathy, speculation, or guesswork. In making your decision, you should be guided by the evidence, common sense, and your best judgment.[1]

[1] *Brueckner v. Norwich University*, 169 Vt. 118, 128–29 (1999); *Kramer v. Chabot & Sons*, 152 Vt. 53, 55 (1989); *My Sister's Place v. Burlington*, 139 Vt. 602, 612 (1981); *Melford v. S.V. Rossi Const. Co.*, 131 Vt. 219, 223, 225–26 (1972).

PERSONAL INJURY DAMAGES

Damages for [Plaintiff's] claim of [nature of claim] can fall into two different categories: economic damages and non-economic damages. Economic damages include such items as lost income and medical expenses. Non-economic damages include such items as lost enjoyment of life, mental anguish, pain and suffering, disability and disfigurement. These damages may include compensation for past harm and future harm, depending on the evidence. You must determine the total amount of [Plaintiff's] damages and place these amounts on the Special Verdict Form.

There is no precise standard for calculating these damages. Your damages determination must be just and reasonable in light of the evidence. In determining the damages that [Plaintiff] has suffered as a result of [his/her] injuries, you should consider the following items:

[Plaintiff] is entitled to damages for any earnings lost in the past, and any probable loss of ability to earn money in the future, caused by [Defendant's] conduct. When considering [Plaintiff's] future earnings, you should consider [Plaintiff's] expected working lifetime.

[Plaintiff] is entitled to damages for the reasonable cost of necessary medical care and other treatment that [he/she] has received or is likely to receive in the future, caused by [Defendant's] conduct.

[Plaintiff] is entitled to damages for any lost enjoyment of life, mental anguish, pain and suffering, disability and disfigurement caused by [Defendant's] conduct. These damages may include any pain, discomfort, fears, anxiety, humiliation, lost enjoyment of life's activities, any other mental and emotional distress, and disability and/or disfigurement suffered by [him/her] in the past, or likely to be suffered in the future.[1]

[1] 14 V.S.A. § 1492; *Mears v. Colvin*, 768 A.2d 1264, 1268–69 (2000); *Clymer v. Webster*, 156 Vt. 614, 629–30 (1991); *Mobbs v. Central Vermont Railway*, 150 Vt. 311, 315–16 (1988).

AGGRAVATION OF PRE-EXISTING CONDITION OR DISABILITY

[Plaintiff] is not entitled to damages for any condition that [he/she] had before the incident. However, if [Plaintiff] had a physical or emotional condition that was made worse by the incident, [Plaintiff] is entitled to damages for any worsening of that condition.

If you cannot separate the state of [Plaintiff's] current condition from [his/her] prior condition, then you must award damages to [Plaintiff] based upon the entire condition.

SUSCEPTIBLE PLAINTIFF

There has been evidence that [Plaintiff] was more susceptible to injury than other people would have been because of [nature of condition]. Nevertheless, you must decide the full amount of money that would reasonably and fairly compensate [Plaintiff] for all damages [he/she] suffered, even if you believe someone else might not have experienced the same [injury/injuries].[1]

[1] See *Callan v. Hackett*, 170 Vt. 609, 610 (2000) (mem.).

LIFE EXPECTANCY

In determining the amount of any future damages to award, you need to consider how long [Plaintiff] will probably live. This is called life expectancy. [The parties have agreed that the Plaintiff has a life expectancy of X years.] [There has been expert testimony about the life expectancy of the Plaintiff and you should weigh that testimony as you weigh all expert testimony, as I have previously instructed you.][1]

[1] As the first bracketed sentence provides, it is appears to be the prevailing practice in Vermont for the court to instruct the jury on life expectancy based upon mortality tables, although if the matter is subject to dispute, it will require jury determination. See also *Arroyo v. Milton Academy, et al.*, Docket No. 5:10-cv-117 (D. Vt. Feb. 1, 2012).

DUTY TO MITIGATE

A party seeking damages must make reasonable efforts to minimize or eliminate those damages. A party is not entitled to recover damages to the extent those damages could have been reduced or avoided by reasonable efforts. This is called mitigation. If you find that [Plaintiff] has failed to mitigate [his/her/its] damages, you must subtract the monetary amount of any such failure from your damages calculation.[1]

[1] *Langlois v. Town of Proctor*, 2014 VT 130, ¶ 22 ("Under the mitigation of damages doctrine – also known as the doctrine of avoidable consequences – a plaintiff may not recover for any damages that the plaintiff could have avoided or minimized through reasonable care or expenditure"); *Arroyo v. Milton Academy*, No. 5:10-cv-117 (D. Vt. Feb. 1, 2012). The burden is on the party asserting that mitigation could have been accomplished. *Cartin v. Continental Homes of New Hampshire*, 134 Vt. 362, 366 (1976).

PRESENT WORTH OF FUTURE LOSS

If you decide that [Plaintiff] is entitled future economic damages for [lost earnings/future medical expenses/lost profits/other damages], then you must determine the "present value" of those awards, because they represent payment now for a loss that will not occur until some future date. Basically, [Plaintiff] will be reimbursed in advance. To find present value, you must determine the amount of money that, if reasonably invested today, will provide [Plaintiff] with the amount of [his/her/its] future damages. [You may consider expert testimony in determining the present cash value of future economic damages.][1]

[1] *Debus v. Grand Union Stores of Vermont*, 159 Vt. 537, 542 (1993) (similar instruction is "standard" in Vermont for reducing future awards to present value); *Arroyo v. Milton Academy*, Case No. 5:10-cv-117 (D. Vt. Feb. 1, 2012).

INCOME TAXES

After you have decided the amount of damages, if any, for [Plaintiff], you must not adjust that amount further for any federal or state income taxes.[1]

[1] See *Stowell v. Simpson*, 143 Vt. 625, 630 (1983); *Derosia v. Verboom*, 169 Vt. 593, 593 (1999) (decision whether to provide such an instruction rests in discretion of court and depends upon extent to which issues concerning the effect of income tax were raised by the parties or their experts at trial.)

INSURANCE

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.[1]

[1] *Joslin v. Griffith*, 125 Vt. 104, 105-06 (1965) (reversing verdict for plaintiff due to liability insurance testimony); *Melo v. Allstate Ins. Co.*, 800 F. Supp. 2d 596 (D. Vt. 2011) ("Evidence that a plaintiff has received compensation for his injuries from insurance or any other third party collateral source is therefore inadmissible in mitigation of damages").

NOMINAL DAMAGES

If you find that [Plaintiff] is entitled to a verdict but do not find that [Plaintiff] has sustained measurable damages, then you may return a verdict in a nominal sum such as one dollar.[1]

[1] A "nominal damages" instruction is rarely used except in some cases where punitive damages are sought or statutory attorney's fees or penalties can be assessed. Nominal damages are allowed in a range of civil claims, including breach of contract, see *Doria v. Univ. of Vt.*, 156 Vt. 114, 119 (1991); *Nashef v. AADCO Medical, Inc.*, 947 F. Supp. 2d 413, 419 (D. Vt. 2013) (citing Restatement (Second) of Contracts § 346 (1981)), and in miscellaneous other civil wrongs, see *Khamnei v. Behrman*, No. 2008-342, 2009 WL 2413622 (Vt. 2009) (illegal eviction)*; John Larkin, Inc. v. Marceau*, 2008 VT 61 (trespass action)*; Roberge v. Town of Troy*, 105 Vt. 134 (1933) (town constable's failure to complete attachment), as well as in federal civil rights actions, see *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978). The Vermont Supreme Court has not yet ruled on whether nominal damages are available in negligence actions, but would likely disallow them, in light of the Restatement (Second) of Torts, §907(a) (1979) ("If actual damage is necessary to the cause of action, as in negligence, nominal damages are not awarded.").

PUNITIVE DAMAGES

Punitive damages are meant to punish a party for its clearly outrageous conduct, and to stop others from acting similarly in the future. In order to award punitive damages, you must find two things:

First, you must find that [Defendant's] wrongful conduct was outrageously reprehensible; that is, that the conduct – whether acts or failures to act – was egregious, morally deserving of blame, to a degree of outrage frequently associated with a crime.

Second, you must find that [Defendant] acted with malice. You may find malice if you find that [Defendant's] reprehensible conduct was intentional and deliberate; that is, that the conduct was the result of [Defendant's] bad motive, ill will, or personal spite or hatred toward [Plaintiff]. You may also find malice even if [Defendant's] motivation behind the intentional, outrageous conduct was to benefit [himself/herself/itself], rather than to harm [Plaintiff]. Alternatively, you may find malice if [Defendant's] wrongful conduct was not intentional, but instead was done with a reckless or wanton disregard of the substantial likelihood that it would cause egregious harm to [Plaintiff]; that is, if [Defendant] acted – or failed to act -- with conscious and deliberate disregard of a known, substantial, and intolerable risk of harm to [Plaintiff], with the knowledge that the conduct was substantially certain to result in the threatened harm.

[Where the defendant is a corporation, such as is the case here, in order to find that the corporation must pay punitive damages, you must find that the conduct justifying punitive damages was corporate conduct, or was conduct permitted by the corporation. Where the management of the corporation was involved in the conduct itself, it may be considered to be corporate conduct. Where the management of the corporation has knowledge of wrongful conduct by lower-level employees, the corporation may be determined to have permitted the conduct. If you find either corporate conduct, or conduct permitted by the corporation, you may find that the corporation must pay punitive damages.]

In determining the amount of punitive damages to award, if any, you may consider such factors as the nature of [Defendant's] conduct, the nature of the resulting harm to [Plaintiff], [Defendant's] wealth or financial status, and the degree of malice or wantonness in [his/her/its] acts.[1]

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[1] The Vermont Supreme Court has clarified several basic tenets of punitive damages. First, plaintiffs must show that defendant's wrongful conduct is "outrageously reprehensible." See *Fly Fish Vermont, Inc. v. Chapin Hill Estates, Inc.*, 2010 VT 33, ¶ 18; *Follo v. Florindo*, 2009 VT 11, ¶44; *Cooper v. Cooper*, 173 Vt. 1, 14 (2001). Second, plaintiffs must show that defendant acted with malice, which the court has defined as "bad motive, ill will, personal spite or hatred, reckless disregard, and the like." See *Fly Fish Vermont*, 2010 VT 33, ¶¶ 22-25; *Monahan v. GMAC Mortgage Corp*., 2005 VT 110, ¶¶55-56; *Brueckner v. Norwich Univ*., 169 Vt. 118, 129 (1999); *Pion v. Bean*, 2003 VT 79, ¶41; *In re Town Highway No. 20*, 2012 VT 17, ¶ 67 (all stating that showing malice is a requirement for punitive damages). The court notes that "malice is most often found when 'the defendant's tortious conduct is motivated by ill will toward the plaintiff.'" *DeYoung v. Ruggiero*, 2009 VT 9, ¶ 26.

Alternatively, the court has stated that it is possible to find malice if the defendant intended to benefit him/herself through his/her intentional, outrageous conduct, and did not actually intend to harm the plaintiff. *DeYoung*, 2009 VT 9, ¶¶ 25-26. The Court has also stated that it is possible to find malice without intent, if the defendant "engage[d] in deliberate and outrageous conduct that is not necessarily motivated by ill will toward any particular person." *Id.* See also *Fly Fish Vermont, Inc.*, 2010 VT 33, ¶ 25 ("[P]unitive damages are not limited to

intentional egregious torts only, but can extend to egregious harm resulting from reckless conduct amounting to malice.").

The Court has also noted that, in considering the amount of punitive damages to award, a jury can consider several factors, including the nature of the harm to the plaintiff, the nature of the defendant's actions, the defendant's financial means, and the degree of malice or wantonness in the defendant's actions. See *Shahi v. Madden*, 2008 VT 25, ¶ 25; *Lent v. Huntoon*, 143 Vt. 539, 550 (1983); *Parker v. Hoefer*, 118 Vt. 1, 20-21 (1953). See also *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (identifying three factors to consider in reviewing punitive damage awards: "(1) the degree of reprehensibility of the defendant's misconduct; the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.").