UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

J.A. McDONALD, INC.,	:	
Plaintiff / Counterclaim Defendant,	:	
v.	:	Docket No. 2:99-CV-172
WASTE SYSTEMS INTERNATIONAL MORETOWN LANDFILL, INC.,	:	
Defendant / Counterclaim Plaintiff.	:	

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

There are two Plaintiffs in this case. Plaintiff J.A. McDonald, Inc., which I will call McDonald, is represented by Eric Parker, Rob Reusch, and Neal Pratt. The Defendant in this case is Waste Systems International Moretown, which I will call WSI-Moretown. WSI-Moretown is represented by Sam Hoar, Mark Berthiaume, and Daniel Conroy.

Each party to this action seeks compensation from the other for damages caused by the delayed construction of landfill cell

2 at the Moretown Landfill. McDonald has brought the following claims against WSI-Moretown: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) *quantum meruit*. WSI-Moretown denies these allegations.

WSI-Moretown has also made its own claims, called counterclaims, against McDonald. WSI-Moretown alleges that McDonald is liable for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) unjust enrichment. McDonald denies WSI-Moretown's allegations.

I will first provide you with general instructions applicable to all claims. I will then address the law regarding each of the parties' claims.

Role of the Court, the Jury, and Counsel

Now that you have listened carefully to the testimony that has been presented to you, you must consider and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You weigh 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. Shortly, I will define "evidence" for you and tell you how to weigh it, including how to evaluate 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 you 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 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. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should evaluate the evidence deliberately 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. 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. But 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.

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.

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.

Witness Credibility

You, as jurors, are the sole judges of the credibility of the witnesses and the importance of their testimony. It is your job to decide how believable each witness was in his or her testimony. 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 may help you decide the truth and the importance of each witness's testimony. 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 either side of the case; any interest he or she may have in the outcome of the case, or any bias for or against any party; 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 of recollection, 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.

Expert Witnesses

You have heard the testimony of a number of expert witnesses in this case. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in a field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing an expert's testimony, you may consider his or her qualifications, opinions, and reasons for testifying, as well as all of the other considerations that apply when you are deciding whether to believe a witness's testimony. You may give the expert's testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should consider the soundness of his or her opinion, reasons for the

opinion and motive, if any, for testifying. You should not, however, accept the expert's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case, as I have said, rests solely with you.

Burden of Proof

Because this is a civil case, each side has the burden of proving their claims by a "preponderance of the evidence." To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. A preponderance of the evidence means the greater weight, or logic, or persuasive force of the evidence. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity.

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 evidence, you conclude that McDonald failed to establish any essential element of its claims by a preponderance of the evidence, you should find for WSI-Moretown as to that particular claim. Similarly, if, after considering all of the evidence, you conclude that WSI-Moretown failed to establish any essential

element of its counterclaims, you should find for McDonald as to that counterclaim. If, after such consideration you find the evidence of both parties to be in balance or equally probable, then the party making the claim has failed to sustain its burden and you must find for the other party.

I now turn to the law you must follow in evaluating each party's specific claims.

Breach of Contract -- In General

McDonald and WSI-Moretown each allege that the other is liable for breach of contract. WSI-Moretown has claimed a breach of the Contract because McDonald failed to complete the landfill cell by the January 1, 1999 deadline. McDonald claims that this failure to complete on time was excused under the Contract and that WSI-Moretown's termination of McDonald was a breach of the Contract. In addition, McDonald claims that WSI-Moretown has breached the Contract by failing to pay retainage withheld under the Contract and by failing to extend the Contract deadline.

In order to prevail on their claims of breach of contract, each party has the burden of proving the following essential elements by a preponderance of the evidence:

(1) that a contract existed between McDonald and WSI-Moretown;

(2) the terms of any such contract;

(3) that a material breach of any such contract occurred;

(4) that damages resulted from any such breach; and

(5) the amount of any damages.

In this case your job is easier because McDonald and WSI-Moretown agree that they entered into a written agreement for the construction of the landfill cell, and that they are legally bound by that contract. The terms of the Contract have been discussed during the course of this trial and you have been given the Contract as an exhibit in this case.

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. Such a breach must be material, meaning it may not related to a minor or incidental matter covered by the Contract. McDonald and WSI-Moretown must each prove by a preponderance of the evidence that they have performed under the Contract and the other has breached the Contract.

If you find that either McDonald or WSI-Moretown has proven that the other has breached the Contract, you will next need to determine the damages, if any, produced by this breach. The party alleging breach of contract must prove by a preponderance of the evidence that they suffered damages as a proximate result of the other party'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 one party's damages were either a direct result or a reasonably probable consequence of the other party's breach of contract.

Lastly, the party alleging breach must prove the amount of their damages by a preponderance of the evidence.

If you find that either party has proved each of these elements, then you may find the other party liable for breach of contract, and assess damages in the amount proved. If, however, you find that either McDonald or WSI-Moretown has failed to prove any one of these essential elements, then you should enter a verdict on behalf of the other party.

Interpreting the Terms in the Contract

In interpreting the meaning of the terms of the Contract you should look to the language of the Contract itself. The words of a contract are generally given their plain and ordinary meaning, unless it is apparent that the term was intended to have a technical meaning.

You must also give effect to all material parts of the Contract. These separate parts must be read together as a harmonious whole. That is, you should interpret the individual

provisions in a way that prevents them from conflicting with each other.

Sometimes the meaning of a contract term or provision is ambiguous. By ambiguous, I mean that two people could reasonably differ as to the meaning of the term or provision. If you find that a term or provision of the Contract is ambiguous, you may look to extrinsic evidence to assist you in determining its meaning.

Extrinsic evidence is evidence beyond the written terms of the Contract. This may include the construction placed on the Contract by the parties themselves. The parties' own construction may be revealed by statements made by the parties, as well as by the conduct or dealings of the parties in rendering or receiving performance under the contract. However, you must give the statements and acts of a party to a contract the meaning or construction that the other party was fairly justified in giving to such statements and acts at the time they were made or performed.

Termination of the Contract for Delay

During the trial there was testimony regarding whether the Contract could be terminated for failure to meet the January 1, 1999 completion deadline. The Court has already determined that under the terms of the Contract the Owner could properly terminate the Contract based on the Contractor's default or

neglect in failing to meet this deadline, provided that the delay was not excused under the Contract or applicable facts. However, the issue of the role of the Engineer in the termination process under the Contract is for you to decide.

Thus, in evaluating testimony from witnesses that termination was not permitted by the Contract, you should keep in mind that this testimony is relevant only to that witness's understanding of the Contract or his intent in acting under the Contract. You should not interpret this testimony as suggesting that the Contract prohibited termination for delay in the event of the Contractor's default or neglect or in the event such a delay was not excusable under the Contract or applicable facts.

Breach of the Implied Covenant of Good Faith and Fair Dealing

Both parties claim that the other has breached the covenant of good faith and fair dealing.

Every contract contains an implied covenant of good faith and fair dealing. By this covenant, each party is presumed to promise that it will not do anything to undermine or destroy the other party's rights to receive the benefits of the agreement. The purpose of the implied covenant of good faith and fair dealing is to ensure that the parties to a contract act with faithfulness to an agreed common purpose and consistently with the justified expectations of the other party. Conduct involving bad faith violates community standards of decency, fairness, and

reasonableness.

Because it is an "implied" covenant, a breach of the covenant of good faith and fair dealing can occur when the conduct at issue does not violate an express term of the contract.

To determine whether either party has violated the covenant of good faith and fair dealing, you must determine whether the other party has proved by a preponderance of the evidence that:

(1) its expectations were justifiable under the circumstances; and

(2) the breaching party acted in bad faith.

If you also find that the non-breaching party has been proximately damaged by this breach, then the breaching party is liable for breach of the implied covenant of good faith and fair dealing.

Breach of Contract: Measure of Damages General Instruction

I will now instruct you on the measure of damages for breach of contract in the event you find that a breach of the Contract or the implied covenant of good faith a fair dealing has occurred. 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 either party's claims. The instructions are for your use only in the event that you find that a breach of contract has

occurred.

Breach of Contract: Direct and Consequential Damages

If you determine by a preponderance of the evidence that either McDonald or WSI-Moretown is liable for breach of contract, you must consider the question of damages.

An award of damages for breach of contract is intended to put the non-breaching party in the same position that it would have been in had the contract been performed. It is your duty to determine the amount of money which reasonably, fairly and adequately compensates that party for their loss of the contract's benefits.

Under Vermont law, two types of damages are recoverable for breach of contract: direct and consequential damages.

Direct damages are damages for those losses that naturally and usually flow from the breach itself. It is not required that the parties actually considered the direct damages claimed, but these damages must be the kind that the parties may fairly be supposed to have considered. In this case if you find in favor of WSI-Moretown, its direct damages would be the amount by which completing the landfill project exceeded the price WSI-Moretown agreed to pay McDonald under the Contract. If instead you find in favor of McDonald, its direct damages would be the Contract price less any expenses it did not have to incur as a result of its termination.

Consequential damages are those foreseeable damages that were caused by the breach and can reasonably be supposed to be in the contemplation of both parties at the time they made the Contract. As this definition suggests, consequential damages are subject to the limitations of causation, certainty, and foreseeability. In considering whether the damages may reasonably be supposed to have been within the contemplation of the parties when the Contract was made, you should look to the type of transaction at issue and the type of damages claimed. If you find that the breaching party could not reasonably have contemplated the type of consequential damages claimed by the other party, then you should find that that party cannot recover consequential damages.

Breach of Contract: Liquidated Damages

The Contract contains a liquidated damages clause. The phrase "liquidated damages" refers to the amount of money that the parties agree, at the time of entering into a contract, will reasonably measure the damages flowing from a particular breach of the contract. The liquidated damages provision provides:

> The sum of one thousand dollars ($1,000) is agreed upon as liquidated damages and will be paid by the Contractor to the Owner as determined by the Engineer for each and every calendar day in which any work of the Contract is uncompleted which prevents the proper completion of the landfill project after the time stipulated for such completion.

If you find that McDonald's failure to complete the landfill cell

by January 1, 1999 is not excused, then you must calculate the amount of liquidated damages owed to WSI-Moretown in accordance with this provision. However, you are instructed that these damages may be assessed only during the time period between the deadline for completion and termination of the Contract by WSI-Moretown. You may not assess liquidated damages during the time period after the Contract was terminated by WSI-Moretown.

The liquidated damages provision is designed to compensate WSI-Moretown only for certain specific injuries. These are injuries arising out of the delay in completion of the landfill. Thus, if you find that WSI-Moretown has been injured by the delay, you may award it liquidated damages in accordance with the liquidated damages provision in the Contract. However, you may not also award WSI-Moretown any other damages for injuries arising out of the delay in completion of the landfill.

The liquidated damages clause does not prevent WSI-Moretown from receiving compensation for other injuries that did not arise out of the delay. In particular, if you find that McDonald was properly terminated, you may award WSI-Moretown damages under the termination provision of the Contract for the cost of completion of the project because those damages do not arise out of the delayed completion of the landfill cell.

Breach of Contract: Mitigation of Damages

If you find that either party is liable for breach of

contract, in calculating any damages owed to the non-breaching party you must consider that the law imposes a duty on that party to mitigate or minimize damages. This means that a person or entity who has suffered a loss has a duty to take reasonable protective or preventive measures in an effort to reduce the harm or prevent its increase or continuance in the future.

If you find that either party has proved this defense by a preponderance of the evidence, you must reduce your award of damages, if any, by an amount equal to the damages the non-breaching party could have avoided by taking such reasonable preventive actions.

Breach of Contract: Avoidance of Duplication

You have been instructed on a number of items of damages. You may award damages to McDonald or WSI-Moretown for each item of damages which that party has established, but you should be careful not to award damages for one item which duplicates an award for another item. Your award in all respects must be fair and reasonable in light of all the evidence that you find worthy of belief and all the reasonable inferences to be drawn from such evidence.

I now turn to the defenses that the parties have raised to against the contract claims brought against them. You need only consider these defenses if you find that liability for breach of

contract has been proven.

Delay Excused by Owner's Own Actions

McDonald claims that WSI-Moretown's breach of contract claim is barred because McDonald's failure to complete the work is excused. McDonald argues, in part, that this failure is excused because WSI-Moretown's own conduct caused the delay.

Delay in performance of a contract is excused where it caused by the act of the opposite party. This means that the party whose delay is excused is not liable for liquidated damages or other damages under the contract. Thus, if you find that McDonald has proven by a preponderance of the evidence that its failure to perform by the Contract deadline was caused by WSI-Moretown's own conduct, McDonald's failure to complete on time is excused and does not constitute a breach of the Contract for which McDonald owes WSI-Moretown compensation.

Waiver

Both parties claim that the other party's breach of contract claims are barred by the doctrine of waiver. That is, each party argues that the other has legally waived or relinquished its right to assert its contract claims.

A waiver is an intentional and voluntary relinquishment or abandonment of a known right. Waiver may be evidenced by express words or by conduct. Thus, a party may waive a term or provision of a contract, or may waive its right to require performance of

part of the contract, if that party continues its performance under the contract knowing that the other party has failed to perform as required under that term or provision.

However, if the non-breaching party asserts that it intends to retain the rights or remedies accruing to it under the contract, it does not waive its right to assert those rights or remedies against the breach. In addition, a waiver of contractual rights can be implied from the conduct of the waiving party only when that conduct is unequivocal.

Waiver is an affirmative defense. This means that the party asserting it has the burden of proving the elements of the waiver by a preponderance of the evidence. If you find that either party has proven by a preponderance of the evidence the elements of waiver with regard to a breach of contract claim asserted against it, then you must enter a verdict in favor of that party with respect that claim.

Equitable Estoppel

Both parties also assert the defense of equitable estoppel. Like the defense of waiver, equitable estoppel is an affirmative defense for which the asserting party bears the burden of proof.

Unlike waiver, the defense of equitable estoppel involves the conduct of both parties to a contract, not one party. It requires that the party asserting the defense has, to its detriment, relied on or been misled by the conduct of the other

party. To prove equitable estoppel each party must prove, by a preponderance of the evidence, that:

(1) the other party knew of certain facts;

(2) the other party acted in a certain way in the face of such knowledge;

(3) (a) the other party intended that its conduct would cause the party asserting estoppel to act in a certain way; or, alternatively,

(b) the party asserting estoppel had a right to believe that the other party intended that it would act in a certain way based on the other party's conduct;

(4) the party asserting estoppel had no knowledge of the true facts; and

(5) the party asserting estoppel relied to its detriment on the conduct of the other party.

The doctrine of equitable estoppel is based on an interest in encouraging fair dealing, good faith, and justice. In evaluating whether either party should be estopped from asserting its breach of contract claim, you should consider whether conscience and the duty of honest dealing prevent it from avoiding the consequences of its conduct. Accordingly, if either party had an obligation to speak, but remained silent in the face of the other party's reliance, the silent party may be equitably

estopped from bringing its contract claim.

Reliance on Oral Modification

In defense of WSI-Moretown's breach of contract claim McDonald argues that it was excused from completing the landfill cell by January 1, 1999 because this condition of the Contract was orally modified by the parties. Specifically, McDonald contends that WSI-Moretown and it orally agreed that instead of meeting the deadline, McDonald should complete a partial cell by January 1, 1999 and complete the entire cell in the spring.

Where parties to a contract orally agree to modify a condition of that contract, such an oral modification will only be enforced where one party has substantially and irretrievably changed its position in reliance on that oral agreement. Thus, to find that McDonald's failure to complete performance by the January 1, 1999 deadline was excused by an oral modification of the Contract, you must determine that McDonald has proven by a preponderance of the evidence that:

(1) WSI-Moretown and McDonald agreed to orally modify the provision of the Contract making January 1, 1999 the deadline for completion of the entire cell; and

(2) in reliance of this oral agreement McDonald substantially and irretrievably changed its position.

If you find that McDonald has proven both these elements by a preponderance of the evidence then you should enter a verdict in favor of McDonald on WSI-Moretown's breach of contract claim. If instead you find that McDonald has not met its burden of proof with regard to either element, McDonald is not excused by oral modification from WSI-Moretown's contract claim.

Constructive Notice

As part of its defense against WSI-Moretown's counterclaims, McDonald also asserts that it provided WSI-Moretown constructive notice of certain facts and circumstances. Constructive notice is notice that is implied or imputed by law. For example, a person or entity may be found to be on notice of a fact or circumstance because the fact or circumstance is notorious in nature or part of the public record. To show constructive notice, McDonald does not have to prove that WSI-Moretown actually had notice of the facts and circumstances at issue.

McDonald does not assert that constructive notice was sufficient to provide notice under the terms of the Contract itself. Constructive notice is relevant only to the defenses McDonald has asserted against WSI-Moretown's counterclaims.

Quasi-Contract Liability: *Quantum Meruit* and Unjust Enrichment

Both parties have brought claims based in what is called "quasi-contract." McDonald has brought a claim of *quantum meruit* against WSI-Moretown and WSI-Moretown has brought a claim of

unjust enrichment against McDonald. Liability under these two types of quasi-contract claims involves the same elements. These claims differ, however, in the way damages are measured. I will explain how damages are determined under each shortly. Before doing so, I will instruct you on the elements that both parties must demonstrate in order to prove liability under quasi-contract.

Claims in quasi-contract are based on the theory that one party has made an implied promise to pay another. The elements of a quasi-contract claim are:

(1) party A has received a benefit from party B;

(2) party A has accepted that benefit;

(3) it would be inequitable for party A to retain that benefit without paying party B for it.

Generally, *quantum meruit* and unjust enrichment apply to situations in which the parties have not entered into a contract for the provision and payment of goods or services. However, the existence of an express contract between McDonald and WSI-Moretown does not prevent recovery under quasi-contract. Either party may still recover in quasi-contract if the benefit conferred was not covered by the Contract and has not been otherwise compensated. However, if the scope of the Contract covers the benefit for which either party seeks compensation,

then you must not award compensation for that benefit in quasi-contract

If you determine that either WSI-Moretown or McDonald has shown by a preponderance of the evidence that it conferred a benefit on the other and that the benefit was accepted by the other, then you must determine whether retaining that benefit without providing compensation would be inequitable. The appropriate inquiry is whether, in light of the totality of the circumstances, it is against equity and good conscience to allow the party who has received and retained the benefit to do so. If you also find that either McDonald or WSI-Moretown has proven by a preponderance of the evidence that it would be inequitable for the other to retain the benefit at issue, then you must find that the retaining party is liable in quasi-contract.

Quantum Meruit

As discussed above, the difference between *quantum meruit* and unjust enrichment, both theories of quasi-contract, lies in the way damages are measured under each.

McDonald has made a claim in *quantum meruit* for goods and services, in the amount of $1,407,472.54, for which it alleges it has not been paid by WSI-Moretown. If you find that WSI-Moretown is liable in quasi-contract for any portion of these benefits, then McDonald is entitled to damages in *quantum meruit* for these benefits.

To determine the compensation owed to McDonald you must determine the reasonable or fair value of the goods and services for which McDonald has not been paid. In doing so, you should consider the fair or reasonable value of the goods and services, regardless of their value to WSI-Moretown.

Unjust Enrichment

WSI-Moretown's quasi-contract claim is based on unjust enrichment. WSI-Moretown claims that McDonald has been unjustly enriched because WSI-Moretown has paid McDonald in excess of the value of the labor, materials, equipment, tools, and services supplied by McDonald.

If you find that McDonald has been unjustly enriched, you must determine WSI-Moretown's damages by calculating the amount by which McDonald has been unjustly enriched. In doing so you should determine the value to WSI-Moretown of the goods and services provided to it by McDonald. Both parties agree that WSI-Moretown has already paid McDonald $3,878,510.84 for these goods and services. Thus, to determine the amount by which McDonald has been unjustly enriched, you must subtract the value to WSI-Moretown of these goods and services from the $3,878,510.84 that WSI-Moretown has already paid McDonald.

Unanimous Verdict

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree.

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement if you can do so without violence to your individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow 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 your fellow jurors or for the mere purpose of returning a verdict.

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

Notes

You have taken notes during the trial for use in your deliberations. These notes may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not

disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

Closing Instructions

I have selected Richard Tallman 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 verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the 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 related to 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 related to the merits of the case.

Dated: Burlington, Vermont May 30th, 2002.

William K. Sessions III
United States District Court