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Article III

Seller shall design, prepare and install the software in buyer’s computer within a reasonable time after buyer has provided seller with the “detailed statement of criteria” called for and described in Article II [~~above~~]of this contract.

Article IV

Seller agrees to provide to buyer, at no additional cost, adequate instruction manuals on the software, training of buyer’s personnel upon installation of the software and backup and consultation services for one year after installation of the software.

Albuquerque Construction Company provided Garcia with the “detailed statement of criteria” on February 15, 1988. Garcia did not deliver and install the software until October 30, 1988. Albuquerque Construction claims that this delay was unreasonable and in breach of contract. Garcia installed the software in Albuquerque Construction’s computer, held a one-day training session for Albuquerque Construction’s staff, and provided Albuquerque Construction with a training manual. Because of the delay in the installation, however, Albuquerque Construction refused to pay Garcia the last \$7,500 installment on the purchase price of the software. In addition, Albuquerque Construction claims that because of the delay in the installation, it was required to expend \$11,000 in additional outside accounting services that would not have been expended if the software had been installed by July 1, 1988, the commencement of Albuquerque Construction’s fiscal year. Finally, in December 1988, a power surge wiped out a considerable part of the data base on Albuquerque Construction’s computer. Albuquerque Construction believed that it had its database “backed up” in a backup file but was having difficulty finding the backup file on the

1 computer’s “hard disk.” Albuquerque Construction called Garcia for “backup” assistance and
2 consultation in finding the backup files on the hard disk. Garcia refused, claiming that the request
3 was not for “backup” services and because Albuquerque Construction did not pay the last \$7,500
4 milestone. As a consequence, Albuquerque Construction Company hired someone for \$3,500 to
5 retrieve the backup files.

6 Albuquerque Construction brought suit against Garcia for damages, claiming breach of
7 contract in the late delivery and in the failure to provide backup. Garcia defended in counterclaim
8 for the \$7,500 payment at the final milestone.

9 ~~**[Instruction No. 1: Theory of the Case; Statement of the Issues; Claim; Burden of**~~
10 ~~**Proof]**~~ **[13-302A NMRA] Statement of Theory for Recovery; [13-302B NMRA] Statement of**
11 **factual contentions of plaintiff, causation and burden of proof; [13-302C NMRA] Statement**
12 **of denial and affirmative defense; [13-302D NMRA] Statement of factual contentions of**
13 **defendant, causation and burden of proof**

14 In this civil action Albuquerque Construction Company seeks compensation from Mr. John
15 Garcia for damages which Albuquerque Construction Company claims were proximately caused
16 by the breach by Mr. Garcia of the contract entered into between Mr. Garcia and Albuquerque
17 Construction Company.

18 To establish its claim of breach of contract on the part of Mr. Garcia, Albuquerque
19 Construction Company has the burden of proving one or more of the following contentions:

20 1. That Mr. Garcia failed to deliver and install the computer software within a
21 “reasonable time” as required by the contract; or

1 2. That Mr. Garcia failed to provide “backup” or “consultation” services as
2 required by the contract.

3 In addition, Albuquerque Construction Company contends and has the burden of proving
4 that any breach of contract caused Albuquerque Construction Company to incur damages as a
5 consequence of Mr. Garcia’s breach of contract.

6 Mr. Garcia denies that he breached any of his contract obligations to Albuquerque
7 Construction Company. Specifically, Mr. Garcia:

8 1. Denies that he did not deliver and install the computer software within a
9 “reasonable time;” and

10 2. Contends that any requests made by Albuquerque Construction Company
11 were not for “backup” services and, therefore, he did not fail to provide backup services as called
12 for under the contract.

13 In addition, as to the claim of breach of contract for failure to provide backup services, Mr.
14 Garcia contends and has the burden of proving that he was excused from performing any backup
15 services because Albuquerque Construction Company itself breached the contract by failing to
16 make the final [payments] payment to Mr. Garcia.

17 In addition, Mr. Garcia counterclaims against Albuquerque Construction Company under
18 the contract, claiming that Albuquerque Construction Company breached its contract obligations
19 to Mr. Garcia by failing to pay the called for final payment of \$7,500. To establish his claim for
20 breach of contract on the part of Albuquerque Construction Company, Mr. Garcia has the burden
21 of proving that Albuquerque Construction Company failed to pay \$7,500 as called for under the

1 contract. Albuquerque Construction Company denies that it breached any contract obligation to
2 Mr. Garcia and contends and has the burden of proving that it is excused from paying Mr. Garcia
3 \$7,500 because Mr. Garcia failed to perform his obligations under the contract.

4 [13-822 NMRA] Breach of contract; definition

5 For you to find Mr. Garcia liable to Albuquerque Construction Company, you must find
6 that Mr. Garcia breached his contract with Albuquerque Construction Company. A person may
7 breach a contract by failing to perform a contractual obligation when that performance is called
8 for (unless that performance is otherwise excused).

9 [13-823 NMRA] Breach of contract; failure to perform

10 Albuquerque Construction Company contends that there has been a material breach of the
11 contract. A material breach occurs when a party fails to do something that is so important to the
12 contract that the failure to perform that obligation defeats an essential purpose of the parties in
13 making the agreement.

14 Albuquerque Construction Company has the burden of proving that Mr. Garcia committed
15 a material breach.

16 Material breach by one party excuses the other from performing its obligations under the
17 contract.

18 [13-825 NMRA] Ambiguity in term or terms; general rule of interpretation

19 There is a dispute as to the meaning of the following term in the contract: backup services.
20 You shall give the term that meaning which you find to be most reasonable, taking into
21 consideration all the circumstances, including the following:

1 the intentions of the parties,
2 the words that the parties used,
3 the purposes the parties sought to achieve,
4 custom in the trade, and
5 whether a party, at the time the contract was entered into, knew or should have known that
6 the other party interpreted the term differently.

7 [13-826 NMRA] Custom in the trade

8 A custom in the trade is any manner of dealing that is commonly followed in a place or
9 trade so as to create a reasonable expectation that it will be followed with respect to the transaction
10 between the parties.

11 [13-831 NMRA] Reasonable time

12 Mr. Garcia was obligated to perform the contract within a reasonable time. What is a
13 reasonable time should be determined by you from the surrounding circumstances.

14 [13-822 NMRA] Breach of contract; definition

15 For you to find Albuquerque Construction Company liable to Mr. Garcia, you must find
16 that Albuquerque Construction Company breached its contract with Mr. Garcia. A person may
17 breach a contract by failing to perform a contractual obligation when that performance is called
18 for (unless that performance is otherwise excused).

19 [13-823 NMRA] Breach of contract; failure to perform

1 Mr. Garcia contends that there has been a material breach of the contract. A material breach
2 occurs when a party fails to do something that is so important to the contract that the failure to
3 perform that obligation defeats an essential purpose of the parties in making the agreement.

4 Mr. Garcia has the burden of proving that Albuquerque Construction Company committed
5 a material breach.

6 Material breach by one party excuses the other from performing its obligations under the
7 contract.

8 [13-843 NMRA] Contracts; measure of damages; general instruction

9 If you should decide in favor of Albuquerque Construction Company on either of its claims
10 for breach of contract, then you must fix the amount of money which will reasonably and fairly
11 compensate Albuquerque Construction Company for damages that resulted from Mr. Garcia's
12 breach.

13 1. On its claim that Mr. Garcia failed to deliver and install the computer software
14 within a "reasonable time" as required by the contract, Albuquerque Construction Company
15 seeks direct damages for the following:

16 \$11,000 it paid for additional outside accounting services.

17 2. On its claim that Mr. Garcia failed to provide "backup" or "consultation" services
18 as required by the contract, Albuquerque Construction Company seeks direct damages for
19 the following:

20 \$3,500 it paid to retrieve the backup files.

1 Direct damages are damages that arise naturally and necessarily as the result of the breach.
2 The direct damages that you award for breach of contract must be the amount of money that will
3 place Albuquerque Construction Company in the position it would have been in if the contract had
4 been performed.

5 Whether any of these elements of damages has been proved by the evidence is for you to
6 determine. Your verdict must be based upon proof, and not upon speculation, guess, or conjecture.

7 Further, sympathy for a person, or prejudice against any party, should not affect your
8 verdict and is not a proper basis for determining damages.

9 [13-843 NMRA] Contracts; measure of damages; general instruction

10 If you should decide in favor of Mr. Garcia for his claim for breach of contract, then you
11 must fix the amount of money which will reasonably and fairly compensate Mr. Garcia for
12 damages that resulted from Albuquerque Construction Company's breach.

13 1. Mr. Garcia seeks direct damages for the following: Albuquerque Construction
14 Company's failure to pay the last \$7,500 milestone.

15 Direct damages are damages that arise naturally and necessarily as the result of the breach.
16 The direct damages that you award for breach of contract must be the amount of money that will
17 place Mr. Garcia in the position he would have been in if the contract had been performed.

18 Whether any of these elements of damages has been proved by the evidence is for you to
19 determine. Your verdict must be based upon proof, and not upon speculation, guess, or conjecture.

20 Further, sympathy for a person, or prejudice against any party, should not affect your
21 verdict and is not a proper basis for determining damages.

1 [Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006,
2 effective for all cases pending or filed on or after December 31, 2020.]

3 **Appendix 2. Sample ~~[formation of contract instructions]~~ Contracts Instructions.**

4 **Statement of facts**

5 Smith, an avid hunter, owns a prize hunting dog named Zeke that is much admired by his
6 friend Jones. Smith is in the National Guard. An international conflict erupts in the Middle East,
7 and Smith’s unit is activated. Anticipating a long absence from the country, Smith writes to his
8 friend: “I feel bad about having to put Zeke in a kennel. I would sell him to a good home if I could
9 get \$500 for him.” Jones writes back immediately: “Five hundred is a fair price for Zeke, but things
10 are pretty tight here and I wish you would take \$400 and my old shotgun instead.”

11 The Middle East conflict is unexpectedly brief, and several days later Smith writes to Jones:
12 “I am back to civilian life already. Thank goodness I won’t be selling Zeke.” Jones claims never
13 to have received this letter. The next month, Jones comes to visit Smith and brings \$400 cash and
14 his shotgun. Smith refuses to part with Zeke. Jones pulls out some more cash and offers Smith
15 \$500, still to no avail. Zeke is worth \$1000. Jones sues Smith for damages for breach of contract.

16 **~~[Sample instructions]~~**

17 ~~*Note: These sample instructions are prepared by including definitional instructions where*~~
18 ~~*possible in the statement of issues, see Gallegos v. Citizens Ins. Agency, Inc., 108 N.M. 722, 779*~~
19 ~~*P.2d 99 (1989), and by including only those instructions, or portions thereof, that are pertinent to*~~
20 ~~*the particular matters in dispute, see Introduction to UJI ch. 8. “Stock” instructions and damage*~~
21 ~~*instructions are omitted from this example.*~~]

1 [13-302A NMRA] **Statement of theory for recovery; [13-801 NMRA] Contract;**
2 **definition**

3 In this civil action the plaintiff Jones seeks compensation from the defendant Smith for
4 damages that plaintiff says were caused by breach of contract.

5 A contract is a legally enforceable promise. ~~[It is formed by an offer and an acceptance.]~~In
6 this case, the parties dispute whether there was an offer and an acceptance.

7 [13-302B NMRA] **Statement of factual contentions of plaintiff, causation and burden**
8 **of proof**

9 To establish his claim of breach of contract on the part of Smith, Jones has the burden of
10 proving each of the following:

- 11 1. Smith offered to sell Jones his dog for \$500.
- 12 2. Jones accepted Smith's offer.
- 13 3. Smith refused to sell the dog to Jones.

14 Jones also contends and has the burden of proving that such breach of contract was a cause
15 of his damages.

16 ~~[[13-302B]~~

17 ~~To establish his claim of breach of contract on the part of Smith, Jones has the burden of~~
18 ~~proving each of the following:~~

- 19 1. ~~Smith offered to sell Jones his dog for \$500.~~
- 20 2. ~~Jones accepted Smith's offer.~~
- 21 3. ~~Smith refused to sell the dog to Jones.~~

1 ~~Jones has the burden of proving that such breach of contract was a cause of his damages.]~~

2 [13-302C NMRA] **Statement of denial and affirmative defense**

3 Smith denies that he offered to sell his dog to Jones. In the alternative, Smith contends and
4 has the burden of proving that he withdrew any offer to sell the dog before Jones accepted the offer
5 or that Jones failed to accept the offer within a reasonable time.

6 [13-805 NMRA] **Offer; definition**

7 An offer is a communication of a willingness to enter into a contract. The communication
8 must satisfy four conditions:

9 First, the communication must have included a definite promise by Smith showing his
10 willingness to contract;

11 Second, the material terms upon which that willingness was based must have been definite;

12 Third, the terms must have been communicated to Jones;

13 Fourth, by the communication Smith must have intended to give Jones the power to create
14 a contract by accepting the terms.

15 In this case, the parties agree that the terms at issue were communicated to Jones. What is
16 in dispute is whether the terms were definite and whether the communication was one which
17 included a definite promise by Smith showing his willingness to contract and by which Smith
18 intended to give Jones the power to create a contract by accepting the terms.

19 [13-807 NMRA] **Acceptance; definition**

1 An acceptance is a statement or conduct made by one party to the other, showing that
2 party's agreement to the terms of the other party's offer. For Jones to have accepted Smith's offer,
3 he must have informed Smith by a statement or conduct that he agreed to the terms of the offer.

4 [13-808 NMRA] **Acceptance; terms of the offer**

5 ~~[A reply is not an acceptance if it adds a material qualification or requests a new condition
6 not in the offer. If, however, you determine that Jones's reply departs from the terms of
7 Smith's offer, that reply is still an acceptance if Jones makes it clear in the reply that his
8 acceptance is not dependent on Smith's agreement to the new term.]~~

9 If Jones responded to an offer by conditioning acceptance on new terms that added, varied
10 or changed any term of the offer, the response was a rejection of the original offer and operated as
11 a new offer that could be accepted or rejected by Smith.

12 If Jones' response to an offer included additional or different terms but did not condition
13 acceptance on agreement to those terms, the response operated as an acceptance of the original
14 offer.

15 [13-806 NMRA] **Offer; revocation; effect of performance**

16 An offer may be withdrawn at any time before notice of its acceptance has been received.
17 To have withdrawn his offer, Smith must have notified Jones that the offer was withdrawn.

18 Once notice of withdrawal has been received, the offer may no longer be accepted and any
19 attempt to accept thereafter will not be effective. If Jones was notified that the offer was withdrawn,
20 Jones could no longer accept the offer.

21 [13-813 NMRA] **Acceptance; timeliness of acceptance; power of revocation**

1 In order for a communication to be an acceptance, it must have been received by Smith
2 within a reasonable time. What constitutes reasonable time should be determined by you from the
3 surrounding circumstances.

4 [13-804 NMRA] **Contract; intentions of the parties**

5 You should determine the intentions of the parties by examining their language and
6 conduct, the objectives they sought to accomplish, and the surrounding circumstances.

7 [13-822 NMRA] **Breach of contract; definition**

8 For you to find Smith liable to Jones, you must find that Smith breached his contract with
9 Jones. A person may breach a contract by failing to perform a contractual obligation when that
10 performance is called for.

11 [As amended, effective March 1, 2005; as amended by Supreme Court Order No. 20-8300-006,
12 effective for all cases pending or filed on or after December 31, 2020.]