UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LISA FISHER,

Plaintiff,

v.

MERMAID MANOR HOME FOR ADULTS, LLC,

Defendant.

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JURY CHARGE

14-CV-3461(WFK)(JO)

LADIES AND GENTLEMEN OF THE JURY, YOU ARE ABOUT TO ENTER YOUR FINAL DUTY, WHICH IS TO DECIDE THE FACTUAL ISSUES IN THE CASE. YOU MUST PAY CLOSE ATTENTION TO ME NOW. I WILL GO AS SLOWLY AND DELIBERATELY AS I CAN, AND WILL BE AS CLEAR AS POSSIBLE.

I TOLD YOU AT THE VERY START OF THE TRIAL YOUR PRINCIPAL FUNCTION DURING THE TAKING OF TESTIMONY WOULD BE TO LISTEN CAREFULLY AND TO OBSERVE EACH WITNESS WHO TESTIFIED. IT HAS BEEN OBVIOUS TO ME AND TO COUNSEL THAT YOU HAVE FAITHFULLY DISCHARGED THIS DUTY. YOUR INTEREST NEVER FLAGGED, AND IT IS EVIDENT THAT YOU FOLLOWED THE TESTIMONY WITH CLOSE ATTENTION. I THANK YOU FOR THAT, AND I ASK THAT

YOU NOW GIVE ME THE SAME CAREFUL ATTENTION THAT YOU GAVE AT TRIAL AS I INSTRUCT YOU ON THE LAW.

NOW THAT THE EVIDENCE IN THIS CASE HAS BEEN PRESENTED AND THE ATTORNEYS FOR THE PLAINTIFF AND THE DEFENDANT HAVE CONCLUDED THEIR CLOSING ARGUMENTS, IT IS MY RESPONSIBILITY TO INSTRUCT YOU AS TO THE LAW THAT GOVERNS THIS CASE. MY INSTRUCTIONS WILL BE IN THREE PARTS:

FIRST: I WILL INSTRUCT YOU REGARDING THE GENERAL RULES THAT DEFINE AND GOVERN THE DUTIES OF A JURY IN A CIVIL CASE AND THE WAY IN WHICH YOU ARE TO REVIEW THE EVIDENCE;

SECOND: I WILL INSTRUCT YOU AS TO THE LEGAL ELEMENTS OF THE CLAIMS IN THIS CASE, THAT IS, WHAT THE PLAINTIFF MUST PROVE TO PREVAIL IN THIS ACTION;

AND

THIRD: I WILL GIVE YOU SOME GENERAL RULES REGARDING YOUR DELIBERATIONS.

ROLE OF THE COURT

YOU HAVE NOW HEARD ALL OF THE EVIDENCE IN THE CASE AS WELL AS THE FINAL ARGUMENTS OF THE LAWYERS FOR THE PARTIES.

MY DUTY AT THIS POINT IS TO INSTRUCT YOU AS TO THE LAW. IT IS YOUR DUTY TO ACCEPT THESE INSTRUCTIONS OF LAW AND APPLY THEM TO THE FACTS AS YOU DETERMINE THEM, JUST AS IT HAS BEEN MY DUTY TO PRESIDE OVER THE TRIAL AND DECIDE WHAT TESTIMONY AND EVIDENCE IS RELEVANT UNDER THE LAW FOR YOUR CONSIDERATION.

ON THESE LEGAL MATTERS, YOU MUST TAKE THE LAW AS I GIVE IT TO YOU. IF ANY ATTORNEY HAS STATED A LEGAL PRINCIPLE DIFFERENT FROM ANY THAT I STATE TO YOU IN MY INSTRUCTIONS, IT IS MY INSTRUCTIONS THAT YOU MUST FOLLOW.

YOU SHOULD NOT SINGLE OUT ANY INSTRUCTION AS ALONE STATING THE LAW, BUT YOU SHOULD CONSIDER MY INSTRUCTIONS AS A WHOLE WHEN YOU RETIRE TO DELIBERATE IN THE JURY ROOM.

YOU SHOULD NOT, ANY OF YOU, BE CONCERNED ABOUT THE WISDOM OF ANY RULE THAT I STATE. REGARDLESS OF ANY OPINION THAT YOU MAY HAVE AS TO WHAT THE LAW MAY BE—OR OUGHT TO BE—IT WOULD VIOLATE YOUR SWORN DUTY TO BASE A VERDICT UPON ANY OTHER VIEW OF THE LAW THAN THAT WHICH I GIVE YOU.

ROLE OF THE JURY

AS MEMBERS OF THE JURY, YOU ARE THE SOLE AND EXCLUSIVE JUDGES OF THE FACTS. YOU PASS UPON THE EVIDENCE. YOU DETERMINE THE CREDIBILITY OF THE WITNESSES. YOU RESOLVE SUCH CONFLICTS AS THERE MAY BE IN THE TESTIMONY. YOU DRAW WHATEVER REASONABLE INFERENCES YOU DECIDE TO DRAW FROM THE FACTS AS YOU HAVE DETERMINED THEM, AND YOU DETERMINE THE WEIGHT OF THE EVIDENCE.

IN DETERMINING THESE ISSUES, NO ONE MAY INVADE YOUR PROVINCE OR FUNCTIONS AS JURORS. IN ORDER FOR YOU TO DETERMINE THE FACTS, YOU MUST RELY UPON YOUR OWN RECOLLECTION OF THE EVIDENCE. WHAT THE LAWYERS HAVE SAID IN THEIR OPENING STATEMENTS, IN THEIR CLOSING

ARGUMENTS, IN THEIR OBJECTIONS, OR IN THEIR QUESTIONS IS NOT EVIDENCE. NOR IS WHAT I MAY HAVE SAID—OR WHAT I MAY SAY IN THESE INSTRUCTIONS—ABOUT A FACT ISSUE EVIDENCE. YOU SHOULD BEAR IN MIND THAT A QUESTION PUT TO A WITNESS IS NEVER EVIDENCE, IT IS ONLY THE ANSWER WHICH IS EVIDENCE. BUT YOU MAY NOT CONSIDER ANY ANSWER THAT I DIRECTED YOU TO DISREGARD OR THAT I DIRECTED STRUCK FROM THE RECORD. DO NOT CONSIDER SUCH ANSWERS.

SINCE YOU ARE THE SOLE AND EXCLUSIVE JUDGES OF THE FACTS, I DO NOT MEAN TO INDICATE ANY OPINION AS TO THE FACTS OR WHAT YOUR VERDICT SHOULD BE. THE RULINGS I HAVE MADE DURING THE TRIAL ARE NOT ANY INDICATION OF MY VIEWS OF WHAT YOUR DECISION SHOULD BE AS TO WHETHER OR NOT THE PLAINTIFF HAS PROVEN HER CASE.

I ALSO ASK YOU TO DRAW NO INFERENCE FROM THE FACT THAT UPON OCCASION I ASKED QUESTIONS OF CERTAIN WITNESSES. THESE QUESTIONS WERE ONLY INTENDED FOR CLARIFICATION OR TO EXPEDITE MATTERS AND CERTAINLY WERE NOT INTENDED TO SUGGEST ANY OPINIONS ON MY PART AS TO

THE VERDICT YOU SHOULD RENDER, OR WHETHER ANY OF THE WITNESSES MAY HAVE BEEN MORE CREDIBLE THAN ANY OTHER WITNESSES. YOU ARE EXPRESSLY TO UNDERSTAND THAT THE COURT HAS NO OPINION AS TO THE VERDICT YOU SHOULD RENDER IN THIS CASE.

AS TO THE FACTS, LADIES AND GENTLEMEN, YOU ARE THE EXCLUSIVE JUDGES. YOU ARE TO PERFORM THE DUTY OF FINDING THE FACTS WITHOUT BIAS OR PREJUDICE TO ANY PARTY. YOUR VERDICT MUST BE BASED SOLELY ON THE EVIDENCE DEVELOPED AT THIS TRIAL, OR THE LACK OF EVIDENCE.

IT WOULD BE IMPROPER FOR YOU TO CONSIDER ANY PERSONAL FEELINGS YOU MAY HAVE ABOUT ONE OF THE PARTIES' RACE, RELIGION, NATIONAL ORIGIN, GENDER, OR AGE. IT WOULD BE IMPROPER FOR YOU TO BE SWAYED BY SYMPATHY. THE PARTIES IN THIS CASE ARE ENTITLED TO A TRIAL FREE FROM PREJUDICE. OUR JUDICIAL SYSTEM CANNOT WORK UNLESS YOU REACH YOUR VERDICT THROUGH A FAIR AND IMPARTIAL CONSIDERATION OF THE EVIDENCE.

IN DETERMINING THE FACTS, YOU ARE REMINDED THAT YOU TOOK AN OATH TO RENDER JUDGMENT IMPARTIALLY AND FAIRLY, WITHOUT PREJUDICE

OR SYMPATHY AND WITHOUT FEAR, SOLELY UPON THE EVIDENCE IN THE CASE AND THE APPLICABLE LAW. I KNOW THAT YOU WILL DO THIS AND REACH A JUST AND TRUE VERDICT.

CONDUCT OF COUNSEL

IT IS THE DUTY OF THE ATTORNEY ON EACH SIDE OF A CASE TO OBJECT WHEN THE OTHER SIDE OFFERS TESTIMONY OR OTHER EVIDENCE WHICH THE ATTORNEY BELIEVES IS NOT PROPERLY ADMISSIBLE. COUNSEL ALSO HAVE THE RIGHT AND DUTY TO ASK THE COURT TO MAKE RULINGS OF LAW AND TO REQUEST CONFERENCES AT THE SIDE BAR OUT OF THE HEARING OF THE JURY. ALL THOSE QUESTIONS OF LAW MUST BE DECIDED BY ME, THE COURT. YOU SHOULD NOT SHOW ANY PREJUDICE AGAINST AN ATTORNEY OR HIS CLIENT BECAUSE THE ATTORNEY OBJECTED TO THE ADMISSIBILITY OF EVIDENCE, OR ASKED FOR A CONFERENCE OUT OF THE HEARING OF THE JURY OR ASKED THE COURT FOR A RULING ON THE LAW.

AS I ALREADY INDICATED, MY RULINGS ON THE ADMISSIBILITY OF EVIDENCE DO NOT, UNLESS EXPRESSLY STATED BY ME, INDICATE ANY OPINION

AS TO THE WEIGHT OR EFFECT OF SUCH EVIDENCE. YOU ARE THE SOLE JUDGES OF THE CREDIBILITY OF ALL WITNESSES AND THE WEIGHT AND EFFECT OF ALL EVIDENCE.

THE BURDEN OF PROOF

THE COURT WILL NOW DESCRIBE THE BURDEN OF PROVING THE ELEMENTS OF THE CASE. THE PARTY WITH THE BURDEN OF PROOF ON ANY GIVEN ISSUE HAS THE BURDEN OF PROVING EVERY DISPUTED ELEMENT OF HIS OR HER CLAIM TO YOU BY A PREPONDERANCE OF THE EVIDENCE. IF YOU CONCLUDE THAT THE PARTY BEARING THE BURDEN OF PROOF HAS FAILED TO ESTABLISH HIS OR HER CLAIM BY A PREPONDERANCE OF THE EVIDENCE, YOU MUST DECIDE AGAINST THAT PARTY ON THE ISSUE YOU ARE CONSIDERING.

WHAT DOES A "PREPONDERANCE OF THE EVIDENCE" MEAN? TO ESTABLISH A FACT BY A PREPONDERANCE OF THE EVIDENCE MEANS TO PROVE THAT THE FACT IS MORE LIKELY TRUE THAN NOT TRUE. 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 CLAIM HAS BEEN PROVED BY A PREPONDERANCE OF THE EVIDENCE, YOU MAY CONSIDER THE RELEVANT TESTIMONY OF ALL WITNESSES, REGARDLESS OF WHO MAY HAVE CALLED THEM, AND ALL THE RELEVANT EXHIBITS RECEIVED IN EVIDENCE, REGARDLESS OF WHO MAY HAVE PRODUCED THEM.

IF YOU FIND THAT THE CREDIBLE EVIDENCE ON A GIVEN ISSUE IS EVENLY DIVIDED BETWEEN THE PARTIES—THAT IT IS EQUALLY PROBABLE THAT ONE SIDE IS RIGHT AS IT IS THAT THE OTHER SIDE IS RIGHT—THEN YOU MUST DECIDE THAT ISSUE AGAINST THE PARTY HAVING THIS BURDEN OF PROOF. THAT IS BECAUSE THE PARTY BEARING THIS BURDEN MUST PROVE MORE THAN SIMPLE EQUALITY OF EVIDENCE—THAT PARTY MUST PROVE THE ELEMENT AT ISSUE BY A PREPONDERANCE OF THE EVIDENCE. ON THE OTHER HAND, THE PARTY WITH THIS BURDEN OF PROOF NEED NOT PROVE MORE THAN A PREPONDERANCE. SO LONG AS YOU FIND THAT THE SCALES TIP, HOWEVER SLIGHTLY, IN FAVOR OF THE PARTY WITH THIS BURDEN OF PROOF—THAT WHAT

THE PARTY CLAIMS IS MORE LIKELY TRUE THAN NOT TRUE—THEN THAT ELEMENT WILL HAVE BEEN PROVED BY A PREPONDERANCE OF EVIDENCE.

SOME OF YOU MAY HAVE HEARD OF PROOF BEYOND A REASONABLE DOUBT, WHICH IS THE PROPER STANDARD OF PROOF IN A CRIMINAL TRIAL. THAT REQUIREMENT DOES NOT APPLY TO A CIVIL CASE SUCH AS THIS AND YOU SHOULD PUT IT OUT OF YOUR MIND.

EVIDENCE

THE EVIDENCE IN THIS CASE IS THE SWORN TESTIMONY OF THE WITNESSES, THE EXHIBITS RECEIVED IN EVIDENCE, STIPULATIONS, AND JUDICIALLY NOTICED FACTS.

BY CONTRAST, THE QUESTIONS OF THE LAWYERS ARE NOT TO BE CONSIDERED BY YOU AS EVIDENCE. IT IS THE WITNESSES' ANSWERS THAT ARE EVIDENCE, NOT THE QUESTIONS. AT TIMES, A LAWYER MAY HAVE INCORPORATED INTO A QUESTION A STATEMENT WHICH ASSUMED CERTAIN FACTS TO BE TRUE, AND ASKED THE WITNESS IF THE STATEMENT WAS TRUE. IF THE WITNESS DENIED THE TRUTH OF A STATEMENT, AND IF THERE IS NO DIRECT

EVIDENCE IN THE RECORD PROVING THAT ASSUMED FACT TO BE TRUE, THEN YOU MAY NOT CONSIDER IT TO BE TRUE SIMPLY BECAUSE IT WAS CONTAINED IN THE LAWYER'S QUESTION.

TESTIMONY THAT HAS BEEN STRICKEN OR EXCLUDED IS NOT EVIDENCE AND MAY NOT BE CONSIDERED BY YOU IN RENDERING YOUR VERDICT. ALSO, IF CERTAIN TESTIMONY WAS RECEIVED FOR A LIMITED PURPOSE—SUCH AS FOR THE PURPOSE OF ASSESSING A WITNESS'S CREDIBILITY—YOU MUST FOLLOW THE LIMITING INSTRUCTIONS I HAVE GIVEN.

ARGUMENTS BY LAWYERS ARE NOT EVIDENCE, BECAUSE THE LAWYERS ARE NOT WITNESSES. WHAT THEY HAVE SAID TO YOU IN THEIR OPENING STATEMENTS AND IN THEIR SUMMATIONS IS INTENDED TO HELP YOU UNDERSTAND THE EVIDENCE TO REACH YOUR VERDICT. HOWEVER, IF YOUR RECOLLECTION OF THE FACTS DIFFERS FROM THE LAWYERS' STATEMENTS, IT IS YOUR RECOLLECTION WHICH CONTROLS.

EXHIBITS WHICH HAVE BEEN MARKED FOR IDENTIFICATION MAY NOT BE CONSIDERED BY YOU AS EVIDENCE UNLESS THEY WERE RECEIVED IN EVIDENCE

BY THE COURT. TO CONSTITUTE EVIDENCE, EXHIBITS MUST BE RECEIVED IN EVIDENCE. EXHIBITS MARKED FOR IDENTIFICATION, BUT NOT ADMITTED, ARE NOT EVIDENCE, NOR ARE MATERIALS BROUGHT FORTH ONLY TO REFRESH A WITNESS'S RECOLLECTION.

FINALLY, STATEMENTS WHICH I MAY HAVE MADE CONCERNING THE QUALITY OF THE EVIDENCE DO NOT CONSTITUTE EVIDENCE.

IT IS FOR YOU ALONE TO DECIDE THE WEIGHT, IF ANY, TO BE GIVEN TO THE TESTIMONY YOU HAVE HEARD AND THE EXHIBITS YOU HAVE SEEN.

DIRECT AND CIRCUMSTANTIAL

THERE ARE TWO TYPES OF EVIDENCE WHICH YOU MAY PROPERLY USE IN REACHING YOUR VERDICT.

ONE TYPE OF EVIDENCE IS DIRECT EVIDENCE. DIRECT EVIDENCE IS WHEN A WITNESS TESTIFIES ABOUT SOMETHING HE KNOWS BY VIRTUE OF HIS OWN SENSES—SOMETHING HE HAS SEEN, FELT, TOUCHED, OR HEARD. DIRECT EVIDENCE MAY ALSO BE IN THE FORM OF AN EXHIBIT WHEN THE FACT TO BE PROVED IS ITS PRESENT EXISTENCE OR CONDITION.

THE OTHER TYPE OF EVIDENCE IS CIRCUMSTANTIAL EVIDENCE. THIS IS EVIDENCE WHICH TENDS TO PROVE A DISPUTED FACT BY PROOF OF OTHER FACTS. THERE IS A SIMPLE EXAMPLE OF CIRCUMSTANTIAL EVIDENCE WHICH IS OFTEN USED IN THIS COURTHOUSE.

ASSUME THAT WHEN YOU CAME INTO THE COURTHOUSE THIS MORNING THE SUN WAS SHINING AND IT WAS A NICE DAY. ASSUME THAT THIS COURTROOM HAD WINDOWS TO THE OUTSIDE OF THIS COURTHOUSE BUILDING, AND THAT THESE WINDOWS HAD BLINDS WHICH HAD BEEN DRAWN SHUT AND SO NO ONE COULD LOOK OUTSIDE. AS YOU WERE SITTING HERE, SOMEONE WALKED IN WITH AN UMBRELLA WHICH WAS DRIPPING WET. THEN A FEW MINUTES LATER ANOTHER PERSON ALSO ENTERED WITH A WET UMBRELLA. NOW, YOU CANNOT LOOK OUTSIDE OF THE COURTROOM, AND YOU CANNOT SEE WHETHER OR NOT IT IS RAINING. SO YOU HAVE NO DIRECT EVIDENCE OF THAT FACT. BUT ON THE COMBINATION OF FACTS WHICH I HAVE ASKED YOU TO ASSUME, IT WOULD BE REASONABLE AND LOGICAL FOR YOU TO CONCLUDE THAT IT HAD BEEN RAINING.

THAT IS ALL THERE IS TO CIRCUMSTANTIAL EVIDENCE. YOU INFER ON THE BASIS OF REASON, EXPERIENCE, AND COMMON SENSE FROM ONE ESTABLISHED FACT THE EXISTENCE OR NON-EXISTENCE OF SOME OTHER FACT.

CIRCUMSTANTIAL EVIDENCE IS OF NO LESS VALUE THAN DIRECT EVIDENCE; FOR, IT IS A GENERAL RULE THAT THE LAW MAKES NO DISTINCTION BETWEEN DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE, BUT SIMPLY REQUIRES THAT YOUR VERDICT MUST BE BASED ON A PREPONDERANCE OF ALL THE EVIDENCE PRESENTED.

WITNESS CREDIBILITY

YOU HAVE HAD THE OPPORTUNITY TO OBSERVE ALL OF THE WITNESSES. IT IS NOW YOUR JOB TO DECIDE HOW BELIEVABLE EACH WITNESS WAS IN HIS OR HER TESTIMONY. YOU ARE THE SOLE JUDGES OF THE CREDIBILITY OF EACH WITNESS AND OF THE IMPORTANCE OF HIS OR HER TESTIMONY.

IT MUST BE CLEAR TO YOU BY NOW THAT YOU ARE BEING CALLED UPON TO RESOLVE VARIOUS FACTUAL ISSUES RAISED BY THE PARTIES IN THE FACE OF VERY DIFFERENT PICTURES PAINTED BY BOTH SIDES. IN MAKING THESE

JUDGMENTS, YOU SHOULD CAREFULLY SCRUTINIZE ALL OF THE TESTIMONY OF EACH WITNESS, THE CIRCUMSTANCES UNDER WHICH EACH WITNESS TESTIFIED, AND ANY OTHER MATTER IN EVIDENCE WHICH MAY HELP YOU DECIDE THE TRUTH AND THE IMPORTANCE OF EACH WITNESS'S TESTIMONY.

HOW DO YOU DETERMINE WHERE THE TRUTH LIES? YOU WATCHED EACH WITNESS TESTIFY. EVERYTHING A WITNESS SAID OR DID ON THE WITNESS STAND COUNTS IN YOUR DETERMINATION. HOW DID THE WITNESS IMPRESS YOU? DID HE APPEAR TO BE FRANK, FORTHRIGHT AND CANDID, OR EVASIVE AND EDGY AS IF HIDING SOMETHING? HOW DID THE WITNESS APPEAR; WHAT WAS HIS DEMEANOR—THAT IS, HIS CARRIAGE, BEHAVIOR, BEARING, MANNER, AND APPEARANCE WHILE TESTIFYING? OFTEN IT IS NOT WHAT A PERSON SAYS, BUT HOW HE SAYS IT THAT MOVES AND INFORMS US.

YOU SHOULD USE ALL THE TESTS FOR TRUTHFULNESS THAT YOU WOULD USE IN DETERMINING MATTERS OF IMPORTANCE TO YOU IN YOUR EVERYDAY LIFE. YOU SHOULD CONSIDER ANY BIAS OR HOSTILITY THE WITNESS MAY HAVE SHOWN FOR OR AGAINST ANY PARTY AS WELL AS ANY INTEREST THE

WITNESS HAS IN THE OUTCOME OF THE CASE. YOU SHOULD CONSIDER THE OPPORTUNITY THE WITNESS HAD TO SEE, HEAR, AND KNOW THE THINGS ABOUT WHICH HE TESTIFIED, THE ACCURACY OF HIS MEMORY, HIS CANDOR OR LACK OF CANDOR, HIS INTELLIGENCE, THE REASONABLENESS AND PROBABILITY OF HIS TESTIMONY, ITS CONSISTENCY OR LACK OF CONSISTENCY AND ITS CORROBORATION OR LACK OF CORROBORATION WITH OTHER CREDIBLE TESTIMONY.

IN OTHER WORDS, WHAT YOU MUST TRY TO DO IN DECIDING CREDIBILITY IS TO SIZE A WITNESS UP IN LIGHT OF HIS OR HER DEMEANOR, THE EXPLANATIONS GIVEN, AND ALL OF THE OTHER EVIDENCE IN THE CASE. ALWAYS REMEMBER THAT YOU SHOULD USE YOUR COMMON SENSE, YOUR GOOD JUDGMENT, AND YOUR OWN LIFE EXPERIENCE.

IN DECIDING WHETHER TO BELIEVE A WITNESS, YOU SHOULD SPECIFICALLY NOTE ANY EVIDENCE OF HOSTILITY OR AFFECTION WHICH THE WITNESS MAY HAVE TOWARDS ONE OF THE PARTIES. LIKEWISE, YOU SHOULD

CONSIDER EVIDENCE OF ANY OTHER INTEREST OR MOTIVE THAT THE WITNESS MAY HAVE IN COOPERATING WITH A PARTICULAR PARTY.

IT IS YOUR DUTY TO CONSIDER WHETHER THE WITNESS HAS PERMITTED ANY SUCH BIAS OR INTEREST TO COLOR HIS TESTIMONY. IN SHORT, IF YOU FIND THAT A WITNESS IS BIASED, YOU SHOULD VIEW HIS TESTIMONY WITH CAUTION, WEIGH IT WITH CARE, AND SUBJECT IT TO CLOSE AND SEARCHING SCRUTINY.

KEEP IN MIND, THOUGH, THAT IT DOES NOT AUTOMATICALLY FOLLOW THAT THE TESTIMONY GIVEN BY A BIASED WITNESS IS TO BE DISBELIEVED. THERE ARE MANY PEOPLE WHO, NO MATTER WHAT THEIR BIAS MAY BE, WOULD NOT TESTIFY FALSELY. IT IS FOR YOU TO DECIDE, BASED ON YOUR OWN PERCEPTIONS AND COMMON SENSE, TO WHAT EXTENT, IF AT ALL, THE WITNESS'S BIAS HAS AFFECTED HIS TESTIMONY.

INTEREST IN OUTCOME

IN EVALUATING THE CREDIBILITY OF THE WITNESSES, YOU SHOULD TAKE INTO ACCOUNT ANY EVIDENCE THAT A WITNESS MAY BENEFIT IN SOME WAY

FROM THE OUTCOME OF THE CASE. SUCH INTEREST IN THE OUTCOME CREATES A MOTIVE TO TESTIFY FALSELY AND MAY SWAY A WITNESS TO TESTIFY IN A WAY THAT ADVANCES HIS OWN INTERESTS. THEREFORE, IF YOU FIND THAT ANY WITNESS WHOSE TESTIMONY YOU ARE CONSIDERING MAY HAVE AN INTEREST IN THE OUTCOME OF THIS TRIAL, THEN YOU SHOULD BEAR THAT FACTOR IN MIND WHEN EVALUATING THE CREDIBILITY OF HIS TESTIMONY, AND ACCEPT IT WITH GREAT CARE.

KEEP IN MIND, THOUGH, THAT IT DOES NOT AUTOMATICALLY FOLLOW THAT THE TESTIMONY GIVEN BY AN INTERESTED WITNESS IS TO BE DISBELIEVED. THERE ARE MANY PEOPLE WHO, NO MATTER WHAT THEIR INTEREST IN THE OUTCOME OF THE CASE MAY BE, WOULD NOT TESTIFY FALSELY. IT IS FOR YOU TO DECIDE, BASED ON YOUR OWN PERCEPTIONS AND COMMON SENSE, TO WHAT EXTENT, IF AT ALL, THE WITNESS'S INTEREST HAS AFFECTED HIS TESTIMONY.

DISCREPANCIES IN TESTIMONY

YOU HAVE HEARD EVIDENCE OF DISCREPANCIES IN THE TESTIMONY OF CERTAIN WITNESSES, AND COUNSEL HAVE ARGUED THAT SUCH DISCREPANCIES ARE A REASON FOR YOU TO REJECT THE TESTIMONY OF THOSE WITNESSES.

YOU ARE INSTRUCTED THAT EVIDENCE OF DISCREPANCIES MAY BE A BASIS TO DISBELIEVE A WITNESS'S TESTIMONY. ON THE OTHER HAND, DISCREPANCIES IN A WITNESS'S TESTIMONY, OR BETWEEN HIS TESTIMONY AND THAT OF OTHERS, DO NOT NECESSARILY MEAN THAT THE WITNESS'S ENTIRE TESTIMONY SHOULD BE DISCREDITED.

PEOPLE SOMETIMES FORGET THINGS AND EVEN A TRUTHFUL WITNESS MAY BE NERVOUS AND CONTRADICT HIMSELF OR HERSELF. IT IS ALSO A FACT THAT TWO PEOPLE WITNESSING AN EVENT WILL SEE OR HEAR IT DIFFERENTLY. WHETHER A DISCREPANCY PERTAINS TO A FACT OF IMPORTANCE OR ONLY TO A TRIVIAL DETAIL SHOULD BE CONSIDERED IN WEIGHING ITS SIGNIFICANCE. HOWEVER, A WILLFUL FALSEHOOD ALWAYS IS A MATTER OF IMPORTANCE AND SHOULD BE CONSIDERED SERIOUSLY.

IT IS FOR YOU TO DECIDE, BASED ON YOUR TOTAL IMPRESSION OF THE WITNESS, HOW TO WEIGH THE DISCREPANCIES IN HIS OR HER TESTIMONY. YOU SHOULD, AS ALWAYS, USE COMMON SENSE AND YOUR OWN GOOD JUDGMENT.

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENTS

YOU HAVE HEARD EVIDENCE THAT AT SOME EARLIER TIME A WITNESS HAS SAID OR DONE SOMETHING WHICH COUNSEL ARGUES IS INCONSISTENT WITH THE WITNESS'S TRIAL TESTIMONY.

EVIDENCE OF A PRIOR INCONSISTENT STATEMENT IS NOT TO BE CONSIDERED BY YOU AS AFFIRMATIVE EVIDENCE IN DETERMINING LIABILITY. EVIDENCE OF A PRIOR INCONSISTENT STATEMENT WAS PLACED BEFORE YOU FOR THE MORE LIMITED PURPOSE OF HELPING YOU DECIDE WHETHER TO BELIEVE THE TRIAL TESTIMONY OF THE WITNESS WHO CONTRADICTED HIMSELF. IF YOU FIND THAT THE WITNESS MADE AN EARLIER STATEMENT THAT CONFLICTS WITH HIS TRIAL TESTIMONY, YOU MAY CONSIDER THAT FACT IN DECIDING HOW MUCH OF HIS TRIAL TESTIMONY, IF ANY, TO BELIEVE.

IN MAKING THIS DETERMINATION, YOU MAY CONSIDER WHETHER THE WITNESS PURPOSELY MADE A FALSE STATEMENT OR WHETHER IT WAS AN INNOCENT MISTAKE; WHETHER THE INCONSISTENCY CONCERNS AN IMPORTANT FACT, OR WHETHER IT HAD TO DO WITH A SMALL DETAIL; WHETHER THE WITNESS HAD AN EXPLANATION FOR THE INCONSISTENCY, AND WHETHER THAT EXPLANATION APPEALED TO YOUR COMMON SENSE.

IT IS EXCLUSIVELY YOUR DUTY, BASED UPON ALL THE EVIDENCE AND YOUR OWN GOOD JUDGMENT, TO DETERMINE WHETHER THE PRIOR STATEMENT WAS INCONSISTENT, AND, IF SO, HOW MUCH, IF ANY, WEIGHT TO GIVE TO THE INCONSISTENT STATEMENT IN DETERMINING WHETHER TO BELIEVE ALL OR PART OF THE WITNESS'S TESTIMONY.

THE CLAIMS

THE PARTIES HAVE STIPULATED TO THE FOLLOWING FACTS. ON OR ABOUT AUGUST 24, 2010, PLAINTIFF STARTED HER EMPLOYMENT WITH DEFENDANT AS A HOME HEALTH AIDE WITHIN ITS ASSISTED LIVING PROGRAM. DEFENDANT IS A RESIDENTIAL ASSISTED LIVING FACILITY. DEFENDANT HAS MORE THAN 15 EMPLOYEES. DEFENDANT MAINTAINS A POLICY PROHIBITING HARASSMENT IN THE WORKPLACE AND SETTING FORTH A PROCEDURE FOR REPORTING HARASSMENT. UPON HIRE, DEFENDANT PROVIDED PLAINTIFF WITH A COPY OF ITS ANTI-HARASSMENT POLICY, WHICH PLAINTIFF REVIEWED AND SIGNED.

IN LATE APRIL 2013, PLAINTIFF LEARNED THAT A COLLAGE, CONSISTING OF TWO PHOTOGRAPHS OF HER AND A PHOTOGRAPH OF A CHARACTER FROM THE PLANET OF THE APES MOVIE AND COMPARING HER TO THE CHARACTER, HAD BEEN POSTED ON INSTAGRAM. DEFENDANT ADVISED PLAINTIFF TO REPORT THE INCIDENT TO THE UNION AND TO THE POLICE. ON MAY 13, 2013, MORDECHAI DEUTSCHER, ADMINISTRATOR, CONDUCTED AN IN-SERVICE

TRAINING TO REINFORCE AND REVIEW DEFENDANT'S ANTI-HARASSMENT POLICY, INFORMED THE STAFF OF A NEW RULE PROHIBITING PHOTOGRAPHS IN THE FACILITY, ADVISE THE STAFF OF AN ONGOING INVESTIGATION REGARDING THE INSTAGRAM INCIDENT, AND REQUEST THAT ANY EMPLOYEES WITH INFORMATION CONCERNING THE INSTAGRAM INCIDENT SPEAK WITH HIM PRIVATELY. THE IN-SERVICE TRAINING WAS PROVIDED TO, AMONG OTHERS, PLAINTIFF, YVONNE KELLY, AND LISI LAURENT.

ON MAY 20, 2013, MR. DEUTSCHER SPOKE WITH YVONNE KELLY ABOUT THE INSTAGRAM INCIDENT, AND SHE DENIED TAKING ANY PHOTOGRAPHS OF PLAINTIFF. ON MAY 21, 2013, MR. DEUTSCHER SPOKE WITH ALICIA SCALES ABOUT THE INSTAGRAM INCIDENT, AND SHE DENIED ANY KNOWLEDGE OF THE PHOTOGRAPHS OR WHO TOOK THEM. ON MAY 22, 2013, MR. DEUTSCHER SPOKE WITH LISI LAURENT ABOUT THE INSTAGRAM INCIDENT. MS. LAURENT ADMITTED POSTING THE COLLAGE ON INSTAGRAM AND CLAIMED MS. KELLY HAD TAKEN THE PHOTOGRAPHS OF PLAINTIFF. MR. DEUTSCHER VERBALLY REPRIMANDED MS. LAURENT, REMINDED HER OF DEFENDANT'S ANTI-

HARASSMENT POLICY, AND ADVISED HER THAT ANY FURTHER BEHAVIOR OF A SIMILAR NATURE WOULD RESULT IN SEVERE DISCIPLINE. ON MAY 24, 2013, MR. DEUTSCHER SPOKE WITH SHEKIA BROWN ABOUT THE INSTAGRAM INCIDENT, AND SHE DENIED ANY KNOWLEDGE OF THE PHOTOGRAPHS OR WHO TOOK THEM. ON MAY 25, 2013, MR. DEUTSCHER SPOKE WITH MS. KELLY FOR A SECOND TIME. HE ADVISED HER THAT AN EMPLOYEE HAD INFORMED HIM THAT MS. KELLY HAD TAKEN THE PHOTOGRAPHS OF PLAINTIFF. MS. KELLY AGAIN DENIED ANY INVOLVEMENT. MR. DEUTSCHER REMINDED HER OF DEFENDANT'S ANTI-HARASSMENT POLICY AND ADVISED HER THAT ANY VIOLATIONS OF THIS POLICY WOULD RESULT IN SEVERE DISCIPLINE. MS. KELLY WAS NOT A SUPERVISOR.

ON JULY 24, 2013, PLAINTIFF FILED A CHARGE WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. IN HER CHARGE, PLAINTIFF CHECKED "RACE" AND "COLOR" AS THE BASES FOR THE ALLEGED DISCRIMINATION. PLAINTIFF DID NOT CHECK "NATIONAL ORIGIN" AS AN ADDITIONAL BASIS FOR THE ALLEGED DISCRIMINATION. IN HER CHARGE,

PLAINTIFF IDENTIFIED HERSELF AS "AFRICAN AMERICAN." IN THE CHARGE, PLAINTIFF CHECKED THE BOX "CONTINUING ACTION." DEFENDANT DID NOT TAKE ANY ADVERSE ACTION AGAINST PLAINTIFF FOR VOLUNTARILY REDUCING HER WORK SCHEDULE.

PLAINTIFF, LISA FISHER, CLAIMS THAT DEFENDANT MERMAID MANOR HOME FOR ADULTS, LLC, VIOLATED TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ("TITLE VII") AND THE NEW YORK CITY HUMAN RIGHTS LAW ("NYCHRL"). PLAINTIFF ALLEGES HOSTILE WORK ENVIRONMENT HARASSMENT UNDER TITLE VII ("CLAIM ONE"), HOSTILE WORK ENVIRONMENT UNDER NYCHRL ("CLAIM TWO"), RETALIATION UNDER TITLE VII ("CLAIM THREE"), AND RETALIATION UNDER NYCHRL ("CLAIM FOUR").

CLAIM ONE: HOSTILE WORK ENVIRONMENT UNDER TITLE VII

HERE, THE PLAINTIFF CONTENDS THAT THE DISCRIMINATORY EMPLOYMENT ACTION TAKEN ON ACCOUNT OF NATIONAL ORIGIN WAS THE CREATION OF WHAT IS CALLED A "HOSTILE WORK ENVIRONMENT." TO ESTABLISH A CLAIM UNDER THIS APPROACH, THE PLAINTIFF MUST PROVE, BY A

PREPONDERANCE OF THE CREDIBLE EVIDENCE, EACH OF THE FOLLOWING ELEMENTS:

1. THAT THE PLAINTIFF WAS SUBJECTED TO UNWELCOME HARASSMENT, RIDICULE, OR OTHER ABUSIVE CONDUCT;

2. THAT THE ABUSIVE CONDUCT WAS MOTIVATED, AT LEAST IN PART, BY THE PLAINTIFF'S NATIONAL ORIGIN;

3. THAT THE ABUSIVE CONDUCT WAS SO SEVERE OR PERVASIVE THAT BOTH THE PLAINTIFF HERSELF AND A REASONABLE PERSON IN THE PLAINTIFF'S POSITION WOULD FIND HER WORK ENVIRONMENT SO HOSTILE OR OFFENSIVE THAT IT WOULD INTERFERE WITH HER WORK PERFORMANCE; AND

4. THAT THE DEFENDANT'S MANAGEMENT EMPLOYEES KNEW, OR SHOULD HAVE KNOWN, OF THE ABUSIVE CONDUCT.

CLAIM TWO: HOSTILE WORK ENVIRONMENT UNDER NYCHRL

IN ORDER TO RECOVER, PLAINTIFF MUST PROVE, BY A PREPONDERANCE OF THE EVIDENCE, (1) THAT SHE WAS AN EMPLOYEE OF DEFENDANT; (2) THAT PLAINTIFF IS AFRICAN AMERICAN; (3) THAT THE CREATION OF A HOSTILE WORK

ENVIRONMENT ACTUALLY OCCURRED; (4) THAT PLAINTIFF WAS SUBJECTED TO THE CONDUCT BECAUSE SHE IS AFRICAN AMERICAN; (5) THAT, AS A RESULT OF THE CREATION OF A HOSTILE WORK ENVIRONMENT, A REASONABLE PERSON WHO IS AFRICAN AMERICAN WOULD CONSIDER THAT SHE WAS BEING TREATED LESS WELL THAN OTHER EMPLOYEES UNDER ALL OF THE CIRCUMSTANCES; (6) THAT PLAINTIFF ACTUALLY CONSIDERED THAT SHE WAS BEING TREATED LESS WELL THAN OTHER EMPLOYEES BECAUSE SHE IS AFRICAN AMERICAN; AND (7) THAT PLAINTIFF WAS HARMED BECAUSE OF THE CONDUCT.

IF YOU DECIDE ALL SEVEN ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE, YOU WILL FIND DEFENDANT LIABLE TO PLAINTIFF AND YOU WILL PROCEED TO CONSIDER THE AMOUNT OF PLAINTIFF'S DAMAGES.

ON THE OTHER HAND, YOU WILL FIND THAT DEFENDANT IS NOT LIABLE TO PLAINTIFF IF YOU DECIDE (1) THAT PLAINTIFF WAS NOT AN EMPLOYEE OF DEFENDANT; OR (2) THAT PLAINTIFF IS NOT AFRICAN AMERICAN; OR (3) THAT THE CREATION OF A HOSTILE WORK ENVIRONMENT DID NOT ACTUALLY OCCUR; OR (4) THAT PLAINTIFF WAS NOT SUBJECTED TO THE CONDUCT BECAUSE SHE IS

AFRICAN AMERICAN; OR (5) THAT, AS A RESULT OF THE CONDUCT, A REASONABLE WHO IS AFRICAN AMERICAN WOULD NOT HAVE CONSIDERED THAT SHE WAS BEING TREATED LESS WELL THAN OTHER EMPLOYEES UNDER ALL OF THE CIRCUMSTANCES; OR (6) THAT PLAINTIFF DID NOT ACTUALLY CONSIDER THAT SHE WAS BEING TREATED LESS WELL THAN OTHER EMPLOYEES BECAUSE SHE IS AFRICAN AMERICAN; OR (7) THAT PLAINTIFF WAS NOT HARMED BECAUSE OF THE CONDUCT. IN SUCH A CASE, YOU WILL FIND THAT DEFENDANT IS NOT LIABLE TO PLAINTIFF.

DEFENDANT CLAIMS THAT THE CONDUCT PLAINTIFF COMPLAINS OF WAS TOO MINOR AND INSIGNIFICANT TO JUSTIFY AN AWARD OF DAMAGES. TO ESTABLISH THIS CLAIM, DEFENDANT MUST SHOW, BY A PREPONDERANCE OF THE EVIDENCE, THAT A REASONABLE PERSON WOULD HAVE CONSIDERED THE CONDUCT TO BE NOTHING MORE THAN PETTY SLIGHTS OR TRIVIAL INCONVENIENCES.

IF YOU DECIDE THAT THE CONDUCT PLAINTIFF PROVED AMOUNTED TO WHAT A REASONABLE PERSON WOULD HAVE CONSIDERED TO BE NOTHING

MORE THAN PETTY SLIGHTS OR TRIVIAL INCONVENIENCES, YOU WILL FIND THAT DEFENDANT IS NOT LIABLE TO PLAINTIFF AND WILL PROCEED NO FURTHER ON THIS CLAIM. ON THE OTHER HAND, IF YOU DECIDE THAT THE CONDUCT PLAINTIFF PROVED WAS WHAT A REASONABLE PERSON WOULD HAVE CONSIDERED SIGNIFICANT AND NOT TRIVIAL OR PETTY, YOU WILL FIND DEFENDANT LIABLE TO PLAINTIFF AND WILL PROCEED TO CONSIDER THE AMOUNT OF PLAINTIFF'S DAMAGES.

CLAIM THREE: RETALIATION UNDER TITLE VII

PLAINTIFF CLAIMS THAT THE DEFENDANT RETALIATED AGAINST HER BECAUSE SHE COMPLAINED THAT HER EMPLOYER WAS ENGAGING IN UNLAWFUL DISCRIMINATION. OPPOSING DISCRIMINATION IN EMPLOYMENT IS A PROTECTED ACTIVITY, WHETHER THE PROTEST IS JUSTIFIED OR NOT. ACCORDINGLY, TO MAKE OUT HER CLAIM OF RETALIATION, PLAINTIFF MUST PROVE, BY A PREPONDERANCE OF THE EVIDENCE, EACH OF THE FOLLOWING ESSENTIAL ELEMENTS:

1. THAT THE PLAINTIFF COMPLAINED OF DISCRIMINATION IN HER EMPLOYMENT, SPECIFICALLY BY MAKING, FILING, OR OTHERWISE ASSERTING COMPLAINTS TO MANAGEMENT, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OR THE COURT;

2. THAT THE DEFENDANT WAS AWARE OF PLAINTIFF'S COMPLAINT;

3. THAT THE PLAINTIFF WAS THEN SUBJECTED TO A MATERIAL ADVERSE ACTION BY THE DEFENDANT, SPECIFICALLY BY PERMITTING A HOSTILE WORK ENVIRONMENT TO EXIST; AND

4. THAT THE PLAINTIFF'S COMPLAINT WAS THE CRITICAL ELEMENT IN THE DEFENDANT'S DECISION TO TAKE THE ADVERSE ACTION.

WITH RESPECT TO THE THIRD ELEMENT, AN ADVERSE ACTION IS "MATERIAL," IN TERMS OF A RETALIATION CLAIM, IF IT MIGHT HAVE DISCOURAGED A REASONABLE WORKER FROM COMPLAINING ABOUT SIMILAR DISCRIMINATION. THE ADVERSE ACTION ITSELF, HOWEVER, NEED NOT BE RELATED TO THE PLAINTIFF'S EMPLOYMENT.

WITH RESPECT TO THE FOURTH ELEMENT, IT MUST BE THE CASE THAT THE DEFENDANT WOULD NOT HAVE TAKEN THE ADVERSE ACTION EXCEPT AS A RESPONSE TO THE PLAINTIFF'S PROTECTED ACTIVITY. THE DEFENDANT MUST HAVE TAKEN THE ADVERSE ACTION BECAUSE OF AN INTENT TO RETALIATE AGAINST THE PLAINTIFF FOR COMPLAINING ABOUT EMPLOYMENT DISCRIMINATION.

CLAIM FOUR: RETALIATION UNDER NYCHRL

THE NEW YORK CITY HUMAN RIGHTS LAWS PROHIBIT EMPLOYERS FROM RETALIATING AGAINST EMPLOYEES FOR OPPOSING PRACTICES PROHIBITED BY THE STATUTE OR FOR FILING A COMPLAINT, TESTIFYING, ASSISTING OR PARTICIPATING IN A DISCRIMINATION PROCEEDING.

TO MAKE OUT AN UNLAWFUL RETALIATION CLAIM UNDER THE NEW YORK CITY HUMAN RIGHTS LAW, A PLAINTIFF MUST SHOW THAT (1) SHE ENGAGED IN A PROTECTED ACTIVITY AS THAT TERM IS DEFINED UNDER THE NYCHRL, (2) HER EMPLOYER WAS AWARE THAT SHE PARTICIPATED IN SUCH ACTIVITY, (3) HER EMPLOYER ENGAGED IN CONDUCT WHICH WAS REASONABLY

LIKELY TO DETER A PERSON FROM ENGAGING IN THAT PROTECTED ACTIVITY, AND (4) THERE IS A CAUSAL CONNECTION BETWEEN THE PROTECTED ACTIVITY AND THE ALLEGED RETALIATORY CONDUCT.

ONCE A PRIMA FACIE CASE IS MADE, THE BURDEN SHIFTS TO THE EMPLOYER TO ARTICULATE A LEGITIMATE NONDISCRIMINATORY REASON. IF DEFENDANT MEETS THIS BURDEN, PLAINTIFF MUST THEN SHOW THAT THE REASONS ADVANCED WERE PRETEXTUAL. EVIDENCE THAT ANY MODIFICATION OR REASSIGNMENT VIOLATED THE EMPLOYER'S INTERNAL PROCEDURES AND KNOWN PAST PRACTICES, COUPLED WITH A STRONG TEMPORAL CORRELATION BETWEEN THE PROTECTED ACTIVITY AND THE ALLEGED RETALIATORY ACTIONS, SUFFICED TO RAISE A QUESTION OF FACT AS TO WHETHER THE EMPLOYER'S CLAIMED BUSINESS MOTIVES WERE PRETEXTUAL.

AFFIRMATIVE DEFENSE

THE DEFENDANT HERE CONTENDS THAT, EVEN IF THE PLAINTIFF WAS IN FACT SUBJECTED TO DISCRIMINATION, THE DEFENDANT TOOK PROMPT REMEDIAL ACTION. THIS IS AN AFFIRMATIVE DEFENSE AS TO WHICH THE

DEFENDANT BEARS THE BURDEN OF PROOF. SPECIFICALLY, YOUR VERDICT MUST BE FOR THE DEFENDANT ON THE PLAINTIFF'S CLAIM OF DISCRIMINATION IF THE DEFENDANT PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT (A) THE DEFENDANT EXERCISED REASONABLE CARE TO PREVENT AND PROMPTLY CORRECT ANY DISCRIMINATORY BEHAVIOR DIRECTED AGAINST THE PLAINTIFF; AND (B) THE PLAINTIFF UNREASONABLY FAILED TO TAKE ADVANTAGE OF PREVENTIVE OR CORRECTIVE OPPORTUNITIES PROVIDED BY THE DEFENDANT.

DAMAGES

IF THE PLAINTIFF HAS PROVEN BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE THAT DEFENDANT IS LIABLE ON THE PLAINTIFF'S CLAIM, THEN YOU MUST DETERMINE THE DAMAGES TO WHICH THE PLAINTIFF IS ENTITLED. HOWEVER, YOU SHOULD NOT INFER THAT THE PLAINTIFF IS ENTITLED TO RECOVER DAMAGES MERELY BECAUSE I AM INSTRUCTING YOU ON THE ELEMENTS OF DAMAGES. IT IS EXCLUSIVELY YOUR FUNCTION TO DECIDE UPON LIABILITY, AND I AM INSTRUCTING YOU ON DAMAGES ONLY SO THAT YOU WILL

HAVE GUIDANCE SHOULD YOU DECIDE THAT THE PLAINTIFF IS ENTITLED TO RECOVERY.

IN THIS LAWSUIT, PLAINTIFF IS SEEKING SOLELY COMPENSATORY DAMAGES FOR ALLEGED EMOTIONAL DISTRESS. PLAINTIFF IS NOT SEEKING ANY ECONOMIC DAMAGES FOR LOST PAY, FRONT PAY, NOR BECAUSE HER EMPLOYMENT WAS TERMINATED. PLAINTIFF IS NOT ASSERTING A CLAIM RELATING TO THE TERMINATION OF HER EMPLOYMENT BY MERMAID MANOR. ANY MENTION OF TERMINATION OF PLAINTIFF'S EMPLOYMENT IS PRESENTED ONLY TO EXPLAIN WHY SHE NO LONGER IS EMPLOYED BY MERMAID MANOR, NOT AS PART OF OR IN CONJUNCTION WITH ANY CLAIM IN THIS LAWSUIT. PLAINTIFF IS NOT SEEKING DAMAGES WITH RESPECT TO ANY VACATION PAY. SHE IS NOT ASSERTING THAT ANY DENIALS TO HER REQUESTS FOR VACATION PAYMENT CAUSED HER TO SUFFER EMOTIONAL DISTRESS.

NOMINAL DAMAGES

IF YOU FIND IN FAVOR OF THE PLAINTIFF, BUT YOU FIND THAT THE PLAINTIFF'S DAMAGES HAVE NO MONETARY VALUE, THEN YOU MUST RETURN

A VERDICT FOR THE PLAINTIFF IN THE NOMINAL AMOUNT OF ONE DOLLAR ($1.00).

ACTUAL DAMAGES

IF YOU FIND IN FAVOR OF THE PLAINTIFF, THEN YOU MUST AWARD PLAINTIFF SUCH SUM AS YOU FIND BY THE PREPONDERANCE OF THE EVIDENCE WILL FAIRLY AND JUSTLY COMPENSATE PLAINTIFF FOR ANY DAMAGES YOU FIND SHE SUSTAINED AS A DIRECT RESULT OF THE DEFENDANT'S CREATION OF A HOSTILE WORK ENVIRONMENT. PLAINTIFF'S CLAIM FOR DAMAGES REQUIRE YOU TO DETERMINE THE AMOUNT OF ANY DAMAGES SUSTAINED BY PLAINTIFF, SUCH AS MENTAL ANGUISH, EMOTIONAL PAIN, SUFFERING, INCONVENIENCE, AND INJURY TO REPUTATION.

PUNITIVE DAMAGES

IN ADDITION TO THE ACTUAL DAMAGES, THE LAW PERMITS THE JURY UNDER LIMITED CIRCUMSTANCES TO AWARD AN INJURED PERSON PUNITIVE DAMAGES.

IF YOU FIND IN FAVOR OF PLAINTIFF, THEN YOU MUST DECIDE WHETHER DEFENDANT ACTED WITH MALICE OR WITH RECKLESS AND/OR CALLOUS INDIFFERENCE TO THE PLAINTIFF'S RIGHT NOT TO BE DISCRIMINATED AGAINST ON THE BASIS OF HER NATIONAL ORIGIN. DEFENDANT ACTED WITH MALICE OR INDIFFERENCE IF:

IT HAS BEEN PROVED THAT DEFENDANT MERMAID MANOR HOME FOR ADULTS, LLC, KNEW THAT THE HOSTILE WORK ENVIRONMENT WAS IN VIOLATION OF LAW PROHIBITING DISCRIMINATION, AND/OR ACTED WITH RECKLESS DISREGARD OF THAT LAW, THAT IS WITH AN INTENTION TO DISREGARD WHAT IT KNEW WAS A HIGH PROBABILITY THAT ITS ACTS WERE IN VIOLATION OF THE LAW.

HOWEVER, YOU MAY NOT AWARD PUNITIVE DAMAGES IF IT HAS BEEN PROVED THAT THE DEFENDANT ITSELF MADE A GOOD-FAITH EFFORT TO COMPLY WITH THE LAW PROHIBITING DISCRIMINATION AND THAT THE MANAGER RESPONSIBLE FOR THE DISCRIMINATION WAS THEREFORE ACTING IN CONTRADICTION OF COMPANY POLICY AND PRACTICE.

IF YOU FIND THAT THE DEFENDANT ACTED WITH MALICE OR RECKLESS DISREGARD AND DID NOT MAKE A GOOD-FAITH EFFORT TO COMPLY WITH THE LAW, THEN IN ADDITION TO ANY ACTUAL DAMAGES TO WHICH YOU FIND THE PLAINTIFF ENTITLED, YOU MAY, BUT ARE NOT REQUIRED TO, AWARD THE PLAINTIFF AN ADDITIONAL AMOUNT AS PUNITIVE DAMAGES IF YOU FIND IT IS APPROPRIATE TO PUNISH THE DEFENDANT OR TO DETER THE DEFENDANT AND OTHERS FROM LIKE CONDUCT IN THE FUTURE. WHETHER TO AWARD THE PLAINTIFF PUNITIVE DAMAGES, AND THE AMOUNT OF THOSE DAMAGES, ARE WITHIN YOUR DISCRETION.

GENERAL RULES REGARDING DELIBERATIONS

THIS BRINGS ME TO THE FINAL PART OF THESE INSTRUCTIONS: SOME GENERAL RULES REGARDING YOUR DELIBERATIONS.

YOU ARE ABOUT TO GO INTO THE JURY ROOM AND BEGIN YOUR DELIBERATIONS. IF DURING THOSE DELIBERATIONS YOU WANT TO SEE ANY OF THE EXHIBITS, YOU MAY REQUEST THAT THEY BE BROUGHT INTO THE JURY ROOM. IF YOU WANT ANY OF THE TESTIMONY READ BACK TO YOU, YOU MAY

ALSO REQUEST THAT. PLEASE REMEMBER THAT IT IS NOT ALWAYS EASY TO LOCATE WHAT YOU MIGHT WANT, SO BE AS SPECIFIC AS YOU POSSIBLY CAN IN REQUESTING EXHIBITS OR PORTIONS OF THE TESTIMONY.

YOUR REQUESTS FOR EXHIBITS OR TESTIMONY—IN FACT, ANY COMMUNICATION WITH THE COURT—MUST BE MADE TO ME IN WRITING AND GIVEN TO ONE OF THE COURT SECURITY OFFICERS. TO ENSURE THE ABILITY OF THE COURT TO READ THE NOTE, THE FOREPERSON OF THE JURY SHOULD PRINT THE NOTE AND THEN SIGN HIS OR HER NAME. IN ANY EVENT, DO NOT TELL ME OR ANYONE ELSE HOW THE JURY STANDS ON ANY ISSUE UNTIL AFTER A UNANIMOUS VERDICT IS REACHED.

IN ORDER TO PREVAIL, THE PLAINTIFF MUST SUSTAIN HER BURDEN OF PROOF, AS I HAVE PREVIOUSLY EXPLAINED TO YOU, WITH RESPECT TO EACH ELEMENT OF THE COMPLAINT. IF YOU FIND THAT PLAINTIFF HAS SUCCEEDED, YOU SHOULD RETURN A VERDICT IN HER FAVOR ON THE CLAIM. IF YOU FIND THAT PLAINTIFF FAILED TO SUSTAIN HER BURDEN, YOU SHOULD RETURN A VERDICT AGAINST HER.

IT IS YOUR DUTY AS JURORS TO CONSULT WITH ONE ANOTHER AND TO DELIBERATE WITH A VIEW TO REACHING AN AGREEMENT. EACH OF YOU MUST DECIDE THE CASE FOR HIMSELF OR HERSELF, BUT YOU SHOULD DO SO ONLY AFTER A CONSIDERATION OF THE CASE WITH YOUR FELLOW JURORS, AND YOU SHOULD NOT HESITATE TO CHANGE AN OPINION WHEN CONVINCED THAT IT IS ERRONEOUS. YOUR VERDICT MUST BE UNANIMOUS. DISCUSS AND WEIGH YOUR RESPECTIVE OPINIONS DISPASSIONATELY, WITHOUT REGARD TO SYMPATHY, WITHOUT REGARD TO PREJUDICE OR FAVOR FOR ANY PARTY, AND ADOPT THAT CONCLUSION WHICH IN YOUR GOOD CONSCIENCE APPEARS TO BE IN ACCORDANCE WITH THE TRUTH.

AGAIN, EACH OF YOU MUST MAKE YOUR OWN DECISION ABOUT THE PROPER OUTCOME OF THIS CASE BASED ON YOUR CONSIDERATION OF THE EVIDENCE AND YOUR DISCUSSIONS WITH YOUR FELLOW JURORS. YOU SHOULD, AND I AM SURE YOU WILL, TREAT EACH OTHER WITH RESPECT.

SELECTION OF FOREPERSON AND RETURN OF VERDICT

WHEN YOU RETIRE, YOU SHOULD ELECT ONE MEMBER OF THE JURY AS YOUR FOREPERSON. THAT PERSON WILL PRESIDE OVER THE DELIBERATIONS AND SPEAK FOR YOU HERE IN OPEN COURT.

I HAVE PREPARED A SPECIAL VERDICT FORM FOR YOU TO USE IN RECORDING YOUR DECISION. THE SPECIAL VERDICT FORM IS MADE UP OF QUESTIONS CONCERNING THE IMPORTANT ISSUES IN THIS CASE. YOUR ANSWERS MUST REFLECT THE CONSCIENTIOUS JUDGMENT OF EACH JUROR. YOU SHOULD ANSWER EVERY QUESTION EXCEPT WHERE THE VERDICT FORM INDICATES OTHERWISE.

ALTHOUGH EACH JUROR WILL HAVE A VERDICT FORM, ONLY ONE COPY SHOULD BE FILLED OUT, SIGNED AND DATED BY THE FOREPERSON, AND RETURNED TO THE COURTROOM. AFTER YOU HAVE REACHED A VERDICT, ADVISE THE OFFICER OUTSIDE YOUR DOOR THAT YOU ARE READY TO RETURN TO THE COURTROOM. WHEN YOU START DELIBERATING, DO NOT TALK TO ME OR TO ANYONE BUT ONE ANOTHER ABOUT THE CASE. YOU MAY NOT USE ANY

ELECTRONIC COMMUNICATION DEVICE OR SOCIAL MEDIA UNTIL I ACCEPT YOUR VERDICT. IF YOU HAVE QUESTIONS OR MESSAGES FOR ME, YOU MUST WRITE THEM DOWN ON A PIECE OF PAPER AND GIVE IT TO THE COURT SECURITY OFFICER TO GIVE TO ME.

I STRESS THAT YOU SHOULD BE IN AGREEMENT WITH THE VERDICT WHICH IS ANNOUNCED IN COURT. ONCE YOUR VERDICT IS ANNOUNCED BY YOUR FOREPERSON IN OPEN COURT AND OFFICIALLY RECORDED, IT CANNOT ORDINARILY BE REVOKED.

REMEMBER DURING DELIBERATIONS THAT THE DISPUTE BETWEEN THE PARTIES IS, FOR THEM, NO PASSING MATTER. THEY AND THE COURT RELY UPON YOU TO GIVE FULL AND CONSCIENTIOUS DELIBERATION AND CONSIDERATION TO THE ISSUES AND EVIDENCE BEFORE YOU. BY SO DOING, YOU CARRY OUT TO THE FULLEST YOUR OATH AS A JUROR TO WELL AND TRULY TRY THE ISSUES OF THIS CASE AND TO RENDER A TRUE VERDICT.

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BROOKLYN, NEW YORK
JULY __, 2016