CONTRACTS--ISSUE OF FORMATION--PEREMPTORY INSTRUCTION.

NOTE WELL: Where the issue of whether a contract was formed is not seriously contested, it may still be advisable to give a portion of the formation charge where, for example, the existence of an implied term of the contract may be relevant to the next issue (e.g., breach of the implied term of good faith and fair dealing).

The (*state number*) issue reads:

"Did the plaintiff and the defendant enter into a contract?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the plaintiff and the defendant entered into a contract.

All of the evidence tends to show that the plaintiff and the defendant entered into a contract.

I also instruct you that (*select from among the following optional provisions as applicable):*

(Intended, But Unexpressed Term. One party may intend for a certain term to have a special or a particular meaning but fails to express that meaning in his [written words] [verbal expressions] [conduct]. Under such circumstances, you should not consider such unexpressed special or particular meaning. However,

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if you find, by the greater weight of the evidence, that (*name party*) knew or should have known what (*name other party*) meant by certain [written words] [verbal expression] [conduct], that meaning is deemed assented to by (*name party*) unless (*name other party*) knew or should have known that (*name party*) gave such [written words] [verbal expressions] [conduct] a different meaning.)[1]

(Supplemental Terms. In some instances, [the parties' course of performance][2] [the parties' course of dealing] [an applicable usage of trade][3] may give particular meaning to and supplement or qualify one or more terms of the parties' contract.

[A course of performance arises out of prior repeated occasions for one party to perform under the contract. When the

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[1]*Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 31 N.C. App. 490, 229 S.E.2d 697 (1976). *But compare Charles Holmes Machine Co.*, 143 N.C. at 184-85, 55 S.E. at 526. There may be instances where both parties advocate that their unexpressed intentions should have been known to the other and, therefore, become part of the agreement. Where this occurs, the Court should give this component twice, with reciprocal party references. Because of the risk of confusing the jury with reciprocating instructions, the Court should also give the competing contentions of the parties.

[2]N.C.G.S. §25-2-208(1) appears to be consistent with the common law rule of "practical construction." *See Cole v. Industrial Fibre Co.*, 200 N.C. 484, 157 S.E. 857 (1931).

[3]N.C.G.S. §25-1-205(1) and (2) appear to comport with common law decisions. *See T.C. May Co. v. Menzies Shoe Co.*, 184 N.C. 150, 113 S.E. 593 (1922); *Cohoun v. Hanell*, 180 N.C. 39, 103 S.E. 906 (1920) and *McKinney v. Matthews*, 166 N.C. 576, 82 S.E. 1036 (1914).

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other party knows about the nature of such prior instances of performance and has an opportunity to object to them but does not, you may consider such course of performance as some evidence of the meaning of the parties' contract.][4]

[A course of dealing is a sequence of prior conduct between the parties in transactions the same as or similar to the one at issue here which reasonably establishes a basis for their common understanding of a particular meaning of a term in their contract (or which supplements or qualifies a term in their contract).][5]

[A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will also be observed in the performance of the contract in question.][6]

(**UNIFORM COMMERCIAL CODE:** The express terms of a contract and any [course of performance] [course of dealing] [usage of trade] must be interpreted by you so as to be consistent with each

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[4]N.C.G.S. §25-2-208(1).

[5]N.C.G.S. §25-1-205(1).

[6]N.C.G.S. §25-1-205(2). A usage of trade ordinarily is ordinarily an issue of fact for the jury. However, if the usage of trade is embodied in a written code or some similar writing, its interpretation becomes a question of law for the court. *Superior Foods, Inc. v. Harris Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

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other whenever it is reasonable to do so. However, where a consistent interpretation is not reasonably possible,

[express terms override [course of performance] [course of dealing] [usage of trade]]

[course of performance overrides [course of dealing] [usage of trade]]

[course of dealing overrides usage of trade].)[7]

(Implied Terms. In some instances, the law supplies a material term that the parties [have failed to include[8]] [have left open].[9] In the matter before you,

[Good Faith. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to

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[7]N.C.G.S. §§25-2-208(2) and 25-1-205(4).

[8]*Kidd v. Early*, 289 N.C. 343, 357-358, 222 S.E.2d 392, 403 (1976). The Court should be careful, however, not to instruct the jury on terms implied-in-law where there is evidence from which the jury could find from the writings, conversations or conduct of the parties that they actually reached agreement on a material term. *See, e.g., Rhyne v. Rhyne*, 151 N.C. 400, 66 S.E. 348 (1909); *Lawrence v. Wetherington*, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

[9]A contract with an open term will not cause the contract to fail for indefiniteness if there are external, objective commercial standards which supply a reasonably certain basis for enforcing the contract by appropriate remedy. N.C.G.S. §25-2-204(3). While "open terms" are more readily identified with the Uniform Commercial Code, some North Carolina common law decisions have supplied certain terms left open by the parties. See *North Carolina Comment* to §25-2-204(3).

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receive the benefits of the agreement, and each party is deemed to have agreed to act in good faith in [performing] [enforcing] the contract.[10] "Good faith" means honesty in fact in the [performance] [enforcement] of the contract.[11] (**UNIFORM COMMERCIAL CODE:** If a party [deals in goods of the kind] [by his occupation holds himself out as having knowledge or skill peculiar to the [practice] [goods involved in the contract] [employs an [agent] [broker] [*name other intermediary*] who by his occupation holds himself out as having knowledge or skill peculiar to the [practice] [goods involved in the contract],[12] "good faith" also means the observance of reasonable commercial standards of fair dealing in the trade.)][13]

[Time for Performance. Where the parties did not expressly provide a time for the performance of an act or the

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[10]*Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985); *Governors Club, Inc. v. Governors Club Ltd. Partnership*, 152 N.C. App. 240, 251, 567 S.E.2d 781, 789 (2002); *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003); *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996). *See also Lord of Shatford v. Shelley's Jewelry, Inc.*, 124 F.Supp.2d 779, 787 (W.D.N.C. 2000). *See also* N.C.G.S. §25-1-203.

[11]This applies both to common law and Uniform Commercial Code cases. N.C.G.S. §25-1-201(19).

[12]N.C.G.S. §25-2-104(2).

[13]N.C.G.S. §25-2-103(1)(b).

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doing of a thing, the parties are deemed to have agreed that the act may be performed or the thing may be done within a reasonable time.[14] In determining what constitutes a reasonable time,[15] you may consider [the subject matter and purpose of the proposed contract] [the intentions and circumstances of the parties] [the anticipated scope of performance by each party[16]] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[Termination. Where the parties did not expressly provide a duration for their contractual relationship, the parties are deemed to have agreed that either of them may terminate their contract upon reasonable notice to the

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[14] *International Minerals and Metals Corp. v. Weinstein*, 236 N.C. 558, 73 S.E.2d 472 (1952); *Graves v. O'Connor*, 199 N.C. 231, 154 S.E.37 (1930); *Winders v. Hill*, 141 N.C. 694, 704, 54 S.E. 440, 443 (1906); *Hardee's Food System, Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E.2d 70 (1969). *See also*, N.C.G.S. §25-2-309.

[15] The terminability of certain contracts are legislatively restricted. *See, e.g.*, N.C. Gen. Stat. §§18B-1205 (wine distribution agreements), 18B-1305 and 1306 (beer distributor franchises) and 20-305(6) (motor vehicle franchises).

[16] *Scarborough v. Adams*, 264 N.C. 631, 142 S.E.2d 608 (1965); *Lambeth v. Thomasville*, 179 N.C. 452, 102 S.E. 775 (1920).

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other.[17] In determining what constitutes reasonable notice, you may consider [the subject matter and purpose of the proposed contract[18]] [the length of time the parties should have reasonably expected their contractual relationship to last[19]] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).

[*state other applicable instances in which the law supplies omitted material terms*][20]).

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater

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[17]*Fulghum v. Town of Selma*, 238 N.C. 100, 104, 76 S.E.2d 368, 371 (1953).

[18]*City of Gastonia v. Duke Power Co.*, 19 N.C. App. 315, 199 S.E.2d 27, *disc. rev. denied*, 284 N.C. 252, 200 S.E.2d 652 (1973).

[19]*General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960), *appeal after remand*, 256 N.C. 561, 124 S.E.2d 508 (1962); *East Coast Dev. Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 228 S.E.2d 72 (1976).

[20]At common law, *see*, e.g., reasonable time to repay a loan, *Helms v. Prikopa*, 51 N.C. App. 50, 275 S.E.2d 516 (1981), payments to be in cash, *Kidd*, 289 N.C. at 358, 222 S.E.2d at 403, contracts of employment terminable at will, *Rosby v. General Baptist State Convention of North Carolina, Inc.*, 91 N.C. App. 77, 370 S.E.2d 605, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988), and uncompleted blanks left in the contract document, *Rhyne*, 151 N.C. 400, 66 S.E. 348.

Under the Uniform Commercial Code, *see*, e.g., open price terms (N.C.G.S. §25-2-305), output terms (N.C.G.S. §25-2-306(1)); requirements terms (N.C.G.S. §25-2-306(2)); exclusive dealing contracts (N.C.G.S. §25-2-306(3)); method of delivery (N.C.G.S. §25-2-307); place of delivery (N.C.G.S. §25-2-308); time for payment (N.C.G.S. §25-2-309).

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weight of the evidence that the facts are as all the evidence tends to show, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, even though there is no evidence to the contrary, then it would be your duty to answer this issue "No" in favor of the defendant.