### IDJI 9.04 – Liquidated damages – affirmative defense

INSTRUCTION NO. \_\_\_

In this case, the contract in question contains a liquidated damage provision stating the amount of damages to be awarded in the event of a breach. The law allows liquidated damage provisions, provided that the provision for such damage is not intended as a penalty or punishment and bears a reasonable relation to the damages that might actually be sustained if the contract is breached.

 Therefore, if you find for the plaintiff on the issue of breach of contract, the plaintiff is entitled to the liquidated damages as stated in the contract, unless you further find that the liquidated damage provision of the contract is not enforceable as explained in this instruction. The defendant has the burden of proof on this defense by proving either or both of the following propositions:

The liquidated damages stated in the contract, when considered in light of all the circumstances, do not bear any reasonable relation to the damages actually sustained and are exorbitant; and/or

The liquidated damages stated in the contract are not intended to be compensation for the consequences of any breach of the contract, but rather are intended to be a penalty to deter a party from not performing or as punishment against a party for breaching the contract.

If the defendant proves either or both of these propositions, the liquidated damage provision of the contract is not enforceable. In such event, the plaintiff is only entitled to such actual damages, if any, that are proved as stated and defined in other instructions.

Comment:

The issue of liquidated damages will usually require jury instructions only where there is a defense that such damages provisions are not enforceable. Therefore, the only pertinent instruction on point is the referenced instruction on the defense burden of proof.

“The burden of proving that the damages specified in the contract bear no reasonable relation to actual damages or that the liquidated damages are exorbitant and unconscionable rests upon the party seeking relief from the liquidated damages clause.” Magic Valley Truck Brokers, Inc. v. Meyer, 982 P.2d 945, 133 Idaho 110 (App. 1999), citing Howard v. Bar Bell Land & Cattle Co., 81 Idaho 189, 340 P.2d 103, (1959); McEnroe v. Morgan, 106 Idaho 326, 678 P.2d 595; Lockhart Co. v. B.F.K., Ltd., 107 Idaho 633, 691 P.2d 1248 (Ct.App.1984); Fleming v. Hathaway, 107 Idaho 157, 686 P.2d 837 (App. 1984).

Where this defense is not raised, then in the usual case the jury can be given a binding instruction on the liquidated damage provision, directing the jury to return the stated liquidated damages.