

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CLIVE B. HILGERT,

Plaintiff,

V.

GEORGE S. MAY INTERNATIONAL
COMPANY,

Defendant.

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CASE NO. 7:07-cv-00094
consolidated with 7:09-cv-00154

JOINT PRETRIAL ORDER

Defendant George S. May's Preface:

The Plaintiff in this case, Mr. Clive B. Hilgert, is *pro se*. Mr. Hilgert does not have access to word processing software or to an electronic mail account. The parties have thus been unable to exchange electronic versions of their proposed pretrial submissions. Instead, Mr. Hilgert has made handwritten revisions to Defendant George S. May's ("May") proposed pretrial order, voir dire questions, jury instructions, and jury interrogatories. Mr. Hilgert has also submitted his own (handwritten) original portions of the pretrial order, voir dire questions, jury instructions, and jury interrogatories. The documents and suggested revisions Mr. Hilgert returned to May as a result of this exchange are disorganized and difficult to decipher. Despite these logistical problems, May has attempted to combine the parties' proposed pretrial submissions into a comprehensive document for the Court's convenience by inserting into this electronic document "JPEG" images and/or "PDF" portions of Mr. Hilgert's proposed language and revisions. The resulting document is somewhat unorthodox, yet accurately represents the parties' joint submission.

But the logistical problems arising from the parties' attempt to confer regarding their Joint Pretrial Order is not May's principal concern. Instead, May objects to Mr. Hilgert's use of these pretrial submissions to interject into this case new legal claims and contentions and/or to revive legal claims that the Court has previously dismissed. The only remaining claims are Mr. Hilgert's breach of contract claim predicated on five discrete transactions and his age discrimination claim under the Age Discrimination in Employment Act ("ADEA"). It is improper for Mr. Hilgert to attempt to add new claims and/or revive old claims at this late stage. Yet this is precisely what Mr. Hilgert has done in his proposed pretrial submissions.

For example, Mr. Hilgert has inserted factual and legal contentions regarding the following new legal claims, surrounding allegations that:

- May discriminated against its own clients;¹
- May violated the Fair Labor Standards Act ("FLSA")² by purportedly failing to pay Mr. Hilgert the minimum wage;³
- May fraudulently induced Mr. Hilgert into signing his employment agreement and/or made intentional misrepresentations regarding his employment contract;⁴

¹ See, e.g., Hilgert's Admission of Fact No. 34 ("Hilgert, in good faith, filed a complaint on May 1, 2007 against GSM attempting to get GSM from discriminating against their clients that resulted in Hilgert not getting paid his commissions."); *id.* at No. 53 ("That the clients of GSM never realized that they were being discriminated against due to the clients' ethnic (sic), race, or national origin."); *see also* Hilgert's Contested Issues of Fact No. 1(F) ("Hilgert had no way of knowing that GSM had a policy, practice and procedure of discriminating against clients, due to the clients ethnic (sic), race, or national origin."); *id.* at No. 1(Q) ("... GSM had developed a scheme to discriminate against some clients, due to the clients ethnic, race, or national origin.").

² During his employment with May, Mr. Hilgert worked as an outside salesperson and was therefore exempt from the FLSA's minimum wage and overtime requirements. See 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.500 (defining an "outside sales employee" under the FLSA). Consequently, Mr. Hilgert's allegations regarding violations of the FLSA and/or Texas law adopting the requirements under the FLSA are without merit.

³ See, e.g., Hilgert's Contested Issues of Fact No. 1(P) ("... But Federal and Texas minimum wage laws applied to Hilgert when commissions were not greater than minimum wage."); *id.* at No. 1(U) ("That the Federal and Texas minimum wage, from March through June 2007 was \$5.15 per hour and not paid to Hilgert.").

⁴ See, e.g., Hilgert's Contested Issues of Fact No. 1 ("That Hilgert was fraudulently induced to sign the employment agreement."); *id.* at No. 1(O) ("GSM knew that the pre-contact representations made during

- May violated the Texas Payday Act;⁵
- May violated Title VII;⁶ and
- May violated various unidentified “Texas Labor Statutes.”⁷

Not only has Mr. Hilgert inserted these new legal and factual claims in the pretrial order, he has also submitted jury instructions and jury questions corresponding to these improper and untimely new claims.⁸ Mr. Hilgert’s attempt to add new claims into this lawsuit at this late stage and to present the jury with contentions and legal propositions regarding these new claims is improper and would severely prejudice May. May therefore objects to Mr. Hilgert’s proposed pretrial submissions on this basis and asks that these new claims be stricken from the Joint Pretrial Order and not be presented to the jury.

Mr. Hilgert’s pretrial submissions are also objectionable because they are largely nonsensical and because his proposed “uncontested” or “agreed” facts, propositions of law, and jury instructions, are—despite Mr. Hilgert’s labels—highly argumentative and also contested by May. For instance, many of Mr. Hilgert’s proposed uncontested “admissions of fact” are contested allegations. *See, e.g.*, Hilgert’s Admissions of Fact No. 10 (wherein Hilgert inserted the contested phrase “which Hilgert alleges to be ambiguous and fraudulently induced”); *id.* at

training were false, misleading, but made to induce Hilgert to sign the contract.”); *see also* Hilgert’s Contested Propositions of Law (wherein Hilgert recites his fraudulent inducement and misrepresentation claims and purports to recite the black-letter law in support of those claims).

⁵ *See, e.g.*, Hilgert’s Contested Issues of Fact No. 1(CC) (“The GSM violated Section 61.019 of the Texas Labor Code in at least the 12 weeks that GSM did not pay Hilgert any commissions....”);

⁶ *See, e.g.*, Hilgert’s Admissions of Fact No. 64 (“GSM changed Hilgert’s conditions of employment, wage, terms conditions and privileges in violation of Title VII when GSM knowingly, willfully and unlawfully failed to pay Hilgert any wages....”).

⁷ *See, e.g.*, Hilgert’s Contested Issues of Fact No. 1(S) (“GSM committed an independent tort of violating the Texas Labor Statutes.”).

⁸ *See, e.g.*, Hilgert’s proposed Jury Definition and Instructions, attached hereto as Exhibit G, wherein Hilgert includes jury instructions and definitions regarding, among other new claims, his claim that May violated “Section 61.019 of the Texas Labor code” and his allegations regarding “violation of the minimum wage”; *see also* Hilgert’s proposed Special Interrogatories, attached hereto as Exhibit G, wherein Hilgert includes jury interrogatories corresponding to his new claims.

No. 20 (wherein Hilgert inserted the disputed phrase “But went on every appointment that was made . . . and found them appointments ‘bogus’”).⁹ Moreover, some of Mr. Hilgert’s proposed “admissions of fact” are not factual allegations at all, but rather contested legal propositions. *See, e.g.*, Hilgert’s *id.* at No. 31 (“GSM is subject to all the Texas and Federal Labor laws and statutes, including minimum wage.”).¹⁰ Likewise, many of Mr. Hilgert’s proposed “agreed propositions of law” are actually highly disputed legal contentions. *See, e.g.*, Hilgert’s Agreed Propositions of Law No. 2 (wherein Mr. Hilgert inserted the disputed allegation that his employment “contract (is) ambiguous”); *id.* at No. 6 (wherein Mr. Hilgert interjected the disputed allegation that “Hilgert alleges that GSM’s decision to terminate was in fact ‘willful’”). Finally, some of Mr. Hilgert’s proposed revisions are simply vague and unintelligible.¹¹ In sum, Mr. Hilgert’s proposed facts and legal contentions are argumentative and contested by May—despite the fact that Mr. Hilgert has labeled many of those allegations as “uncontested.” Consequently, Mr. Hilgert’s allegations should not go to the jury as agreed statements of fact or law.

⁹ *See also* Hilgert’s Admissions of Fact No. 44 (“GSM has allegedly found a ‘legal’ way to both discriminate against clients and not pay commissions.”); *id.* at No. 58 (“That Hilgert fully qualified for the employee profit sharing trust plan.”).

¹⁰ *See also* Hilgert’s Admissions of Fact No. 35 (“Texas does not have a whistleblower law that might have assisted Hilgert in his attempt to stop GSM from discriminating against some clients due to their race, ethic (sic), and national origin.”); *id.* at No. 36 (“Hilgert learned that Title VII did not cover him as a protected person, since the present state of the law alleges that a client is treated the same as a customer.”); *id.* at No. 37 (“Case law holds that a customer cannot effect an employees wages, terms and conditions of employment.”); *id.* at No. 39 (“GSM is subject to all Texas and Federal labor laws and statutes.”); *id.* at No. 52 (“That courts cannot hold a pro se to the same legal standards of pleading as a court can hold a licensed attorney and officer of the court.”).

¹¹ *See, e.g.*, Hilgert’s Admissions of Fact No. 55 (“GSM acknowledges that the allegations made by Mr. Hilgert are probative of other facts that GSM had motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, and absence of mistake or accident, with all of GSM’s dealings with employees and clients of GSM.”).

1. APPEARANCE OF COUNSEL

List the parties, its counsel, and counsel's address and telephone number in separate paragraphs:

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ATTORNEYS FOR DEFENDANT

2. STATEMENT OF THE CASE

Defendant's Statement of the Case:

Plaintiff Clive Hilgert is a former employee of the defendant, George S. May International Company (GSM). GSM is a management consulting firm that provides business and management consulting services to clients in various industries. It employs commissioned outside sales representatives (whose job titles are "special representative") to find suitable clients to purchase a "business survey" to be performed by GSM. GSM employed Mr. Hilgert as a

special representative from February 22, 2005 to June 8, 2007, when he was terminated for failing to generate sales.

Mr. Hilgert contends that he is owed commissions for sales work that he performed for GSM with regard to five transactions. GSM denies that Hilgert qualified for the commissions that he seeks in this case. Mr. Hilgert also contends that he was terminated because of his protected status (*i.e.*, his age) in violation of the ADEA.

Plaintiff's Statement of the Case:

Plaintiff Clive Hilgert is a former employee of the defendant, George S. May International Company (GSM). GSM is a management consulting firm that provides business and management consulting services to clients in various industries. It employs commissioned outside sales representatives (whose job titles are "special representative") to find suitable clients to purchase a "business survey" to be performed by GSM. GSM employed Mr. Hilgert as a special representative from February 22, 2005 to June 8, 2007, when he was terminated for failing to generate sales. ^{ALLEGED} DUE TO "BOGUS" APPOINTMENTS MADE BY GSM AND MR. HILGERT'S AGE.

Mr. Hilgert contends that he is owed commissions for sales work that he performed for GSM with regard to five transactions. GSM denies that Hilgert qualified for the commissions that he seeks in this case. Mr. Hilgert also contends that he was terminated because of his protected status (*i.e.*, his age) in violation of the Age in Employment Discrimination Act ("ADEA"). ^{HILGERT ALSO ALLEGES GSM VIOLATED STATE AND FEDERAL MINIMUM WAGE STATUTES, AND THAT HILGERT WAS FRAUDULENTLY INDUCED INTO A "BOILERPLATE" EMPLOYMENT AGREEMENT, AND GSM BREACHED THE CONTRACT.}

3. JURISDICTION

Jurisdiction is not disputed. The Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 in that Mr. Hilgert brings this action under the ADEA. The Court also has supplemental jurisdiction over Mr. Hilgert's breach of contract claim. *See* 29 U.S.C § 1367.

The Court also has diversity jurisdiction because the parties are completely diverse and the amount in controversy exceeds \$75,000. *See* 28 U.S.C. § 1332.

4. MOTIONS

Mr. Hilgert filed a motion to compel discovery on April 6, 2010 (Docket No. 68). On July 20, 2010, the Court granted in part and denied in part Mr. Hilgert's motion to compel. (See July 26, 2010 Minute Entry.) The Court denied Mr. Hilgert's motion to compel, but ordered GSM to produce for *in camera inspection* the documents GSM withheld from discovery based on the work-product doctrine and the attorney-client privilege. GSM produced those documents to the Court for *in camera* inspection on August 4, 2010. (Docket No. 88.)

GSM filed a motion in limine on May 6, 2010. (Docket No. 78.) That motion is still pending.

5. CONTENTIONS OF THE PARTIES

Defendant's Contentions:

Mr. Hilgert worked as special representative for GSM. His job required him to sell a service, known as a business survey, to prospective clients. Mr. Hilgert did not perform the business survey. Mr. Hilgert only sold the business surveys. A different employee, known as an Analyst, performed the business survey. After performing the business survey, the Analyst would then attempt to sell a service known as "Management Services." GSM would sometimes make a profit when the Analyst was able to sell the Management Services to a client. GSM does not make a profit from selling business surveys.

Mr. Hilgert contends that he should have been paid a commission anytime a client purchased Management Services from one of GSM's Analysts. GSM disagrees, and contends that under the terms of Mr. Hilgert's Employment Agreement with GSM, Mr. Hilgert was to receive a commission for each business survey that he sold, only if certain minimum standards

necessary to qualify for the commission were satisfied. Mr. Hilgert contends that he is owed sales commissions on five separate transactions involving the following companies: (1) Hargill Growers; (2) Rebecca Thibodeaux d/b/a Valley Pecan; (3) Mr. Rooter Plumbing; (4) Norma's Air Conditioning; and (5) Valley Armature. GSM intends to show that Mr. Hilgert is not entitled to a commission on these five transactions because these companies were either (1) below the minimum standards necessary to qualify for a commission; or (2) expressed a desire to cancel (and did not pay for) the survey. Mr. Hilgert's Employment Agreement explicitly states that both of these conditions must be satisfied before he may qualify for a sales commission.

Mr. Hilgert also contends that he was terminated because of his age in violation of the ADEA. GSM denies that it terminated Mr. Hilgert because of his age. GSM has a rule that all special representatives (such as Mr. Hilgert) must make at least two qualified sales in a four week time period. If any employee fails to satisfy this minimum quota, the employee is subject to termination. This rule is stated in Mr. Hilgert's Employment Agreement. GSM claims that it terminated Mr. Hilgert because he did not generate any qualified sales for over a three month period prior to his termination. GSM alleges that it terminated Mr. Hilgert without regard to his age.

Plaintiff's Contentions:

Mr. Hilgert worked as special representative for GSM. His job required him to sell a service, known as a business survey, to prospective clients. Mr. Hilgert did not perform the business survey. Mr. Hilgert only sold the business surveys. A different employee, known as an Analyst, performed the business survey. After performing the business survey, the Analyst would then attempt to sell a service known as "Management Services." GSM would sometimes make a profit when the Analyst was able to sell the Management Services to a client, ^{PLUS GSM} GSM does ~~WOULD NOT PAY HILGERT~~ not make a profit from selling business surveys; ^{BUT MAKES MORE PROFIT WHEN GSM CAN FIND A REASON(S) NOT TO PAY MR. HILGERT}

Mr. Hilgert contends that he should have been paid a commission anytime a client ^{FROM A CLIENT PRODUCED BY HILGERT} purchased Management Services from one of GSM's Analysts. GSM disagrees, and contends that under the terms of Mr. Hilgert's Employment Agreement with GSM, ^{THAT GSM SOLELY WROTE "BOILERPLATE"} Mr. Hilgert was to receive a commission for each business survey that he sold, only if certain minimum standards ^{BUT GSM SOLD TO ANY CLIENT INCLUDING THOSE THAT DID NOT MEET MINIMUM STANDARDS.} necessary to qualify for the commission were satisfied. Mr. Hilgert contends that he is owed sales commissions on five separate transactions involving the following companies: (1) Hargill

~~FEEL~~ Growers; (2) Rebecca Thibodeaux d/b/a Valley Pecan; (3) Mr. Rooter Plumbing; (4) Norma's Air Conditioning; and (5) Valley Armature. GSM intends to show that Mr. Hilgert is not entitled

to a commission on these five transactions because these companies were either (1) below the minimum standards necessary to qualify for a commission, ^{BUT GSM REGULARLY SELL TO ANY CLIENT THAT CAN PAY THE FEES.} or (2) expressed a desire to cancel ^{BUT GSM COMPLETED THE SURVEY, THE CLIENT PAID A \$500. RETURNED ALL THE \$500. BUT GSM} (and did not pay for) the survey. ^{WRITTEN SOLELY BY GSM, "BOILERPLATE"} Mr. Hilgert's Employment Agreement explicitly states that both of these conditions must be satisfied before he may qualify for a sales commission.

Mr. Hilgert also contends that he was terminated because of his age in violation of the ADEA. GSM denies that it terminated Mr. Hilgert because of his age. ^{BUT HIRED AND TRAINED A 37 YEAR OLD BEFORE TERMINATING HILGERT.} Mr. Hilgert further claims that GSM hired a younger employee (Mr. Raul Rodriguez) to replace him. GSM has a rule that all special representatives (such as Mr. Hilgert) must make at least two qualified sales in a four week time period. ^{BUT MR. HILGERT ALLEGES THAT HE WAS SENT ON BOGUS APPOINTMENTS BY GSM.} If any employee fails to satisfy this minimum quota, the employee is subject to termination. This rule is stated in Mr. Hilgert's Employment Agreement. GSM claims that it terminated Mr. Hilgert because he did not generate any qualified sales for over a three ^{BUT WENT TO ALL OF THE APPOINTMENTS MADE BY GSM}

month period prior to his termination, GSM alleges that it terminated Mr. Hilgert without regard

to his age, *BUT KNOWINGLY, WILLFULLY HIRED AS A REPLACEMENT MR RAUL RODRIGUEZ III THAT WAS 37 YEARS OLD*

6. ADMISSIONS OF FACT

1. GSM provides business consulting services throughout the United States.
2. GSM has three basic groups of employees, (1) special representatives, (2) analysts, and (3) consultants.
3. Consultants work in the management services department and are chiefly responsible for performing management services.
4. Special representatives generate new business through a combination of telemarketing appointments scheduled by GSM's Telemarketing Department and self-initiated business development, including "cold calls" and customer referrals.
5. After the Telemarketing Department schedules an initial appointment with a prospective client, the District Manager and/or Divisional Manager assigns the appointments to a specific special representatives based on, among other things, geographic proximity and the special representative's level of experience.
6. Mr. Hilgert's gross earnings at GSM in 2005 were \$14,200.00.
7. Mr. Hilgert's gross earnings at GSM in 2006 were \$25,715.85.
8. Mr. Hilgert's gross earnings at GSM in 2007 were \$6,431.50

7. CONTESTED ISSUES OF FACT

The parties dispute whether, under the terms of the Employment Agreement, Plaintiff qualified for a commission for selling a survey to the following five businesses:

- (1) Mr. Rooter Plumbing
- (2) Norman's Air Conditioning
- (3) Hargill Growers
- (4) Rebecca Thibodeaux d/b/a Valley Pecan
- (5) Valley Armature

The parties dispute whether Mr. Hilgert was terminated because of his age.

The parties dispute whether GSM sent Mr. Hilgert on 18 alleged "bogus" appointments in 2007 in order to create a pretext to terminate Mr. Hilgert's employment.

The parties dispute whether Mr. Raul Rodriguez was hired to be Mr. Hilgert's replacement.

7. **CONTESTED ISSUES OF FACT**

WRITTEN SOLELY BY GSM

The parties dispute whether, under the terms of the Employment Agreement, Plaintiff qualified for a commission for selling a survey to the following five businesses:

- (1) Mr. Rooter Plumbing
- (2) Norman's Air Conditioning
- (3) Hargill Growers
- (4) Rebecca Thibodeaux d/b/a ~~Reagan Valley~~ *VALLEY PECAN*
- (5) Valley Armature

The parties dispute whether Mr. Hilgert was terminated because of his age. *BUT NOT THAT MR. HILGERT WAS REPLACED BY A 37 YEAR OLD NAMED RAUL RODRIGUEZ III.*
The parties dispute whether GSM sent Mr. Hilgert on 18 alleged "bogus" appointments in

2007 in order to create a pretext to terminate Mr. Hilgert's employment. *AFTER HILGERT FILED A COMPLAINT BUT MAY ADMITS AT ANSWER 18 THAT PLAINTIFF WAS REQUIRED TO GO ON TRIP TO APPOINTMENTS WITH PROSPECTIVE CLIENTS DURING HIS EMPLOYMENT WITH MAY.*
The parties dispute whether Mr. Raul Rodriguez was hired to be Mr. Hilgert's

replacement. *BUT WAS HIRED, TRAINED AND ON THE JOB ON JUNE 9, 2007. ADMITS MAY'S ANSWER #30*

Despite the fact that Mr. Hilgert has labeled the following allegations as "admissions of fact," May does not concede that these allegations are agreed or uncontested. May therefore contests Mr. Hilgert's allegations and revisions outlined below:

6. ADMISSIONS OF FACT

1. GSM provides business consulting services throughout the United States, *CANADA / MEXICO*.
2. GSM has three basic groups of employees, (1) special representatives, (2) analysts, and (3) consultants.
3. Special representatives work in GSM's field services department and have the primary duty of selling business surveys to prospective clients. *BY USE OF FORM 68 ALECK CONTRACT.*
4. A survey is a service in which GSM reviews the client's operating procedures and identifies key areas of concern that may be affecting operating efficiency and profitability. The special representatives do not perform the surveys, they merely sell the survey services to prospective clients. *AND ACT LIKE A LISTING AGENT IN THE REAL ESTATE BUSINESS*
5. Analysts work in the survey department and are responsible for performing the surveys. The analyst will work with the client to identify those areas of the

*NOTE:
SR NEVER ATTEMPTS
TO SELL M/S.*

- business that need improvement. After performing the survey, the analysts will also attempt to sell GSM's management services to the client. Management services are the actual consulting work in which GSM offers advice on how to improve the client's operating efficiency and profitability. The analysts do not perform management services, they only identify the key areas of concern by performing the survey. *BUT GSM'S POLICY IS TO SELL ANY AND ALL CLIENTS THAT CAN PAY GSM'S FEES, QUALIFIED OR NOT.*
6. Consultants work in the management services department and are chiefly responsible for performing management services. *NOR FOR THE WORK OF THE ANALYSTS,*
7. GSM does not make a profit from selling surveys. The client typically pays \$350, *MOST OFTEN LESS,* to GSM for the survey, but that amount does not offset the costs associated with sending an analyst *OR SR* to the prospective client's place of business to perform the survey (e.g., airfare, hotel, rental car or cab fare, etc.).
8. Under GSM's business model, the GSM will only make a profit if the client purchases management services. *WHICH GSM WILL SELL TO ANY CLIENT THAT CAN PAY THE FEES* In essence, the special representative sells the survey at a loss to the client so that the analyst will have an opportunity to meet with the client and sell management services for a profit, *AND MORE PROFIT IF THE SR DOES NOT HAVE TO BE PAID.*
9. GSM employed Mr. Hilgert as a special representative from February 22, 2005 to June 8, 2007. *DURING WHICH TIME HILGERT'S PRODUCTION WAS*

- SATISFACTORY, EXCEPT DURING THE LAST COUPLE MONTHS*
10. Mr. Hilgert and GSM entered into a binding employment agreement on January 15, 2006 ("the Employment Agreement"), *WHICH HILGERT ALLEGES TO BE AMBIGUOUS AND FRAUDULENTLY INDUCED.*
 11. Mr. Hilgert was required to sell surveys and was compensated on a commissions only basis, *SO HAD TO TAKE MONEY OUT OF SAVINGS ACCOUNT WHEN THERE WERE NO SALES.*
 12. Under the Employment Agreement, Hilgert is entitled to a commission for selling a business survey if three conditions are satisfied: (1) the survey department accepts the survey; (2) the client's business meets the minimum standards necessary to qualify for a commission, *IF NOT WAIVED BY GSM*; and (3) the client actually receives and pays for the business survey, *BUT IT IS GSM'S STANDARD PRACTICE TO SELL TO ANY CLIENT THAT CAN PAY FOR ITS SERVICES.*
 13. The minimum standards necessary to qualify for a commission are: (1) the client must have an average of at least seven employees over the past 52 weeks; and (2) the client must have \$500,000 in annual sales over the past 12 months, *BUT THERE ARE MANY EXCEPTIONS MADE BY THE CHICAGO OFFICE OF GSM.*
 14. Under the Employment Agreement, if an employee fails to achieve at least two qualified sales in any four (4) week period, the employee is subject to immediate termination, *IN THE AGREEMENT WRITTEN SOLELY BY GSM. THAT HILGERT ALLEGES TO BE AMBIGUOUS AND FRAUDULENTLY INDUCED.*
 15. Before attempting to sell a survey, the special representative is required to ask the prospective client if it meets the minimum standards. *BUT CLIENTS LIE AND GSM'S POLICY, PRACTICE AND PROCEDURE IS TO SELL ANY CLIENT THAT CAN PAY.*
 16. When the analyst meets with the client to perform the survey, the analyst fills out a statistical report, based on the client's records, *THAT ARE USUALLY LACKING,* that shows the actual average

- ALL CASH ARE NOT COUNTED, NOR THOSE THAT ARE PAID CASH
- number of employees over the prior 52 weeks and the actual annual sales volume over the past 12 months; BUT THERE ARE MANY EXCEPTIONS SUCH AS NEW BUSINESS, SEASONAL BUSINESS, NEW OWNERS, ETC
17. GSM consults the statistical report to determine if the client's business meets the "minimum standards" for purposes of determining whether the sale of the survey is a "Qualified Sale." BUT EVEN IF IT IS NOT A "QUALIFIED SALE" GSM SELLS THE CLIENT IF THE CLIENT CAN PAY THE FEES. BUT NOT HILGERT'S COMMISSIONS.
 18. If the statistical report confirms that the client meets the minimum standards, then the sale is considered a "Qualified Sale" and the special representative is entitled to a \$900.00 commission for the "Qualified Sale." But if the statistical report reveals that the client is in fact below the minimum standards, then the special representative is not entitled to a commission; BUT SELL THEIR SERVICES ANYWAYS AND REFUSES TO PAY ANY COMMISSIONS.
 19. If the special representative makes a "Qualified Sale" and GSM sells management services to that client as a result of that sale, the special representative is also entitled to a commission equal to Two Percent (2%) of all cash collected by GSM that resulted from that Qualified Sale; BUT BY USING THE ALLEGED MEANINGLESS QUALIFIER OF A "QUALIFIED SALE," NO COMMISSION IS PAID.
 20. Mr. Hilgert did not generate any qualified sales for over a three month period prior to his termination. BUT WENT ON EVERY APPOINTMENT THAT WAS MADE BY THE TEL-MKT OF GSM AND FOUND THE APPOINTMENTS BOGUS.
 21. Mr. Brian Vaill, the Executive Assistant to the President of GSM, made the decision and recommendation to terminate Mr. Hilgert's employment. WHICH HE DID PERSONALLY, KNOWING THAT A REPLACEMENT HAD BEEN HIRED, TRAINED.
 22. Special representatives generate new business through a combination of telemarketing appointments scheduled by GSM's Telemarketing Department and self-initiated business development, including "cold calls" and customer referrals.
 23. GSM employs approximately 90 telemarketers, AMONG THE APPROX 1,000 EMPLOYEES to schedule initial appointments with prospective clients. The telemarketers use a computer database populated with information obtained from a third party that randomly assigns a prospective client to them to call to try and set up an appointment, WHICH THE SR'S ARE REQUIRED TO ATTEND.
 24. The telemarketers set up the appointment for a specific date and time AND SR ARE REQUIRED TO CALL INTO CHICAGO BEFORE, DURING AND AFTER THE APPOINTMENTS.
 25. GSM employs auditors to verify and screen the initial appointments scheduled by the telemarketers; BUT HILGERT ALLEGES THAT THE APPOINTMENT GIVEN TO HIM DURING THE LAST 3 MONTHS OF EMPLOYMENT WERE BOGUS DESIGNED TO MAKE HIM QUIT.
 26. After the Telemarketing Department schedules an initial appointment with a prospective client, the District Manager and/or Divisional Manager assigns the appointments to a specific special representatives based on, among other things, geographic proximity and the special representative's level of experience.
 27. Mr. Hilgert's gross earnings at GSM in 2005 were \$14,200.00.
 28. Mr. Hilgert's gross earnings at GSM in 2006 were \$25,715.85.
 29. Mr. Hilgert's gross earnings at GSM in 2007 were \$6,431.50
 30. THE ABOVE FIGURES DO NOT INCLUDE THE FIVE CONTESTED CLIENTS.
 31. GSM IS SUBJECT TO ALL THE TEXAS AND FEDERAL LABOR LAWS AND STATUTES, INCLUDING MINIMUM WAGE.
 32. MR HILGERT WAS TERMINATED 14 DAYS AFTER GSM WAVED SERVICE ON HILGERT'S COMPLAINT FILED MAY 1, 2007.
 33. GSM HAD SUPERIOR KNOWLEDGE IN WRITING THE EMPLOYMENT AGREEMENT AND WOULD NOT EVEN ALLOW CORRECTIONS FOR KNOWN MISTAKES. BOILERPLATE CONTRACT.

May does not concede that the following allegations are agreed or uncontested, despite the fact that Mr. Hilgert has labeled these additional allegations as "admissions of fact."

ADMISSIONS OF FACT. (CONTINUED)

34 HILGERT, IN GOOD FAITH, FILED A COMPLAINT ON MAY 1, 2007 AGAINST GSM ATTEMPTING TO GET GSM FROM DISCRIMINATING AGAINST THEIR CLIENTS THAT RESULTED IN HILGERT NOT GETTING PAID HIS COMMISSIONS.

35 TEXAS DOES NOT HAVE A WHISLE-BLOWER LAW THAT MIGHT HAVE ASSISTED HILGERT IN HIS ATTEMPT TO STOP GSM FROM DISCRIMINATING AGAINST SOME CLIENTS DUE TO THE CLIENT'S RACE, ^{ETHNIC} ~~COLOR~~, AND NATIONAL ORIGIN.

36 HILGERT LEARNED THAT TITLE VII DID NOT COVER HIM AS A PROTECTED PERSON, SINCE THE PRESENT STATE OF THE LAW ALLEGES THAT A CLIENT IS TREATED THE SAME AS A CUSTOMER

37 CASE LAW HOLDS THAT A CUSTOMER CAN NOT EFFECT AN EMPLOYEE'S WAGES, TERMS AND CONDITIONS OF EMPLOYMENT.

38 HILGERT ALLEGES THAT A CLIENT, THAT HAS A WRITTEN CONTRACT WITH GSM

DOES IN FACT DIRECTLY AFFECT THE COMMISSIONS OF HILBERT WHEN GSM CHOOSES TO DISCRIMINATE AGAINST THE CLIENT DUE TO THE CLIENT'S RACE, ^{ETHNIC} COLOR OR NATIONAL ORIGIN.

39 GSM IS SUBJECT TO ALL TEXAS AND FEDERAL LABOR LAWS AND STATUTES.

40. HILBERT ALLEGES THAT GSM HAS WORDED THE EMPLOYMENT AGREEMENT SO THAT GSM CAN "LEGALLY" DISCRIMINATE AGAINST CLIENTS AND NOT PAY HILBERT ANY COMMISSIONS FOR GETTING THE CLIENTS TO AGREE IN WRITING TO HAVE A SURVEY OF THEIR BUSINESS.

41 AFTER THE EEOC APPROVE HILBERT'S RIGHT TO FILE A CLAIM AGAINST GSM FOR AGE DISCRIMINATION; HILBERT FILE ANOTHER COMPLAINT ON JUNE 4, 2009.

42 AFTER ONLY 14 DAYS OF GSM WAIVING THE SERVICE OF THE COMPLAINT, GSM HAD HIRED, TRAINED A 37 YEAR OLD TO REPLACE HILBERT BY THE NAME OF RAUL RODRIGUEZ III.

43 IN GSM'S ANSWER NUMBER 30, GSM ADMITS IT HIRED AND TRAINED RAUL RODRIGUEZ III BEFORE JUNE 8, 2007

44. GSM HAS ALLEGEDLY FOUND A "LEGAL WAY" TO BOTH DISCRIMINATE AGAINST CLIENTS AND NOT PAY COMMISSIONS.

45 GSM, AS AN EMPLOYER OF HUNDREDS OF EMPLOYEES IS SUBJECT TO BOTH STATE AND FEDERAL LABOR LAWS ESPECIALLY WHEN IT COMES TO COMMISSION ONLY EMPLOYEES THAT DO NOT EARN COMMISSIONS THAT ARE LARGE ENOUGH TO OFFSET THE REQUIRED MINIMUM WAGE LAWS.

46. GSM USES A "BOILERPLATE" EMPLOYMENT AGREEMENT FOR ALL SRs AND WILL NOT EVEN CORRECT KNOWN MISTAKES

47 AT ANSWER #18 "MAY ADMITS IT REQUIRED HILBERT TO GO TO APPOINTMENTS WITH PROSPECTIVE CLIENTS DURING HIS EMPLOYMENT WITH MAY."

48. THAT GSM IN ITS NEWSLETTER DATED SEPTEMBER 21, 2007 ON PAGE 11 OF 14; "OUR EXPERIENCE HAS SHOWN THAT BUSINESSES NEED A CERTAIN VOLUME AND NUMBER OF EMPLOYEES TO BE SUITABLE CLIENTS. SIMPLY BECAUSE A BUSINESS MAY NEED OUR HELP DOES NOT MEAN THEY ARE SUITABLE CANDIDATES FOR THE GEORGE S. MAY INTERNATIONAL COMPANY. ONE OF THE MANY THINGS OUR 82 YEARS WORTH OF EXPERIENCE HAS SHOWN IS THAT FOR OUR SURVEY ANALYSTS AND CONSULTANTS TO WORK EFFECTIVELY, POTENTIAL CLIENTS MUST HAVE MINIMUM VOLUMES AND NUMBER OF EMPLOYEES. THESE MINIMUMS ARE NEEDED FOR US TO BE ABLE TO PROVIDE OUR CLIENTS WITH THE RETURN ON THEIR DOLLAR WE OFFER"

"IF THEY DO NOT HAVE THESE MINIMUMS, WE WOULD BE MISLEADING THEM INTO THINKING WE CAN MAKE MEANINGFUL IMPROVEMENTS IN THEIR BUSINESSES, WHICH OUR EXPERIENCE TELLS US IS NOT POSSIBLE."

MAY'S ANSWER AT 13;

49 "MAY ADMITS THE ALLEGATIONS SET FORTH IN PARAGRAPH B." PLAINTIFF'S ALLEGATION STATES: "IN COMPLAINT M-07-94 @ 102 PLAINTIFF HILBERT STATED: 'DEFENDANTS, IN A LEVEL ABOVE THAT OF PLAINTIFF, HAVE DEVELOPED A PATTERN AND PRACTICE OF INDIRECTLY DISCRIMINATING AGAINST CERTAIN CLIENTS DUE TO THEIR ETHNIC, RACE, OR NATIONAL ORIGINS; WHICH IN TURN AND AS A RESULT OF DEFENDANTS ACTIONS, DIRECTLY DISCRIMINATES AGAINST PLAINTIFF(S) AND RESULTS IN NOT BEING PAID FOR THE SERVICES RENDERED BY PLAINTIFF(S) AND CHANGES THE TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT OF PLAINTIFF(S).'"

50. Gsm, in the Boilerplate Employment CLAIMS SPECIAL KNOWLEDGE THAT IS PROVIDED TO THE EMPLOYEE BY Gsm.

THE SPECIAL KNOWLEDGE OF Gsm IS TO BE SAFE GUARDED BY EMPLOYEE(S) AND IS FURTHER PROTECTED BY Gsm BY COVENANTS NOT TO COMPETE WITH Gsm.

51 A "SPECIAL RELATIONSHIP" RESULTS WHERE THERE IS INHERENTLY UNEQUAL BARGAINING POSITION OF THE PARTIES, SUPERIOR POSITION OF ONE PARTY, AND VULNERABILITY OF THE OTHER PARTY

52 THAT COURTS CAN NOT HOLD A PRO SE TO THE SAME LEGAL STANDARDS OF PLEADING AS A COURT CAN HOLD A LICENSED ATTORNEY AND OFFICER OF THE COURT.

53 THAT THE CLIENTS OF GSM NEVER REALIZED THAT THEY WERE BEING DISCRIMINATED AGAINST DUE TO THE CLIENTS ETHNIC, RACE, OR NATIONAL ORIGIN.

54 GSM DOES NOT CONTEST THE FACTS THAT (1) MAHIGENT WAS OVER THE AGE OF 40 YEARS OLD AT THE TIME OF TERMINATION (2) THAT HE WAS QUALIFIED FOR HIS POSITION; (3) THAT HE WAS DISCHARGED.

55 GSM ACKNOWLEDGES THAT THE ALLEGATIONS MADE BY MR. HILBERT ARE PROBATIVE OF OTHER FACTS THAT GSM HAD MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, MODUS OPERANDI, AND ABSENCE OF MISTAKE OR ACCIDENT, WITH ALL OF GSM'S DEALINGS WITH EMPLOYEES AND CLIENTS OF GSM.

56. GSM ADMITS TO THE FACT THAT THEIR FORM 68, BETWEEN GSM AND THE CLIENTS, STATES THAT "WE AGREE THIS AUTHORIZATION IS NONCANCELABLE"

57. THAT IN THE FIELD SERVICE MANUAL OF POLICIES AND PROCEDURES FROM ISRAEL KUSHNIR, PRESIDENT OF GSM, THE STATEMENT IS MADE, "SEXUAL HARASSMENT, OTHER HARASSMENT OR DISCRIMINATION MUST NOT BE ALLOWED TO COMPROMISE ANY PART OF OUR BUSINESS."

58. THAT HILBERT IS FULLY QUALIFIED FOR THE EMPLOYEE PROFIT SHARING TRUST PLAN.

59. THAT IN THE FIELD SERVICE MANUAL OF POLICIES AND PROCEDURES UNDER JOB CANCELLATIONS THE STATEMENT OF "CANCELLATIONS OF A SALE ONCE IT HAS BEEN REPORTED IS A RARE OCCURRENCE."

60. THAT IN THE FIELD SERVICE MANUAL OF POLICIES AND PROCEDURES UNDER INTER-DEPARTMENTAL RELATIONS THE STATE^{MENT} IS MADE THAT "FRATERNIZING WITH EMPLOYEES OF OTHER DEPARTMENTS IS A MATTER OF POOR JUDGMENT AND NOT PERMITTED."

61. THAT IN THE FIELD SERVICE MANUAL OF POLICIES AND PROCEDURES UNDER SURVEY AUTHORIZATION (FORM 68) GSN STATES "THE SURVEY AUTHORIZATION (FORM 68), IS A LEGAL DOCUMENT."

62 THAT IN THE FIELD SERVICE MANUAL OF POLICIES AND PROCEDURES UNDER LONG TERM DISABILITY INCOME PLAN THE STATEMENTS BY GSN IS "COVERAGE IS PROVIDED BY THE COMPANY WITHOUT COST TO THE EMPLOYEE." ELIGIBILITY IS LIMITED TO EMPLOYEES UNDER THE AGE OF 70 AND IS EFFECTIVE AFTER FIVE YEARS OF CONTINUOUS EMPLOYMENT "THE MAXIMUM MONTHLY BENEFIT IS \$1,500 PER MONTH, LESS AMOUNTS RECEIVED FROM WORKERS' COMPENSATION, GROUP DISABILITY PLANS, SOCIAL SECURITY, OR ANY OTHER GOVERNMENTAL BENEFITS FOR WHICH THE COMPANY HAS PAID ANY PART OF THE COST."

63 GSN MADE THE FIELD SERVICE DEPARTMENT MANUAL OF POLICIES AND PROCEDURES FOR SPECIAL REPRESENTATIVES (THE MANUAL) A PART OF THE EMPLOYMENT AGREEMENT BY REFERENCE TO THE "MANUAL" IN THE EMPLOYMENT AGREEMENT.

64 GSM CHANGED HILBERT'S CONDITIONS
OF EMPLOYMENT, WAGE, TERMS, ^{CONDITIONS} AND
PRIVILEGES IN VIOLATION OF TITLE VII
WHEN GSM KNOWINGLY, WILLFULLY AND
UNLAWFULLY FAILED TO PAY HILBERT
ANY WAGES FOR THE 12 WEEKS THAT
GSM ALLEGES THAT HILBERT WAS
DOING ALL THE WORK THAT HE WAS
DIRECTED TO DO BY THE CHICAGO
OFFICE, INCLUDING BUT LIMITED TO
MAKING THE APPOINTMENTS THAT
WERE SET-UP BY THE TEL-MKT
DEPARTMENT OF GSM.

65

CONTESTED ISSUES OF FACT

1. THAT HILBERT WAS FRAUDULENTLY INDUCED TO SIGN THE EMPLOYMENT AGREEMENT FOR THE REASONS BELOW:

- A. AGREEMENT WAS STANDARD "BOILERPLATE" DONE BY GSM, WRITTEN TO THEIR SOLE ADVANTAGE.
- B. TRAINING WAS DONE FIRST WITH ALL THE "SALES HYPE" OF HOW EASY IT WAS TO GET CLIENTS.
- C. HILBERT NOT ALLOWED TO CORRECT KNOWN MISTAKES IN CONTRACT; AREA TO WORK IN TX.
- D. HILBERT COULD NOT OF KNOWN THAT GSM HAD A POLICY, PRACTICE AND PROCEDURE OF SELLING SERVICES TO ANY CLIENT THAT COULD PAY THE FEES.
- E. THE USE OF THE "QUALIFIED SALE" WAS NOTHING MORE THAN A "PRETEXT" TO NOT PAY HILBERT COMMISSIONS.
- F. HILBERT HAD NO WAY OF KNOWING THAT GSM HAD A POLICY, PRACTICE AND PROCEDURE OF DISCRIMINATING AGAINST CLIENTS, DUE TO THE CLIENTS ETHNIC, RACE, OR NATIONAL ORIGIN.
- G. NOT ALLOWING HILBERT, OR ANYONE ELSE, TIME TO CONSULT WITH LEGAL COUNSEL BEFORE BEING REQUIRED TO SIGN CONTRACT.

H. WHEN ASKING THE INSTRUCTOR, MR JONES, ^{PICK} WHAT WOULD HAPPEN IF ONE WOULD NOT SIGN THE CONTRACT AND BEING TOLD BY JONES THAT "IT WOULD BE THE JOB APPLICANT'S PROBLEM AND COSTS TO GET BACK HOME; GSM ONLY PAID RETURNS TO THOSE THAT SIGNED THE "BOILERPLATE CONTRACTS."

I. GSM'S INTERNET SITE STATED UNREALISTIC EXPECTATIONS OF THE AMOUNT OF COMMISSIONS THAT COULD BE EARNED, EXPECTI^{SP}LY IN THE LIMITED OPPORTUNITIES IN THE RIO GRANDE VALLEY OR TEXAS.

J. GSM WOULD NOT GIVE OUT ANY OF THE ACTUAL AVERAGES THAT WERE MADE BY THE AVERAGE SALES PERSON.

K. THAT SOME OF THE APPLICANTS, INCLUDING HILBERT, HAD TO SIGN THE ~~APP~~ "BOILERPLATE" CONTRACT DUE TO THE FACT THAT THEIR WAS NO WAY TO PAY FOR THE COSTS TO GET HOME.

L. HILBERT RELIED ON THE INDUCEMENTS OF GSM, DURING THE TRAINING AND DURING THE TOTAL EMPLOYMENT, ALMOST 2 1/2 YEARS, WITH GSM.

M. GSM HAD SUPERIOR KNOWLEDGE IN THE MORE THAN 80 YEARS GSM HAS BEEN IN THE BUSINESS CONSULTING BUSINESS. AND APPLIED THAT SUPERIOR KNOWLEDGE IN THE ARTFULLY WORDING OF THEIR EMPLOYMENT AGREEMENTS.

N. GSM CREATED A SPECIAL RELATIONSHIP BY THE EMPLOYMENT AGREEMENT AND THE ACTS OF GSM BETWEEN HILBERT AND GSM, ^{AS HILBERT HAD TO ACT AS GSM AGENT} IN GETTING CLIENTS.

O. GSM KNEW THAT THE PRE-CONTRACT REPRESENTATIONS, ^{MADE DURING TRAINING} WERE FALSE, MISLEADING BUT MADE TO INDUCE HILBERT TO SIGN THE CONTRACT.

P. THAT GSM CHANGED HILBERT'S TERMS AND ^{AND PRIVILEGES} CONDITIONS OF EMPLOYMENT DURING THE 12 WEEKS THAT GSM SENT HILBERT TO APPOINTMENTS THAT PROVED TO BE BOGUS SO THAT HILBERT EARNED NO COMMISSIONS; BUT FEDERAL AND TEXAS MINIMUM WAGE LAWS APPLIED TO HILBERT WHEN COMMISSION WERE NOT GREATER ^{THAN} MINIMUM ^{WAGE}.

Q. GSM WAS KNOWLEDGEABLE IN BUSINESS MATTERS RELATING TO GSM POLICIES, PRACTICE AND PROCEDURES AND HILBERT WAS NOT ABLE TO DEAL AT ARM'S LENGTH DUE TO THE FACT THAT HILBERT HAD NO WAY OF KNOWING THAT GSM HAD DEVELOPED A SCHEME TO DISCRIMINATE AGAINST SOME CLIENTS, DUE TO THE CLIENTS ETHNIC, RACE, OR NATIONAL ORIGIN.

[Signature]

R. GSM SOLELY CREATED AN EMPLOYMENT AGREEMENT THAT WAS ONE-SIDED AND LACKED MUTUALITY OF OBLIGATION, WHICH GAVE GSM THE POWER, MOTIVE AND OPPORTUNITY TO ACT UNSCRUPULOUSLY.

S. GSM COMMITTED AN INDEPENDENT TORT OF VIOLATING THE TEXAS LABOR STATUTES.

T. THE ACTS OF GSM WERE DONE KNOWINGLY, WILLFULLY AND DONE WITH MALICE.

U. THAT THE FEDERAL AND TEXAS MINIMUM WAGE, FROM MARCH THROUGH JUNE 2007 WAS \$5.15 PER HOUR AND NOT PAID TO HILBERT

V. THAT GSM DID NOT PAY HILBERT AND COMMISSION OR MINIMUM WAGE FOR THE TIME HILBERT WORKED FOR GSM FROM MARCH THROUGH JUNE 8, 2007

W. THAT GSM KNOWINGLY AND WILLFULLY CHANGED HILBERT'S TERMS, CONDITIONS AND PRIVILEGES OF EMPLOYMENT FROM MARCH THROUGH JUNE 8, 2007

X. THAT THE USE OF THE WORDS AND ACTS OF GSM CAUSED THE EMPLOYMENT AGREEMENT TO BE ALLEGED BY HILGERT, AMBIGUOUS.

Y. THAT "QUALIFIED SALE" IS NOTHING MORE THAN A PRETEXT SO AS NOT TO PAY HILGERT THE COMMISSIONS

Z THAT GSM DISCRIMINATED AGAINST SOME CLIENTS DUE TO THE CLIENT'S ETHNIC, RACE, OR NATIONAL ORIGIN

AA. THAT THE CLIENTS THAT WERE DISCRIMINATED AGAINST DO TO THE CLIENT'S ETHNIC, RACE, OR NATIONAL ORIGIN NEVER REALIZED THE DISCRIMINATION DO TO THE FACT THAT GSM JUST FAKE TO SHOW-UP TO RUN THE SURVEY OR CLAIMED THAT IT WAS THE CLIENT THAT CANCELLED THE SURVEY.

BB THAT GSM KNOWINGLY AND WILLFULLY WAIVED ANY AND ALL MINIMUM STANDARDS WHEN IN FACT GSM SOLD TO ANY CLIENT THAT COULD PAY FOR GSM'S FEES

CC THAT GSM VIOLATED SECTION
61.019 OF THE TEXAS LABOR CODE
IN AT LEAST THE 12 WEEKS THAT
GSM DID NOT PAY HILBERT ANY
COMMISSIONS, BUT SENT HILBERT
ON PRE-SET APPOINTMENTS

DD THAT, "BUT FOR" HILBERT'S AGE HE
WOULD NOT HAVE BEEN TERMINATED
BY GSM.

EE THAT ALL OF THE ACTS OF GSM
WERE DONE WITH "INTENT" AND OR
"WILLFUL" IN VIOLATION OF THE TEXAS
AND FEDERAL LAWS

FF. THAT GSM DISCRIMINATED AGAINST
HILBERT, DO TO HILBERT'S AGE

GG.

8. AGREED PROPOSITIONS OF LAW

1. Under Texas law, the elements of an action for breach of contract are: (1) there is a valid, enforceable contract; (2) the plaintiff performed its contractual obligation; (3) the defendant breached the contract; and (4) the defendant's breach caused the plaintiff's damages. *Aguiar v. Segal*, 167 S.W.3d 443, 450 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Under the parole evidence rule, extrinsic evidence may not be used to contradict, vary, or add to the terms of an unambiguous contract. *In re H. E. Butt Grocery Co.*, 17 S.W.3d 360, 369 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). In order to establish a breach of contract, a plaintiff must plead and prove that all conditions precedent to the defendant's performance have been satisfied. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998); *Hohenberg Bros. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976).

2. The ultimate question in every employment discrimination case is whether the plaintiff was the victim of intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153, (2000). Section 623(a)(1) of the ADEA makes it unlawful for an employer "to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 632(a)(1).

3. To establish a discrimination case under the ADEA, Mr. Hilgert must prove: (1) that he was over 40 years old at the time of his termination; (2) that he was qualified for his position; (3) that he was discharged; and (4) that GSM terminated his employment "because of" his age." 29 U.S.C. § 623(a)(1); *Palasota v. Haggard Clothing Co.*, 342 F.3d 569, 575-76 (5th Cir. 2003).

4. To carry this burden under the ADEA, Mr. Hilgert must prove, by a preponderance of the evidence, that "but for" his age, he would not have been terminated but

would have remained employed. *Gross v. FBL Financial Services, Inc.*, __ U.S. __, 129 S.Ct. 2343, 2351-52 (2009) (explaining that plaintiff must show that he would have remained employed “but for” his age). “The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.” *Id.* at 2352.

5. Mr. Hilgert cannot recover liquidated damages under the ADEA unless he proves that GSM’s decision to terminate his employment was “willful.” 29 U.S.C. §§ 216(b), 626(b).

6. To establish a “willful” violation under the ADEA, Mr. Hilgert must prove that, when GSM terminated his employment, GSM either (a) knew that its conduct violated the ADEA, or (b) acted with reckless disregard for compliance with the ADEA. *Thurston v. Transworld Airlines, Inc.*, 469 U.S. 111, 125 (1985); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 391 (5th Cir. 2003).

7. Because front pay is an equitable remedy, a court rather than a jury should determine whether an award of front pay is appropriate and if so, the amount of any award of front pay. *Julian v. City of Houston, Tex.*, 314 F.3d 721, 729 n.25 (5th Cir. 2002); *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 824 (5th Cir. 1990).

9. CONTESTED PROPOSITIONS OF LAW

May does not concede that the following revisions and/or additions to its “agreed propositions of law”—which are proposed by Mr. Hilgert—are uncontested, despite the fact that Mr. Hilgert has labeled these revisions as “agreed propositions of law.” Mr. Hilgert’s proposed revisions are actually contested propositions of law:

8. AGREED PROPOSITIONS OF LAW

1. The parties agree that the Employment Agreement, ^{WRITTEN SOLELY BY GSM} dated January 15, 2006 ("the Employment Agreement"), is a legally binding contract between Clive B. Hilgert and George S.

May International Company, ^{BUT HILGERT ALLEGES THAT THE AGREEMENT IS AMBIGUOUS. AND THAT GSM HAS SPECIAL KNOWLEDGE IN WRITING THE AGREEMENT.}

2. Under Texas law, the elements of an action for breach of contract are: (1) there is a valid, enforceable contract; (2) the plaintiff performed its contractual obligation; (3) the defendant breached the contract; and (4) the defendant's breach caused the plaintiff's damages. *Aguilar v. Segal*, 167 S.W.3d 443, 450 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Under the parole evidence rule, extrinsic evidence may not be used to contradict, vary, or add to the terms of an unambiguous contract. ^{HILGERT ALLEGES THAT CONTRACT IS AMBIGUOUS.} *In re H. E. Butt Grocery Co.*, 17 S.W.3d 360, 369 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). In order to establish a breach of contract, a plaintiff must plead and prove that all conditions precedent to the defendant's performance have been satisfied. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998); *Hohenberg Bros. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976).

3. The ultimate question in every employment discrimination case is whether the plaintiff was the victim of intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153, (2000). Section 623(a)(1) of the ADEA makes it unlawful for an employer "to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 632(a)(1).

4. To establish a discrimination case under the ADEA, Mr. Hilgert must prove: (1) that he was over 40 years old at the time of his termination; (2) that he was qualified for his position; (3) that he was discharged; and (4) that GSM terminated his employment "because of" his age." 29 U.S.C. § 623(a)(1); *Palasota v. Haggard Clothing Co.*, 342 F.3d 569, 575-76 (5th Cir. 2003). ^{GSM DOES NOT CONTEST (1)(2)(3) BUT ONLY (4).}

5. To carry this burden under the ADEA, Mr. Hilgert must prove, by a preponderance of the evidence, that "but for" his age, he would not have been terminated but would have remained employed. *Gross v. FBL Financial Services, Inc.*, ___ U.S. ___, 129 S.Ct. 2343, 2351-52 (2009) (explaining that plaintiff must show that he would have remained employed "but for" his age). "The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision." *Id.* at 2352.

6. Mr. Hilgert cannot recover liquidated damages under the ADEA unless he proves that GSM's decision to terminate his employment was "willful." 29 U.S.C. §§ 216(b), 626(b).

HILGERT ALLEGES THAT GSM'S DECISION TO TERMINATE WAS IN FACT "WILLFUL"

7. To establish a "willful" violation under the ADEA, Mr. Hilgert must prove that, when GSM terminated his employment, GSM either (a) knew that its conduct violated the ADEA, or (b) acted with reckless disregard for compliance with the ADEA. *Thurston v. Transworld Airlines, Inc.*, 469 U.S. 111, 125 (1985); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 391 (5th Cir. 2003).

GSM ACKNOWLEDGES THAT 14 DAYS AFTER GSM WAIVED SERVICE THAT MR. RODRIGUEZ WAS HIRED AND TRAINED AND ON THE JOB.

8. Because front pay is an equitable remedy, a court rather than a jury should determine whether an award of front pay is appropriate and if so, the amount of any award of front pay. *Julian v. City of Houston, Tex.*, 314 F.3d 721, 729 n.25 (5th Cir. 2002); *DeLoach v.*

DeChamps, Inc., 897 F.2d 815, 824 (5th Cir. 1990).

8A. GSM IS SUBJECT TO ALL TEXAS AND FEDERAL LABOR LAWS AND STATUTES, AND MINIMUM WAGE LAWS.

9. Mr. Hilgert cannot recover punitive damages or exemplary damages on his breach of contract claim, even if the breach was malicious, intentional, or capricious. *Lisanti v. Dixon*, 147 S.W.3d 638, 645 (Tex. App.—Dallas 2004, pet. denied); *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 567 (Tex. App.—Austin 2004, no pet.).

9. CONTESTED PROPOSITIONS OF LAW

1. Mr. Hilgert contends that GSM ^{KNOWINGLY, WILLFULLY AND} legally waived the conditions that must be ^{WRITTEN BY GSM WITHOUT ANY INPUT FROM HILGERT} satisfied under the Employment Agreement in order to qualify for a commission with respect to the following four businesses: (1) Mr. Rooter Plumbing, (2) Norman's Air Conditioning, (3) Hargill Growers, and (4) ^{VALLEY PECAN} Pecan Valley. Mr. Hilgert believes GSM legally waived the requirements in Mr. Hilgert's Employment Agreement with respect to these clients because a different employee, known as an Analyst, was able to successfully sell a different service to these same clients and was thus able to generate a profit for GSM. ^{THAT WAS A DIRECT RESULT OF HILGERT SELLING THE SERVICE FIRST.} GSM denies that it legally waived the conditions set forth in Mr. Hilgert's contract because a waiver requires a clear intent to give up a right, and no such clear intent was expressed with respect to any of the transactions at issue. ^{BUT GSM ADMITS THAT IT REGULARLY SELLS TO ANY CLIENT THAT CAN PAY THE FEES.} See *Regent Int'l Hotels v. Las Colinas Hotels*, 704 S.W.2d 101, 103-04 (Tex. App.— Dallas 1985, no writ).

CONTESTED PROPOSITIONS OF LAW.1A. EVIDENCE OF OTHER BAD ACTS ISPROPERLY ADMITTED IF FOUR REQUIREMENTSARE MET: (1) THE EVIDENCE IS OFFEREDFOR A PROPER PURPOSE UNDER FED R. EVID404(b); (2) THE EVIDENCE IS RELEVANT UNDERFED R. EVID 401; (3) THE PROBATIVE VALUEOF THE EVIDENCE IS NOT SUBSTANTIALLYOUTWEIGHTED BY ITS POTENTIAL FOR UNFAIRPREJUDICE UNDER FED R. EVID 403; AND(4) THE DISTRICT COURT, UPON REQUEST,INSTRUCTS THE JURY TO CONSIDER THEEVIDENCE ONLY FOR THE PURPOSE FORWHICH IT WAS ADMITTED.

AN INDUCEMENT CLAIM REQUIRES PROOF OF (1) A FALSE REPRESENTATION OF MATERIAL FACT (2) MADE WHEN THE DEFENDANT KNEW OR SHOULD HAVE KNOWN OF THE STATEMENT'S FALSITY, (3) AND MADE WITH AN INTENT TO INDUCE RELIANCE, (4) THAT PLAINTIFF IN FACT RELIED UPON JUSTIFIABLY. SEE *LOU BACHRODT CHEVROLET V SAVAGE* 570 So. 306, 308 FLA 4TH DCA. 1990) REVIEW DENIED, 581 So 2d 166 FLA 1991)

THE TEXAS SUPREME COURT, IN *FORMOSA PLASTICS CORPORATION USA, V. PRESIDIO ENGINEERS AND CONTRACTORS* 960 S.W.2d 41 (TEX 1998), RELIED ON PRECISELY THIS DUTY ANALYSIS IN HOLDING THAT THE ECONOMIC LOSS RULE (ELR) DOES NOT BAR FRAUDULENT INDUCEMENTS CLAIMS.

TEXAS LAW HAS LONG IMPOSED A DUTY TO ABSTAIN FROM INDUCING ANOTHER TO ENTER INTO A CONTRACT THROUGH THE USE OF FRAUDULENT MISREPRESENTATIONS. AS A RULE, A PARTY IS NOT BOUND BY A CONTRACT PROCURED BY FRAUD. MOREOVER, IT IS WELL ESTABLISHED THAT THE LEGAL DUTY NOT TO FRAUDULENTLY PROCURE A CONTRACT IS SEPERATE AND INDEPENDENT FROM THE DUTIES ESTABLISHED BY THE CONTRACT ITSELF. THE LAW LONG AGO ABANDONED THE POSITION

THAT A CONTRACT MUST BE HELD SACRED REGARDLESS OF THE FRAUD OF ONE OF THE PARTIES IN PROCURING IT" Id AT 46 (QUOTING BATES V. SOUTHEAST, 31 N.E. 2d 551, 558 MASS 1941) (CITATIONS OMITTED)

WHILE IT MAY BE COLD COMFORT, AN IMPORTANT SAFEGUARD AGAINST A CONTRACT CASE BEING RECAST AS FRAUD LIES IN THE "STRICT PLEADING AND PROOF REQUIREMENTS NECESSARY TO RECOVER COMPENSATORY AND PUNITIVE DAMAGES BASED ON FRAUD. ROLLS V. ~~BLISS~~ BLISS / NYITROTE INC. 408 So 2d 229, 237. (FLA 3d D.C.A. 1981)

HOWEVER, WHEN ONE PARTY TO THE CONTRACT SITS AT THE BARGAINING TABLE WITH DECEIT IN ITS HEART, ALL BETS ARE OFF, OR AT LEAST THEY SHOULD BE. IT HAS BEEN COMMONLY STATED, FOR EXAMPLE, THAT "FRAUD UNRAVELS EVERYTHING." PETER A. ALCES, THE LAW OF FRAUDULENT TRANSACTIONS (SECTIONS) 3.03(1), at 3-5. (1989). ~~IT~~ AND "FRAUD DESTROYS ALL CONSENT." GAWLEY BROS. INC V BUTLER BROS. B.L.D.E CO., 212 N.W 602, 603 (min (1927)

QUOTED IN R. JOSEPH BANTON, DROWNING IN A SEA OF CONTRACT; APPLICATION OF THE ECONOMIC LOSS RULE TO FRAUD AND NEGLIGENT MISREPRESENTATION (LAING 41 WM & MARY L. REVIEW 1789, 1836 (2000).

UNDER TEXAS LAW, COMMON-LAW FRAUD AND MISREPRESENTATION ARE THE SAME CAUSE OF ACTION SEE *Snyder Commc'ns L.P. v MAGANA*, 142 S.W.2d 295, 298 (TEX 2004) "PROOF THAT A PARTY RELIED TO ITS DETRIMENT ON AN ALLEGED MISREPRESENTATION IS AN ESSENTIAL ELEMENT OF A FRAUD CLAIM" *HAASE v. GLAZNER*, 62-S.W.3d 795, 798 (TEX 2001). IF A DEFENDANT INDUCES A PLAINTIFF INTO A CONTRACT BY USING FALSE REPRESENTATIONS, THE PLAINTIFF MAY CLAIM FRAUD OR FRAUDULENT INDUCEMENT. SEE *FORMOSA PLASTICS CORP* 960. S.W.2d 4546

AN OTHERWISE VALID "AS IS" AGREEMENT WILL NOT NEGATE THE CAUSATION ELEMENT OF A CLAIM IF THE BUYER CAN PROVE HE WAS FRAUDULENTLY INDUCED TO ENTER THE AGREEMENT BECAUSE OF FRAUDULENT REPRESENTATION OR CONCEALMENT OF INFORMATION BY THE SELLER. *PRUDENTIAL* 896 S.W.2d 45162. *HILBERT* WAS REQUIRED TO TAKE THE EMPLOYMENT OF GSN "AS IS", EVEN KNOWING OF MISTAKES IN THE AREA THAT *HILBERT* WOULD BE WORKING.

THE SUPREME COURT DISAGREED, FINDING THAT THE FRAUDULENT INDUCEMENT CLAIM WAS "INDEPENDENT" OF THE CONTRACT AND THUS VIABLE. THE COURT REASONED THAT "FRAUDULENT INDUCEMENT IS AN INDEPENDENT TORT IN THAT IT REQUIRES PROOF OF FACTS SEPERATE AND DISTINCT FROM THE BREACH OF CONTRACT" CITING AFM Corp V. SOUTHERN BELL, 515 So 2d 180. (FLA 1987)

FRAUDULENT INDUCEMENT IS AN EXCEPTION TO THE ECONOMIC LOSS RULE. WHERE, DURING NEGOTIATIONS, AND IN ADVANCE OF THE EXECUTION OF A CONTRACT, A PARTY DOES NOT DISCLOSE CERTAIN FACTS OR MISREPRESENTS CERTAIN FACTS DURING THE NEGOTIATIONS BEFORE THE CONTRACT IS EXECUTED, A CLAIM FOR FRAUDULENT INDUCEMENT MAY BE AVAILABLE, EVEN THOUGH THE CONTRACT WAS ACTUALLY SIGNED. FORMOSA PLASTICS CORP V PRESIDIO ENGINEERS, 960 S.W 2d 41, 46, 48 (TEX 1998) ALSO SEE SUSAN OIL INC V CONTINENTAL OIL COMPANY, 319 S.W 2d 230, 236 N 6 (TEX, CIV APP - SAN ANTONIO 1975. WRIT REF'D NRE) DEWITT COUNTY ELECTRIC COOP INC V PARKS 15 W 3d 96 (TEX 1999).

2. Mr. Hilgert cannot recover punitive and/or compensatory damages under the ADEA. *Smith v. Berry Company*, 165 F.3d 390, 395 (5th Cir. 1999) (punitive damages are not recoverable under the ADEA); *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036, 1038-39 (5th Cir.

1977) ("[N]either general damages nor punitive damages are recoverable in private actions posited upon the ADEA"). BUT IF JURY FINDS THAT GSM WAS "WILLFUL" IN THEIR ACTIONS THEN DAMAGES CAN BE AWARDED.

3. Mr. Hilgert, as *pro se* litigant, cannot recover attorneys' or paralegal fees for work that he himself performed. BUT TEXAS IS A RIGHT TO WORK STATE AND HILGERT GAVE UP HIS BUSINESS OPPORTUNITIES TO WORK ON THIS CASE. See *De Mingo v. Achenbaum*, 136 Fed. Appx. 695, 696-98 (5th Cir.

2005) (denying *pro se* plaintiff's request for attorneys' fees and paralegal fees); see also *Dumdei*

v. Certified Financial Planner Bd. of Standards, Inc., slip op., 1999 WL 787402, at *8 (N.D.

Tex. Oct. 1, 1999) ("Plaintiff is a *pro se* litigant, not an attorney. As such, he cannot recover

attorney's fees as a matter of law.") (citing TEX. CIV. PRAC. & REM. CODE § 38.002 (noting that a

party must be represented by an attorney in order to recover attorneys' fees)). BUT THERE IS CASE LAW SUPPORTING HILGERT'S POSITION THAT IT IS PARALEGAL FEES NOT ATTORNEY FEES THAT HILGERT IS DUE

4/ GSM IS IN VIOLATION OF TEXAS AND FEDERAL LABOR LAWS AND STATUTES

10. EXHIBITS

PATALEGAL FEES

3A. HILGERT IS NOT AN OFFICER OF THE COURT AND THE COURT CAN NOT GIVE HILGERT'S SERVICES AWAY FOR NOTHING. THE CASES CITED BY DEFENSE COUNSEL REFER TO ATTORNEYS THAT ARE OFFICERS OF THE COURT, WHICH CAN AND DOES TELL THE ATTORNEYS WHEN AND WHEN NOT THEY CAN GET PAID. 11 U.S.C. §330(3)(A) DOES NOT USE THE WORD "ATTORNEY" BUT ONLY USES THE WORD PROFESSIONAL IN RELATION TO THE FEES AWARDED, BASED ON REASONABLE HOURLY RATES AND REASONABLE HOURS.

HILGERT ALLEGES THAT HE IS A PROFESSIONAL AND THE ONLY ONE IN THE COURT THAT IS NOT REQUIRED TO HAVE A LICENSE TO REPRESENT HIMSELF.

THE EQUAL ACCESS TO JUSTICE ACT AUTHORIZES THE PAYMENT OF ATTORNEY'S FEES TO A PRIVATE PERSON WHO WINS IN AN ADMINISTRATIVE OR JUDICIAL PROCEEDING AGAINST THE UNITED STATES. HILGERT ALLEGES THAT THE SAME SHOULD BE AWARDED TO A PRO SE, LIKE HILGERT

RULE 11(2) SANCTIONS: (2) THE CLAIMS, DEFENSES, AND OTHER LEGAL CONTENTIONS THEREIN ARE WARRANTED BY EXISTING LAW

OR BY A NONFRIVOLOUS ARGUMENT FOR EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW OR THE ESTABLISHMENT OF NEW LAW;

HILGERT IS NOT A DOUBLY INTERESTED PARTY, BUT ONLY ATTEMPTING TO COLLECT UNPAID COMMISSIONS AND OTHER DAMAGES.

HILGERT ALLEGES THAT HE "IS ENTITLED AT A MINIMUM TO AN AWARD OF AN INCENTIVE FEE" AN AWARD THAT SOME COURTS HAVE MADE TO NON-LAWYERS FOR THEIR SERVICE IN CONFERRING A BENEFIT ON THE CLASS. (COMMISSION ONLY EMPLOYEES)

PARALEGAL EXPENSES ARE "FEES" NOT "COSTS" AND SHALL BE RECOVERED BY LITIGANTS AT PREVAILING MARKET RATES.

RIEHLIN SEC SERVICE CO. V CHENTOFF 128 S CT 2007 (2008) THE COURT HELD THAT AMOUNTS BILLED FOR PARALEGAL WORK ARE FEES, NOT COSTS OR OTHER EXPENSES, AND NOTED THAT PARALEGAL WORK WAS SURELY MORE ANALOGOUS TO ATTORNEY WORK THAN TO "STUDIES, ANALYSES, REPORTS, TESTS, AND PROJECTS" Id AT 2013 - eg, MISSOURI V JENKINS 491 U.S. 274 (1989) (HOLDING THAT THE PROVISION IN 42 U.S.C. § 1988, ALLOWING RECOVERY OF ATTORNEY FEES IN CIVIL RIGHTS

CASES, INCLUDED PARALEGAL FEES)
 RICHLIN SECURITY, 128 S. CT AT 2013.
 CITING SECTION 504(a)(1), THE COURT
 NOTED THAT THE ACT "PROVIDED THAT AN
 AGENCY SHALL AWARD TO A PREVAILING
 PARTY "FEES AND OTHER EXPENSES INCURRED
 BY THAT PARTY" *Id* (EMPHASIS ADDED BY COURT)
 SIGNIFICANCE OF OPINION:
 THIS OPINION HELPS SOLIDIFY THE NOTION
 THAT PARALEGAL FEES ARE INCLUDED
 WITHIN THE PLAIN MEANING OF "ATTORNEY
 FEES."

HILBERT HAS LOST THE OPPORTUNITY
 TO TAKE OTHER EMPLOYMENT OVER THE PAST
 4 YEARS DUE TO THE FACT THAT THIS
 CASE HAS TAKEN ALL OF HIS TIME.

ADDITIONALLY THE FOLLOWING AREAS
 OF LAW WOULD HAVE TO BE CONSIDERED:

- A. EQUAL PROTECTION
- B. DUE PROCESS
- C. TEXAS IS A RIGHT TO WORK STATE.
- D. DID THE COURT SYSTEM PUT HILBERT
 INTO SLAVERY?
- E. THE POSITION THAT THE IRS MIGHT
 TAKE ON WHAT TAXES ARE OWED, BY
 WHOM, ANY GIFT TAXES, ETC, ETC

10. EXHIBITS

- A. On a form similar to the one provided by the clerk, each party will attach two lists of all exhibits expected to be offered and will make the exhibits available for examination by opposing counsel. All documentary exhibits must be exchanged before trial, except for rebuttal exhibits or those whose use cannot be anticipated.
- B. A party requiring authentication of an exhibit must notify the offering counsel in writing within five (5) days after the exhibit is listed and made available; failure to object in advance of the trial in writing concedes authenticity.
- C. Within reason, other objections to admissibility of exhibits must be made at least three business days before trial; the Court will be notified in writing of disputes, with copies of the disputed exhibit and authority.
- D. Parties must mark their exhibits to include the date and case number on each.
- E. At the trial, the first step will be the offer and receipt in evidence of exhibits.

Two copies of Plaintiff's exhibit list are attached hereto as Exhibit A.¹²

Two copies of Defendant's exhibit list are attached hereto as Exhibit B.

¹² May objects to Mr. Hilgert's Trial Exhibit List because it does not provide May with sufficient notice regarding the exhibits that Mr. Hilgert expects and/or intends to use at trial. Mr. Hilgert's Exhibit List identifies various collections of documents as purported single "exhibits" when they are in fact multiple separate and distinct documents that encompass hundreds of pages. Mr. Hilgert's Exhibit No. 2, for example, encompasses approximately 144 pages and is made up of multiple different documents, including (but not limited to) accounts receivables records, contracts, correspondence, and payment checks. Likewise, Mr. Hilgert's Exhibit No. 5 includes approximately 223 pages and encompasses a multitude of different documents. Mr. Hilgert's Exhibit List is also deficient in that it fails to identify his proposed exhibits by "Bates" number, despite the fact that all the documents produced in this case include these identifying markers. The parties have produced over two thousand pages of documents in this case, and many of those documents are similar or include versions with only slight variations. Consequently, Mr. Hilgert's omission of the "Bates" numbers on his Exhibit List makes it nearly impossible for May to identify those exhibits that Mr. Hilgert will use at trial. In light of the foregoing, May requests that Mr. Hilgert be ordered to revise his Trial Exhibit List as follows: (1) to identify the specific documents Mr. Hilgert intends to use at trial, instead of selecting document ranges with hundreds of different documents; and (2) to include his proposed trial exhibits "Bates" number for the corresponding exhibits so that May can more easily identify his exhibits.

11. WITNESSES

A. List the names and addresses of witnesses who may be called with a brief statement of the nature of their testimony. Include the qualifications of expert witnesses; these will be used to qualify the expert at trial.

B. Include:

If other witnesses to be called at the trial become known, their names addresses, and subject of their testimony will be reported to opposing counsel in writing as soon as they are known; this does not apply to rebuttal or impeachment witnesses.

Two copies of Plaintiff's witness list are attached hereto as Exhibit C.

Two copies of Defendant's witness list are attached hereto as Exhibit D.

12. SETTLEMENT

The parties attended a mediation conference before The Honorable Peter E. Ormsby, United States Magistrate Judge, in January 2009. The parties were unable to resolve their disputes at that time. Since then, the parties have attempted to resolve their disputes through informal settlement discussions. No settlement has been reached. GSM believes that all settlement possibilities have been exhausted, that the case cannot be settled, and that the case will have to be tried.

13. TRIAL

A. The probable length of trial is three days.

B. The parties do not anticipate any logistical problems with the presentation of evidence.

14. ATTACHMENTS

A. For a jury trial:

(1) Proposed questions for the voir dire examination.

Plaintiff's proposed voir dire questions are attached hereto as Exhibit E.

Defendant's proposed voir dire questions are attached hereto as Exhibit F.

- (2) Proposed charge, including instructions, definitions, and special interrogatories, with authority.

The parties have significant disagreements regarding the factual and legal issues in this case, as illustrated by the foregoing portions of the parties' Joint Pretrial Order. The majority of these disagreements (as indicated in May's preface above) stem from the fact that Mr. Hilgert's proposed pretrial submissions include factual allegations and legal propositions concerning claims that are not at issue in this lawsuit. His jury instructions and jury questions are no exception—they are replete with argumentative and prejudicial allegations that have no relation to the remaining legal claims.

Moreover, Mr. Hilgert's proposed jury instructions and jury questions are technically deficient. His proposed instructions and questions are not derived from pattern jury charges and he provides no citations to legal authority (statutes, case law, or pattern jury instructions) that support the submission of the instructions and/or jury questions that Mr. Hilgert seeks. Mr. Hilgert's proposed jury questions are also improper and prejudicial because he inserted his own biased and prejudicial answers after several special interrogatories—which are meant to be read to the jury and which must be objective and accurate reflections of the law.¹³

In sum, Mr. Hilgert's proposed jury instructions and questions are improper because they are argumentative and are not an accurate reflection of the law or the claims remaining at issue in this case. Consequently, Mr. Hilgert's proposed jury instructions and questions should not be presented to the jury. In addition, because the parties do not agree regarding the factual and/or legal issues remaining in this case, the parties are submitting their own separate proposed jury instructions and interrogatories:

¹³ See, e.g., Hilgert's proposed Special Interrogatory regarding Age Discrimination, Exhibit G, wherein Mr. Hilgert inserted his own biased and prejudicial answer to this interrogatory and discusses at least five reasons supporting his allegation that his employment was terminated because of his age.

Plaintiff's proposed jury charge and questions are attached hereto as Exhibit G.

Defendant's proposed jury charge and questions are attached hereto as Exhibit H.

Date

ROBERT HINOJOSA
UNITED STATES DISTRICT COURT JUDGE

APPROVED:

August 31, 2010
Date

s/ John Collins
John Collins, Attorney for Defendant

AUG 13 2010
DATE

Clive B. Hilgert
CLIVE B. HILGERT pro se