EXHIBIT "A"

INSTRUCTIONS PRIOR TO VOIR DIRE COMMENCEMENT[1]

Members of the jury panel, if you have a cell phone, PDA, Blackberry, smart phone, iPhone or any other wireless communication device with you, please take it out now and turn it off. Do not turn it to vibrate or silent; power it down. During jury selection, you must leave it off.

There are certain rules you must follow while participating in this trial.

First, you may not communicate with anyone about the case, including your fellow jurors, until it is time to deliberate. I understand you may want to tell your family, close friends and other people that you have been called for jury service so that you can explain when you are required to be in court. You should warn them not to ask you about this case, tell you anything they know or think they know about it, or discuss this case in your presence, until after I accept your verdict or excuse you as a juror.

Similarly, you must not give any information to anyone by any means about this case. For example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, camera, recording device, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, or Twitter, or any other way to communicate to anyone any information about this case until I accept your verdict or until you have been excused as a juror. This includes any information about the parties, witnesses, participants, claims, evidence, or anything else related to this case.

Second, do not speak with anyone in or around the courthouse other than your fellow jurors or court personnel. Some of the people you encounter may have some connection to the case. If you were to speak with them, that could create an appearance or raise a suspicion of impropriety.

Third, do not do any research—on the Internet, in libraries, in books, newspapers, magazines, or using any other source or method. Do not make any investigation about this case on your own. Do not visit or view any place discussed in this case and do not use Internet programs or other devices to search for or view any place discussed in the testimony. Do not in any way research any information about this case, the law, or the people involved, including the parties, the wit- nesses, the lawyers, or the judge, until after you have been excused as jurors. If you happen to see or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect the parties' right to have this case decided only on evidence they know about, that has been presented here in court. If you do any research, investigation or experiment that we do not know about, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, which includes the oath to tell the truth and cross-examination. It could also be unfair to the parties' right to know what information the jurors are relying on to decide the case. Each of the parties is entitled to a fair trial by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide the case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will

[1] Fifth Circuit Pattern Jury Instructions (Civil Cases), § 1.1 (2014).

have done an injustice. It is very important that you abide by these rules. Failure to follow these instructions could result in the case having to be retried.

PRELIMINARY INSTRUCTIONS TO THE JURY[2]

MEMBERS OF THE JURY:

You have now been sworn as the jury to try this case. As the judge, I will decide all questions of law and procedure. As the jury, you are the judges of the facts. At the end of the trial, I will instruct you on the rules of law that you must apply to the facts as you find them.

You may take notes during the trial. Do not allow your note-taking to distract you from listening to the testimony. Your notes are an aid to your memory. If your memory should later be different from your notes, you should rely on your memory. Do not be unduly influenced by the notes of other jurors. A juror's notes are not entitled to any greater weight than each juror's recollection of the testimony.

Until this trial is over, do not discuss this case with anyone and do not permit anyone to discuss this case in your presence. This includes your spouse, children, relatives, friends, coworkers, and people with whom you commute to court each day. During your jury service, you must not communicate any information about this case by any means, by conversation or with the tools of technology. For example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, camera, recording device, Black- berry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, or Twitter, or any other way to communicate to anyone any information about this case until I accept your verdict or excuse you as a juror.

Do not even discuss the case with the other jurors until the end of the case when you retire to deliberate. It is unfair to discuss the case before all of the evidence is in, because you may become an advocate for one side or the other. The parties, the witnesses, the attorneys, and persons associated with the case are not allowed to communicate with you. And you may not speak with anyone else in or around the courthouse other than your fellow jurors or court personnel.

Do not make any independent investigation of this case. You must rely solely on what you see and hear in this courtroom. Do not try to learn anything about the case from any other source. In particular, you may not use any electronic device or media, such as a telephone, cell phone, smartphone, or computer to research any issue touching on this case. Do not go online or read any newspaper account of this trial or listen to any radio or television newscast about it. Do not visit or view any place discussed in this case and do not use Internet programs or other devices to search for or to view any place discussed in the testimony. In sum, you may not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge, until after you have been excused as jurors.

There are some issues of law or procedure that I must decide that the attorneys and I must discuss. These issues are not part of what you must decide and they are not properly discussed in your presence. To avoid having you leave the courtroom and to save time, I may discuss these issues with the attorneys at the bench, out of your hearing. When I confer with the attorneys at the bench, please do not listen to what we are discussing. If the discussions require more time, I may have you leave the

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[2] Fifth Circuit Pattern Jury Instructions (Civil Cases), § 1.2 (2014).

courtroom until the lawyers and I resolve the issues. I will try to keep these interruptions as few and as brief as possible.

The trial will now begin. Lawyers for each side will make an opening statement. Opening statements are intended to assist you in understanding the significance of the evidence that will be presented. The opening statements are not evidence.

After the opening statements, the plaintiff will present its case through witness testimony and documentary or other evidence. Next, the defendant will have an opportunity to present its case. The plaintiff may then present rebuttal evidence. After all the evidence is introduced, I will instruct you on the law that applies to this case. The lawyers will then make closing arguments. Closing arguments are not evidence, but rather the attorneys' interpretations of what the evidence has shown or not shown. Finally, you will go into the jury room to deliberate to reach a verdict.

Keep an open mind during the entire trial. Do not decide the case until you have heard all of the evidence, the closing arguments, and my instructions.

It is now time for the opening statements.

JURY CHARGE

MEMBERS OF THE JURY:

It is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any opinion that you might have as to what the law ought to be.[3]

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.[4]

You should consider all of the instructions about the law as a whole and regard each instruction in light of the others, without isolating a particular statement or paragraph.[5]

The testimony of the witnesses and other exhibits introduced by the parties constitute the evidence. The statements of counsel are not evidence; they are only arguments. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports the arguments. You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must apply the law as I instruct you.[6]

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or sympathy you might have for the plaintiff or the defendant in arriving at your verdict.[7]

Do not let bias, prejudice or sympathy play any part in your deliberations. A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.[8]

Summary of Parties Contentions: I am now going to provide a brief summary of each parties' contentions in this case. Plaintiff Nukote of Illinois, Inc.—who I will refer to as Nukote—alleges five different causes of action against Defendants Clover Holdings, Inc. and Clover Technologies Group, LLC—who I will collectively refer to as "Clover." First, Nukote alleges that Clover engaged in unfair competition against Nukote by misappropriating Nukote's trade secrets. Second, Nukote alleges that Clover intentionally interfered with Nukote's contracts with Office Depot, S.P. Richards, and Nukote's former employees. Third, Nukote alleges that Clover aided and abetted Nukote's former employees' breach of their fiduciary duties to Nukote. Fourth, Nukote

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3 Fifth Circuit Pattern Jury Instructions (Civil Cases), § 3.1 (2014).
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 Fifth Circuit Pattern Jury Instructions (Civil Cases), § 2.16 (2014).

alleges that Clover acquired or maintained monopoly power by anticompetitive conduct within a relevant market—I will refer to this claim as Nukote's "Monopoly Claim." And finally, Nukote alleges that Clover engaged in anticompetitive conduct with the intent to, and the dangerous probability that Clover would, acquire or maintain monopoly power within a relevant market—I will refer to this claim as Nukote's "Attempted Monopoly Claim."

Clover contends that it has not engaged in any unlawful conduct and denies Nukote's claims.

Unless I tell you otherwise, Nukote has the burden of proving its case by a preponderance of the evidence. To establish by a preponderance of the evidence means to prove something is more likely so than not so. If you find that Nukote has failed to prove any element of its claims by a preponderance of the evidence, then it may not recover on that claim.[9]

The evidence you are to consider consists of the testimony of the witnesses, the documents and other exhibits admitted into evidence, and any fair inferences and reasonable conclusions you can draw from the facts and circumstances that have been proven.[10]

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude another fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.[11]

You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the witness's manner and demeanor on the witness stand, any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.[12]

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.[13]

You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.[14]

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9 Fifth Circuit Pattern Jury Instructions (Civil Cases), § 3.2 (2014).
10 Fifth Circuit Pattern Jury Instructions (Civil Cases), § 3.3 (2014).
11 *Id.*
12 Fifth Circuit Pattern Jury Instructions (Civil Cases), § 3.4 (2014).
13 *Id.*
14 *Id.*

Certain testimony has been presented to you through a deposition. A deposition is the sworn, recorded answers to questions a witness was asked in advance of the trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, that witness's testimony may be presented, under oath, in the form of a deposition. Sometime before this trial, attorneys representing the parties in this case questioned this witness under oath. A court reporter was present and recorded the testimony. The questions and answers have been shown to you. This deposition testimony is entitled to the same consideration and is to be judged by you as to credibility and weighed and otherwise considered by you in the same way as if the witness had been present and had testified from the witness stand in court.[15]

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely on it.[16]

Nukote's Monopolization Claim: I am now going to instruct you on the law related to Nukote's Monopoly and Attempted Monopoly Claims. Instructions specific to Nukote's other claims are provided in the jury verdict form.

To prevail on its Monopoly Claim, Nukote must prove the following elements by a preponderance in the evidence: (1) First, that Clover possessed monopoly power in a relevant market; (2) Second, that Clover willfully acquired or maintained monopoly power in that market by engaging in anticompetitive conduct; and (3) Third, that Nukote was injured in its business or property because of Clover's anticompetitive conduct.[17]

The Relevant Market: Defining the relevant market is essential because you are required to make a judgment about whether Clover has monopoly power in a properly defined economic market. To make this judgment, you must be able to determine what, if any, economic forces restrain Clover's freedom to set prices for or restrict output of remanufactured ink jet and laser toner cartridges.[18]

There are two aspects to a "relevant market." The first aspect is known as a relevant product market. The second aspect is known as the relevant geographic market.[19]

The Relevant Product Market: The relevant product market includes all products that are reasonable substitutes for each other from a buyer's point of view; that is, the products compete with

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15 Fifth Circuit Pattern Jury Instructions (Civil Cases), § 2.13 (2014).

16 Fifth Circuit Pattern Jury Instructions (Civil Cases), § 3.5 (2014).

17 *Retractable Tech., Inc. v. Becton, Dickinson & Co.*, No 2:08-CV-16-LED-RSP, Dkt No. 577 (E.D. Tex. September 19, 2013) (attached as Ex. A). The jury instructions given in *Retractable* are included in the sample antitrust jury instructions on the American Bar Association's ("ABA") website. *See* Jury Instructions, American Bar Association, *available at*, http://apps.americanbar.org/dch/comadd.cfm?com=AT325050&pg=1.

18 This paragraph is a modified version of the ABA Model Jury Instructions in Civil Antitrust Cases (2005) § C-6.

19 *Id.*; *see also Christou v. Beatport LLC*, No. 1:10-CV-02921, Dkt No. 294-7 (USDC Colo. July 0, 2013) (jury instructions related to establishing the relevant product market) (attached as Ex. B). The jury instructions from *Christou* are included in the sample antitrust jury instructions on the American Bar Association's website. *See* Jury Instructions, American Bar Association, *available at*, http://apps.americanbar.org/dch/comadd.cfm?com=AT325050&pg=1.

each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes.[20]

To determine whether products are reasonable substitutes for each other, you should consider whether a small but significant permanent increase in the price of one product would result in a substantial number of consumers switching from that product to another. Generally speaking, a small but significant permanent increase in price is approximately a five percent increase in price not due to external cost factors, but you may conclude in this case that some other percentage is more applicable to the product at issue. If you find that such switching would occur, then you may conclude that the products are in the same product market.[21]

In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence or absence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of Nukote and Clover regarding who their respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.[22] Furthermore, you should consider the consumers' propensity to switch from one product to another, similar product when relative prices change.[23] Products similar enough that a small relative price change causes consumers to substitute one for another are in the same market.[24]

In this case, Nukote contends that the relevant product market is remanufacturers of printer cartridges supplying big box retailers. Clover asserts that Nukote has failed to allege a proper relevant product market. If you find that Nukote has proven a relevant product market comprised of products that are reasonably interchangeable, then you should continue to evaluate the remainder of Nukote's Monopoly Claim.[25]

The Relevant Geographic Market: For each relevant product market there must also be a relevant geographic market. The relevant geographic market is the area in which Clover faces competition from other firms that compete in the relevant product market and to which customers can reasonably turn for purchases.[26] In this case, the parties agree that the relevant geographic market is the United States.

Monopoly Power. If you find that Nukote has proven a relevant market, you should determine whether Clover has monopoly power in that market. Monopoly power is the power to control prices and exclude competition in a relevant market. More precisely, a defendant is a

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20 *Id.* at § C-7; *see also Christou*, No. 1:10-CV-02921, Dkt No. 294-7.

21 *Id.* at § C-8; *see also Christou*, No. 1:10-CV-02921, Dkt No. 294-7.

22 *Id.* at § C-8; *see also Christou*, No. 1:10-CV-02921, Dkt No. 294-7.

23 *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exchange*, 89 F.3d 233, 236 n.3 (5th Cir. 1996).

24 *Id.*

25 This paragraph is a modified version of the Model Jury Instructions in Civil Antitrust Cases (2005) § C-9; *see also Christou*, No. 1:10-CV-02921, Dkt No. 294-7.

26 *Id.* at § C-13.

monopolist if it can profitably raise prices substantially above the competitive level for a significant period of time.[27]

Nukote has the burden of proving that Clover has the ability to raise or maintain the prices that it charges in the relevant market above competitive levels. Nukote must prove that Clover has the power to do so by itself – that is, without the assistance of, and despite competition from, any existing or potential competitors.[28]

Nukote must also prove that Clover has the power to maintain the prices above a competitive level for a significant period of time. If Clover attempted to maintain prices above competitive levels, but would lose so much business to other competitors that the price increase would become unprofitable and would have to be withdrawn, then Clover does not have monopoly power.[29]

Similarly, Nukote must prove that Clover has the ability to exclude competition. For example, if Clover attempted to maintain prices above competitive levels, but new competitors could enter the relevant market or existing competitors could expand their sales and take so much business that the price increase would become unprofitable and would have to be withdrawn, then Clover does not have monopoly power.[30]

The ability to earn high profit margins or a high rate of return does not necessarily mean that Clover has monopoly power. Other factors may enable a company without monopoly power to sell at higher prices or earn higher profit margins than its competitors, such as the ability to offer superior products or services, the ability to maintain an efficient business operation, or superior advertising or marketing. However, an ability to sell at higher prices or earn higher profit margins than other companies for similar goods or services over a long period of time may be evidence of monopoly power. By contrast, evidence that Clover would lose a substantial amount of sales if it raised prices substantially, or that Clover's profit margins were low compared to its competitors, erratic, and/or decreasing, might evidence that Clover does not have monopoly power.[31]

Monopoly power may be proven indirectly, by evidence of the structure of the market. The evidence presented by the parties includes evidence of market share, barriers to entry, entry and exist by other companies, and the number and size of other competitors. If this evidence establishes that Clover has the power to control prices and exclude competition in the relevant market, then you may conclude that Clover has monopoly power in the market.[32]

The first factor you should consider is Clover's market share. A market share above 50 percent may be sufficient to support an inference that Clover has monopoly power, but in considering whether Clover has monopoly power it is also important to consider other aspects of the relevant market, such as market share trends, the existence of barriers to entry, the entry and exit by other companies, and the number and size of competitors. Along with Clover's market share, these factors should inform

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27 *Id.* at § C-4.
28 *Id.* at § C-23.
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.* at § C-16.

you as to whether Clover has monopoly power. The likelihood that a company has monopoly power is stronger the higher that company's share is above 50 percent.[33]

A market share below 50 percent is ordinarily not sufficient to support a conclusion that a defendant has monopoly power. However, if you find that the other evidence demonstrates that the defendant does, in fact, have monopoly power despite having a market share below 50 percent, you may conclude that the defendant has monopoly power.[34]

The trend in Clover's market share is also something you may consider. An increasing market share may strengthen an inference that a company has monopoly power, particularly where that company has a high market share, while a decreasing share might show that a company does not have monopoly power.[35]

You may also consider barriers to entry into the relevant market. Barriers to entry make it difficult for new competitors to enter the relevant market in a meaningful and timely way. Barriers to entry might include intellectual property rights (such as patents or trade secrets), specialized marketing practices, and the reputation of the companies already participating in the market (or the brand name recognition of their products). Evidence of low or no barriers may be evidence that Clover does not have monopoly power because new competitors could enter easily if Clover attempted to raise prices for a substantial period of time. By contrast, evidence of high barriers to entry may support an inference that Clover has monopoly power.[36]

The history of entry and exist in the relevant market may be helpful to consider as well. Entry of new competitors or expansion of existing competitors may be evidence that Clover lacks monopoly power. On the other hand, departures from the market, or the failure of firms to enter the market, particular if prices and profit margins are relatively high, may support an inference that Clover has monopoly power.[37]

You may consider whether Clover's competitors are capable of effectively competing. In other words, you should consider whether the financial strength and number of competitors act as a check on Clover's ability to price its products. If Clover's competitors are vigorous, this may be evidence that Clover lacks monopoly power. On the other hand, if you determine that Clover's competitors are weak, this may support an inference that Clover has monopoly power.[38]

Anticompetitive Conduct: If you find Clover possessed monopoly power, you must next determine whether it willfully acquired or maintained monopoly power through anticompetitive conduct. Anticompetitive conduct is acts or practices—other than competition on the merits—that have the effect of preventing or excluding competition or frustrating or foreclosing the efforts of other companies to compete for customers within the relevant market. Harm to competition is to be distinguished from harm to a single competitor or group of competitors, which does not necessarily constitute harm to competition. In addition, you should distinguish the acquisition or maintenance

33 *Id.* at C-17.
34 *Id.* at C-17.
35 *Id.* at C-17.
36 *Id.* at § C-18.
37 *Id.* at § C-18 – C-19.
38 *Id.* at § C-19.

of monopoly power through anticompetitive acts from the acquisition or maintenance of monopoly power by supplying better products or services, possessing superior business skill, or because of luck, which in not unlawful.[39]

The difference between anticompetitive conduct and conduct that has a legitimate business purpose can be difficult to determine. This is because all companies have a desire to increase their profits and increase their market share. These goals are an essential part of a competitive marketplace, and the antitrust laws do not make these goals – or the achievement of these goals – unlawful, as long as a company does not use anticompetitive means to achieve these goals.[40]

In determining whether Clover's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether it provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.[41]

Anticompetitive conduct must represent something more than the conduct of business that is part of the normal competitive process or commercial success. It must represent conduct that has made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason.[42]

Causation and Antitrust Injury: The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property caused by the violation. If you find that Nukote has proven the other elements of its Monopoly claim, then you must decide if Nukote is entitled to recover damages as a result.[43]

To establish that it is entitled to recover damages, Nukote must prove that it was injured as a result of Clover's violation of the antitrust laws. This is sometimes referred to as proving "legal causation." If Nukote has proved causation, then it has proved that it suffered an "antitrust injury."[44]

Proving causation does not require Nukote to prove the dollar value of its injuries. It requires only that Nukote prove that it was in fact injured by Clover's antitrust violation. If you find that Nukote has established that it was in fact injured, you may then consider the amount of its damages. It is important to understand, however, that injury and amount of damage are different concepts and

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39 *Id.* at § C-26; *see also Retractable Tech*, No 2:08-CV-16-LED-RSP, Dkt No. 577; *Continental Airlines, Inc. v. American Airlines, Inc.*, Civ. A. Nos. G–92–259, G–92–266, 1993 WL 379396, at *2 (S.D. Tex. Aug. 10, 1993) (attached as Ex. C). The jury instructions given in *Continental* are included in the sample antitrust jury instructions on the ABA's website. *See* Jury Instructions, American Bar Association, available at, http://apps.americanbar.org/dch/comadd.cfm?com=AT325050&pg=1.

40 This paragraph is a modified version of the ABA Model Jury Instructions in Civil Antitrust Cases (2005) § C-27; *see also Retractable Tech*, No 2:08-CV-16-LED-RSP, Dkt No. 577; *Continental Airlines,* 1993 WL 379396, at *2.

41 *Id.*

42 *Id.* at § C-29.

43 *Continental Airlines,* 1993 WL 379396, at *6-7.

44 *Id.*

that you should not consider the amount of damage unless and until you have concluded that Nukote has established it was, in fact, injured.[45]

To establish injury, Nukote must prove by a preponderance of the evidence that Clover's alleged illegal conduct was a material cause of Nukote's injury. This means that Nukote must have proved that some damage flowed to it as a result of Clover's alleged antitrust violation. Nukote is not required to prove that Clover's alleged antitrust violations were the sole cause of its injuries; nor need Nukote eliminate all of the possible causes of injuries to establish causation. It is enough if Nukote has proved that the alleged antitrust violations were a material cause of its injuries. However, if you find that Nukote's injuries were caused solely by something other than the alleged antitrust violations, then you must find that Nukote has failed to prove that it is entitled to recover damages from Clover on its Monopoly claim.[46]

Nukote must also prove that its injury is the type of injury that the antitrust laws were intended to prevent. This is sometimes referred to as "antitrust injury." If Nukote's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition or acts that would otherwise harm competition, then Nukote's injuries are antitrust injuries. On the other hand, if Nukote's injuries were caused by heightened competition, the competitive process itself, or by acts that would benefit customers, Nukote's injuries are not antitrust injuries. You should bear in mind that business may incur losses for many reasons that the antitrust laws are not designed to prohibit or protect against—such as where a competitor offers better products or services or where a competitor is more efficient and can charge lower prices and still earn a profit—and the antitrust laws do not permit a plaintiff to recover damages for losses that were caused by the competitive process or conduct that benefits consumers.[47]

Finally, Nukote must establish that the injury which it claims to have suffered was an injury to its "business or property". The term "business" includes any commercial interest or venture. Nukote has been injured in its "business" if you find that it has suffered injury to any of its commercial interests or enterprises as a result of Clover's alleged antitrust violations. The term "property" includes anything of value which Nukote owns or possesses. You are instructed that Nukote has been injured in its "property" if you find that anything of value which it owns or possesses has been damaged as a result of Clover's alleged antitrust violation. You are further instructed that Nukote has been injured in its "property" if you find that it has lost money as a result of Clover's alleged antitrust violation.[48]

If you find that Clover did in fact injure Nukote's business or property, that Clover's conduct was a material cause of Nukote's injury, and that Nukote's injury was the type that the antitrust laws were intended to prevent, then Nukote is entitled to recover damages for the injury.[49]

Damages: If you find that Clover violated the antitrust laws and that this violation caused injury to Nukote, then you must determine the amount of damages, if any, Nukote is entitled to

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45 This paragraph is a modified version of the ABA Model Jury Instructions in Civil Antitrust Cases (2005) § F-2 – F-3; *see also Continental Airlines,* 1993 WL 379396, at *6-7.

46 *Id.* at § F-3; *see also Continental Airlines,* 1993 WL 379396, at *6-7.

47 *Id.* at § F-4; *see also Continental Airlines,* 1993 WL 379396, at *6-7.

48 *Id.* at § F-7.

49 *Id.* § F-4 – F-5.

recover. The law provides that plaintiff should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful.[50]

The purpose of awarding damages in an antitrust action is to put an injured plaintiff as near as possible in the position in which it would have been if the alleged antitrust violation had not occurred. The law does not permit you to award damages to punish a wrongdoer – what we sometimes refer to as punitive damages – or to deter a defendant from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. You are also not permitted to award to the plaintiff an amount for attorney's fees or the costs of maintaining this lawsuit. Antitrust damages are compensatory only. In other words, they are designed to compensate a plaintiff for the particular injuries is suffered as a result of the alleged violation of the law.[51]

Damages may not be based on guesswork or speculation. If you find that a damages calculation cannot be based on evidence and reasonable inferences, and instead can only be reached through guesswork or speculation, then you may not award damages. If the amount of damages attributable to an antitrust violation cannot be separated from the amount of harm caused by factors other than the antitrust violation except through guesswork or speculation, then you may not award damages.[52]

You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damages suffered by Nukote. If Nukote establishes with reasonable probability the existence of an injury proximately caused by Clover's antitrust violation, you are permitted to make a just and reasonable estimate of the damages. So long as there is a reasonable basis in the evidence for a damages award, Nukote should not be denied a right to be fairly compensated just because damages cannot be determined with absolute mathematical certainty. The amount of damages must, however, be based on reasonable, non-speculative assumptions and estimates. Nukote must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find that Nukote failed to carry its burden of providing a reasonable basis for determining damages, then your verdict must be for Clover. If you find that Nukote has provided a reasonable basis for determining damages, then you may award damages based on a just and reasonable estimate supported by the evidence.[53]

Nukote may not recover damages for any portion of its injuries that it could have avoided through the exercise of reasonable care and prudence. Nukote is not entitled to increase any damages through inaction. The law requires an injured party to take all reasonable steps it can to avoid further injury and thereby reduce its loss. If Nukote failed to take reasonable steps available to it, and the failure to take those steps results in greater harm to Nukote than it would have suffered had it taken those steps, then Nukote may not recover any damages for that part of the injury it could have avoided.[54]

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50 This paragraph is a modified version of the ABA Model Jury Instructions in Civil Antitrust Cases (2005) § F-12.

51 *Id.*

52 *Id.* at F-15.

53 *Id.*

54 *Id.* at F-47.

Clover has the burden of proof on mitigation. Clover must prove by a preponderance of the evidence that Nukote acted unreasonably in failing to take specific steps to minimize of limit its losses, that the failure to take those specific steps resulted in its losses being greater than they would have been had it taken such steps, and the amount by which Nukote's loss would have been reduced had Nukote taken those steps.[55]

In determining whether Nukote failed to take reasonable measures to limit its damages, you must remember that the law does not require Nukote to have taken every conceivable step that might have reduced its damages. The evidence must show that Nukote failed to take commercially reasonable measures that were open to it. Commercially reasonable measures mean those measures that a prudent businessperson in Nukote's position would likely have adopted, given the circumstance as they appeared at that time. Nukote should be given a wide latitude in deciding how to handle the situation, so long as what Nukote did was not unreasonable in light of existing circumstances.[56]

Attempted Monopolization Claim: To prevail on its attempted monopoly claim, Nukote must prove: (1) First, that Clover had a specific intent to achieve monopoly power in a relevant market; (2) Second, Clover engaged in anticompetitive conduct in furtherance of their specific intent; and (3) Third, there was a dangerous probability that Clover would achieve monopoly power in the relevant market. You should rely on my prior instructions related to the definition of monopoly power, the relevant market, anticompetitive conduct, and damages in evaluating Nukote's attempted monopoly claim.[57]

Intent to Monopolize: To prove its claim for Attempted Monopoly, Nukote must prove Clover had a specific intent to monopolize a relevant market. To do so, Nukote must first prove the relevant market as discussed above. If you find that Nukote has proven a relevant market, you must then decide whether Clover had the specific intent to monopolize that market. In other words, you must decide if the evidence shows Clover acted with the conscious aim of acquiring the power to control prices or to exclude competition in the relevant market.[58]

There are several ways in which Nukote may prove that Clover had a specific intent to monopolize. Nukote may prove that Clover had the specific intent to monopolize by presenting evidence of direct statements of Clover's intent to obtain a monopoly in a relevant market or to destroy competition. Such proof of specific intent may consist of documents prepared or statements made by responsible officers or employees of Clover at or about the time of the conduct in question.[59]

Also, specific intent may be inferred from what Clover did. For example, if the evidence shows that the natural and probable consequence of Clover's conduct in the relevant market was to give Clover control over prices or the ability to exclude or destroy competition and that this was plainly foreseeable by Clover, then you may infer that Clover specifically intended to acquire monopoly power.[60]

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55 *Id.* at F-47.
56 *Id.* at F-47.
57 *Id.* at § C-88.
58 *Id.* at § C-91; *Continental Airlines,* 1993 WL 379396, at *3.
59 *Id.*
60 *Id.*

Dangerous Probability of Achieving Monopoly Power. If you find that Clover had the specific intent to achieve a monopoly in a relevant market and engaged in anticompetitive conduct, you must then determine whether there was a dangerous probability that Clover would succeed in achieving monopoly power if it continued to engage in that same or similar conduct.[61]

In determining whether there was a dangerous probability that Clover would acquire monopoly power in the relevant market, you should consider such factors as Clover's market share, the trend in Clover's market share, whether the barriers to entry into the market made it difficult for competitors to enter the market, and the likely effect of any anticompetitive conduct.[62]

A dangerous probability of success need not mean that success was nearly certain, but it does mean that there was a substantial and real likelihood that Clover would ultimately acquire monopoly power.[63]

Closing Instructions. It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.[64]

Remember at all times, you are the judges of the facts. You have been allowed to take notes during this trial. Any notes that you took during this trial are only aids to memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you did not take notes, rely on your independent recollection of the evidence and do not be unduly influenced by the notes of other jurors. Notes are not entitled to greater weight than the recollection or impression of each juror about the testimony.[65]

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes. You must select a jury foreperson to guide you in your deliberations and to speak for you here in the courtroom.[66]

Your verdict must be unanimous. After you have reached a unanimous verdict, your jury foreperson must fill out the answers to the written questions on the verdict form and sign and date it. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.[67]

If you need to communicate with me during your deliberations, the jury foreperson should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will

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61 *Id.* at § C-95; *see also Retractable Tech*, No 2:08-CV-16-LED-RSP, Dkt No. 577; *Continental Airlines,* 1993 WL 379396, at *5.

62 *Id.*

63 *Id.*

64 Fifth Circuit Pattern Jury Instructions (Civil Cases), § 3.7 (2014).

65 *Id.*

66 *Id.*

67 *Id.*

respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.[68]

You may now proceed to the jury room to begin your deliberations.

68 *Id.*

VERDICT FORM

Nukote's Intentional Interference with Existing Contract Claim

QUESTION NO. 1

Did Clover intentionally interfere with any of the following contracts?[69]

1. **Nukote's contracts with Office Depot.**
2. **Nukote's contracts with SP Richards.**
3. **Nukote's contracts with its former employees, Steve Noyes, Dino Gaspardo, and Mike Ducey.**

Answer "Yes" or "No."

Answer: _____

Interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.[70]

Interference can include conduct that prevents performance of a contract or makes performance of a contract impossible, more burdensome, or more difficult or of less or no value to the one entitled to performance.[71]

69 Texas Pattern Jury Charge (2014) § 106.1.

70 *Id.*

71 *Id.*; *see also International Union UAW v. Johnson Controls, Inc.*, 813 S.W.2d 558, 568 (Tex. App.—Dallas 1991, writ denied); *Tippett v. Hart*, 497 S.W.2d 606, 610 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 501 S.W.2d 874 (Tex. 1973).

If you answered "Yes" to Question 1, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 1(a)

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Nukote for its damages, if any, proximately caused by the conduct found by you in Question 1?[72]

"Proximate cause" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.[73]

Consider the following elements of damages, if any, and none other:

> The diminution in value of Nukote or lost business opportunities that were the natural, probable, and foreseeable consequence of the conduct found by you in Question No. 1.[74]

Answer in dollars and cents, if any.

Answer: _____

Do not add any amount for interest on damages, if any.[75]

Do not increase or reduce the amount of damages because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.[76]

Do not include in your answer any amount that you find Nukote could have avoided by the exercise of reasonable care. To establish that Nukote failed to mitigate its damages, Clover had the burden of proving by a preponderance of the evidence that Nukote failed to exercise reasonable care and the amount by which Nukote's damages were increased by Nukote's alleged failure to exercise reasonable care.[77]

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72 Texas Pattern Jury Charge (2014) § 115.22.
73 *Id.* at § 100.12.
74 *Id.* at § 115.5.
75 *Id.* at § 115.22 (Prejudgment interest).
76 *Id.* (Parallel theories).
77 *Id.* at § 115.8.

If you entered an amount of damages in response to Question 1(a), then answer Question 1(b). Otherwise, do not answer Question 1(b).

QUESTION NO. 1(b)

Was Clover part of a conspiracy to accomplish the unlawful conduct found by you in response to Question 1 that damaged Nukote?[78]

To be part of a conspiracy, Clover and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to Nukote. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Answer "Yes" or "No": _____

78 Texas Pattern Jury Charge (2014) § 109.1.

If you entered an amount of damages in response to Question 1(a), then answer Question 1(c). Otherwise, do not answer Question 1(c).

QUESTION NO. 1(c)

Do you find by clear and convincing evidence that the harm to Nukote caused by the conduct you found in response to Question 1 resulted from malice or gross negligence by Clover?[79]

Answer "Yes" or "No": _____

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.[80]

"Malice" means a specific intent by Clover to cause substantial injury or harm to Nukote.[81]

"Gross negligence" means an act or omission by Clover,[82]

1. which when viewed objectively from the standpoint of Clover at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which Clover has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that malice and gross negligence may be attributable to Clover because of an act by its employee(s) if, but only if:[83]

1. Clover authorized the doing and the manner of the act, or
2. The employee(s) was employed as a vice-principal or in a managerial capacity and was acting in the scope of employment, or
3. Clover or a vice-principal of Clover ratified or approved the act.

The term "vice-principal" means:

1. A corporate officer; or
2. A person who has authority to employ, direct, and discharge an employee of Clover; or
3. A person engaged in the performance of non-delegable or absolute duties of Clover; or
4. A person to whom the entity has confided the management of the whole or a department or division of the business of Clover.

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79 Texas Pattern Jury Charge (2014) § 115.37.
80 *Id.*
81 *Id.*
82 *Id.*
83 Texas Pattern Jury Charge (2014) § 115.39.

If you answered "Yes" to Question 1(c), then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 1(d)[84]

What sum of money, if any, if paid now in cash, should be assessed against Clover and awarded to Nukote as exemplary damages, if any, for the conduct found in response to Question 1?

Answer in dollars and cents, if any.

Answer: _____

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of Clover.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of Clover.

84 Texas Pattern Jury Charge (2014) § 115.38.

Nukote's Unfair Competition by Misappropriation Claim

QUESTION NO. 2

Did Clover misappropriate any of Nukote's trade secrets?

Answer "Yes" or "No": _____

"Trade secret" means any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it.[85] To be a "trade secret," there must be a substantial element of, though not absolute, secrecy and a party must take reasonable measures to protect the secrecy of its trade secrets.[86] Matters of public knowledge, readily available, or of general knowledge in an industry at the time of the alleged misappropriation arc not "trade secrets."[87] A "trade secret" need not be novel or unique and it may consist of a combination of simple and otherwise known components.[88] The fact that a trade secret can be discovered by experimentation and other lawful means does not deprive its owner of protection from those acquiring it by improper means.[89] The personal efficiency, inventiveness, skills and experience that an employee develops through work belong to the employee, not the former employer; however, trade secrets developed by the employee in the course and scope of his employment, and trade secrets disclosed to the employee by the employer, are the property of the employer, not the employee.[90]

Misappropriation occurs if:

1. Clover acquired Nukote's trade secret through the breach of a confidential relationship or other improper means; and
2. Clover used Nukote's trade secret without authorization.[91]

A person or entity is liable for misappropriation if they advise and assist another in acquiring trade secret information through the breach of a confidential relationship or

85 *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (a trade secret is "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it.").

86 *Halliburton Energy Services, Inc. v. Axis Technologies, LLC*, 444 S.W.3d 251, 255-56 (Tex. App.—Dallas 2014, no pet.); *Bancservices Group, Inc. v. Strunk & Associates, L.P.*, No. 14–03–00797–CV, 2005 WL 2674985, *2 (Tex. App.—Houston [14 Dist.] October 20, 2005).

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *See Nova Consulting Group, Inc. v. Engineering Consulting Services, Ltd.*, 290 Fed. Appx. 727, 734 (5th Cir. 2008) ("'Under Texas law, there are three elements needed to establish the injury of trade secret misappropriation: (1) a trade secret exists; (2) [ECS] acquired the trade secret by breach of a confidential relationship or other improper means; and (3) [ECS] used the trade secret without authorization.'"); *General Universal Systems, Inc. v. HAL, Inc.*, 500 F.3d 444, 459 (5th Cir. 2007 (same); *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 262 (5th Cir. 2007) (same).

other improper means.[92] The person or entity need not take an active role in wrongly acquiring the trade secret information or in the subsequent use or disposition of the information to be liable.[93]

A "confidential relationship" is a relationship where one party reposes confidence and special trust in another and is justified in placing such trust and confidence in the other party.[94] The relationship is based upon fair dealing and good faith, rather than legal obligation.[95] The question is whether the recipient of the information knew or should have known that the information was a trade secret and that disclosure was made in confidence.[96]

"Improper means" are means that fall below the generally accepted standards of commercial morality and reasonable conduct.[97] The mere fact that trade secret information might be acquired through lawful means such as inspection, experimentation, and analysis does not preclude protection from those who would secure the knowledge by unfair means.[98]

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92 *Hooser v. G.M. Carlton Bros. & Co.*, 288 S.W. 1095, 1097 (Tex. Civ. App.—Waco 1926, no writ) ("It has accordingly been held that a person is guilty of conversion, though he did not personally engage with the person who actually took possession of the property and used, consumed, and disposed of it, if he cooperated with him in those acts by aiding and abetting him in doing them, and by his subsequent recognition, approval, and adoption of them. So also is a person who, though having no active personal agency in the taking of the property or in the subsequent use or disposition of it, yet advised and assisted another in the measures adopted for the taking of it, received benefit from the taking, and subsequently approved and adopted it.").

93 *Id.*

94 *Thigpen v. Locke*, 363 S.W.2d 247 (Tex. 1963) (confidential relationship exists if beneficiary is justified in placing trust and confidence in fiduciary to act in beneficiary's best interest); *see also Halliburton*, 444 S.W.3d at 255-56.

95 *Crutcher-Rolfs-Cummings, Inc. v. Ballard*, 540 S.W.2d 380, 386-87 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); *see also Halliburton*, 444 S.W.3d at 255-56.

96 *Phillips v. Frey*, 20 F.3d 623, 631-32 (5th Cir. 1994); *see also Halliburton*, 444 S.W.3d at 255-56.

97 *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1015–16 (5th Cir. 1970); *see also Lamont v. Vaquillas Energy Lopeno Ltd., LLP*, No. 04–12–00219–CV, 2013 WL 5228500 (Tex. App.—San Antonio Sept. 18, 2013, no pet. h.).

98 *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, 314 S.W.2d 782, 788 (Tex. 1958).

If you answered "Yes" to Question 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 2(a)

Was Clover's misappropriation of Nukote's trade secrets unfair competition?

Answer "Yes" or "No": _____

To establish that Clover engaged in unfair competition with Nukote, you must find that:

1. Nukote created the trade secrets that Clover misappropriated through extensive time, labor, skill, and money; and[99]
2. Clover used Nukote's trade secrets in competition with Nukote, thereby gaining special advantage in that competition because Clover was burdened with little or none of the expense incurred by Nukote in creating the trade secrets.[100]

99 *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 839 (5th Cir. 2004).

100 *Id.*

If you answered "Yes" to Question 2(a), then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 2(b)

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Nukote for its damages, if any, that resulted from the conduct found by you in Question No. 2(a)?[101]

Consider the following elements of damages, if any, and none other:

> The diminution in value of Nukote or lost business opportunities that were the natural, probable, and foreseeable consequence of the conduct found by you in Question No. 2(a).[102]
>
> Answer in dollars and cents, if any.
>
> Answer: _____

Do not add any amount for interest on damages, if any.[103]

Do not increase or reduce the amount of damages because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.[104]

Do not include in your answer any amount that you find Nukote could have avoided by the exercise of reasonable care. To establish that Nukote failed to mitigate its damages, Clover had the burden of proving by a preponderance of the evidence that Nukote failed to exercise reasonable care and the amount by which Nukote's damages were increased by Nukote's alleged failure to exercise reasonable care.[105]

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101 Texas Pattern Jury Charge (2014) § 115.3.

102 *Id.* at § 115.5; Restatement (Third) of Unfair Competition § 45 ("A frequent element of loss resulting from the appropriation of a trade secret is the lost profit that the plaintiff would have earned in the absence of the use by the defendant. The plaintiff may prove lost profits by identifying specific customers diverted to the defendant. The plaintiff may also prove lost profits through proof of a general decline in sales or a disruption of business growth following the commencement of use by the defendant . . ."); *see also Bishop v. Miller*, 412 S.W.3d 758, 773 n. 22 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (relying on the Restatement (Third) of Unfair Competition § 45).

103 *Id.* at § 115.3.

104 *Id.* (Parallel theories).

105 *Id.* at § 115.8.

If you entered and amount of damages in response to Question 2(b), then answer Question 2(c). Otherwise, do not answer Question 2(c).

QUESTION NO. 2(c)

Was Clover part of a conspiracy to accomplish the unlawful conduct found by you in response to Question 2(a) that damaged Nukote?[106]

> To be part of a conspiracy, Clover and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to Nukote. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Answer "Yes" or "No": _____

106 Texas Pattern Jury Charge (2014) § 109.1.

If you entered and amount of damages in response to Question 2(b), then answer Question 2(d). Otherwise, do not answer Question 2(d).

QUESTION NO. 2(d)

Do you find by clear and convincing evidence that the harm to Nukote caused by the conduct you found in response to Question 2(a) resulted from malice or gross negligence by Clover?[107]

Answer "Yes" or "No": _____

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.[108]

"Malice" means a specific intent by Clover to cause substantial injury or harm to Nukote.[109]

"Gross negligence" means an act or omission by Clover,[110]

1. which when viewed objectively from the standpoint of Clover at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which Clover has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that malice and gross negligence may be attributable to Clover because of an act by its employee(s) if, but only if:[111]

1. Clover authorized the doing and the manner of the act, or
2. The employee(s) was employed as a vice-principal or in a managerial capacity and was acting in the scope of employment, or
3. Clover or a vice-principal of Clover ratified or approved the act.

The term "vice-principal" means:

1. A corporate officer; or
2. A person who has authority to employ, direct, and discharge an employee of Clover; or
3. A person engaged in the performance of non-delegable or absolute duties of Clover; or
4. A person to whom the entity has confided the management of the whole or a department or division of the business of Clover.

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107 Texas Pattern Jury Charge (2014) § 115.37.
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.* at § 115.39.

If you answered "Yes" to Question 2(d), then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 2(e)

What sum of money, if any, if paid now in cash, should be assessed against Clover and awarded to Nukote as exemplary damages, if any, for the conduct found in response to Question 2(a)?

Answer in dollars and cents, if any.

Answer: _____

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of Clover.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of Clover.

Nukote's Aiding and Abetting Breach of Fiduciary Duty Claim

QUESTION NO. 3

Did Steve Noyes, Dino Gaspardo, or Mike Ducey breach their fiduciary duty to Nukote?[112]

Answer "Yes" or "No"

To prove that a former Nukote employees breached his fiduciary duty to Nukote, Nukote must show that the employee used confidential or proprietary information acquired during his employment relationship with Nukote in a manner adverse to Nukote.[113]

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112 Texas Pattern Jury Charge (2014) § 104.3 (explaining that the "instruction may require modification based on the specific facts involved" because "not every fiduciary relationship creates a general fiduciary duty.").

113 "The agency relationship between employer and employee creates certain fiduciary duties." *Heat Shrink Innovations, LLC v. Medical Extrusion Technologies-Texas, Inc.*, No. 02–12–00512–CV, 2014 WL 5307191, at *11 (Tex. App.—Fort Worth, Oct. 16, 2014); *see also Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201 (Tex. 2002); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600 (Tex. App.—Amarillo 1995, no writ) ("Upon the formation of an employment relationship certain duties arise apart from any written contract."). Those duties include the employee's obligation not to use confidential or proprietary information acquired during the relationship in a manner adverse to the employer, even after the employment relationship ends. *See Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC*, 404 S.W.3d 737, 753 (Tex. App.—El Paso 2013, no pet.) ("[A] breach of fiduciary duty can be based on an employee's use of an employer's confidential or proprietary information in a manner adverse to the employer."); *RenewData Corp. v. Strickler*, No. 03–05–00273–CV, 2006 WL 504998, at *12 (Tex. App.—Austin Mar. 3, 2006, no pet.) (mem.op.) (discussing employee's "post-termination fiduciary duty" not to use employer's confidential information); *Miller Paper*, 901 S.W.2d at 600 (noting that employee's duty not to use confidential information against employer "survives termination of employment"). This duty is imposed upon employees even when there is no contractual obligation. *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 858 (Tex. App.—Fort Worth 2003, no pet.) ("Even in the absence of an enforceable nondisclosure agreement, a former employee may not use confidential information or trade secrets the employee learned in the course of his employment for his own advantage and to the detriment of his employer."); *Rugen v. Interactive Bus. Sys., Inc.*, 864 S.W.2d 548, 551 (Tex. App.—Dallas 1993, no writ) (same).

Answer Question 3(a) only if you answered "Yes" to Question 3. Otherwise, do not answer the following question.

QUESTION NO. 3(a)[114]

Did Clover knowingly participate in Steve Noyes's, Dino Gaspardo's, or Mike Ducey's breach of their fiduciary duty to Nukote?[115]

Answer "Yes" or "No"

To prove that Clover knowingly participated in the employees' breach of their fiduciary duty, Nukote must show that:

1. Clover knew of the fiduciary relationship between the employee and Nukote; and
2. Clover was aware that it was participating in the breach of the employees' fiduciary duty to Nukote.[116]

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114 Texas Pattern Jury Charge (2014) § 104.3 (explaining that "an additional question or instruction may be required when the plaintiff alleges that a defendant is liable because it knowingly participated in another's breach of fiduciary duty.").

115 *See Kinzbach Tool Co. v. Corbett–Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) ("where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.").

116 *See Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 721–22 (Tex. App.—Austin 2001) (citing *Kinzbach Tool*, 160 S.W.2d at 514); *see also In re ReoStar Energy Corp.*, No. 12–CV–046–A, 2012 WL 3184726, at *5 (N.D. Tex. Aug. 3, 2012) ("In addition to the existence of a fiduciary duty, the plaintiff must show the defendant knew of the fiduciary relationship and was aware of his participation in the third party's breach of its duty.").

If you answered "Yes" to Question 3(a), then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 3(b)

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Nukote for its damages, if any, that were proximately caused by the conduct found by you in Question 3(a)?[117]

"Proximate cause" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.[118]

Consider the following elements of damages, if any, and none other:

> The diminution in value of Nukote or lost business opportunities that were the natural, probable, and foreseeable consequence of the conduct found by you in Question No. 3(a).[119]

Answer in dollars and cents, if any.

Answer: _____

Do not add any amount for interest on damages, if any.[120]

Do not increase or reduce the amount of damages because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.[121]

Do not include in your answer any amount that you find Nukote could have avoided by the exercise of reasonable care. To establish that Nukote failed to mitigate its damages, Clover had the burden of proving by a preponderance of the evidence that Nukote failed to exercise reasonable care and the amount by which Nukote's damages were increased by Nukote's alleged failure to exercise reasonable care.[122]

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117 Texas Pattern Jury Charge (2014) § 115.18
118 *Id.* at § 100.12
119 *Id.* at § 115.5.
120 *Id.* at § 115.22 (Prejudgment interest).
121 *Id.* at § 115.22 (Parallel theories).
122 *Id.* at § 115.8.

If you entered an amount of damages in response to Question 3(b), then answer Question 3(c). Otherwise, do not answer Question 3(c).

QUESTION NO. 3(c)

Was Clover part of a conspiracy to accomplish the unlawful conduct found by you in response to Question 3(a) that damaged Nukote?[123]

> To be part of a conspiracy, Clover and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to Nukote. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Answer "Yes" or "No": _____

123 Texas Pattern Jury Charge (2014) § 109.1.

If you entered an amount of damages in response to Question 3(b), then answer Question 3(d). Otherwise, do not answer Question 3(d).

QUESTION NO. 3(d)

Do you find by clear and convincing evidence that the harm to Nukote caused by the conduct you found in response to Question 3(a) resulted from malice or gross negligence by Clover?[124]

Answer "Yes" or "No": _____

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.[125]

"Malice" means a specific intent by Clover to cause substantial injury or harm to Nukote.[126]

"Gross negligence" means an act or omission by Clover,[127]

1. which when viewed objectively from the standpoint of Clover at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which Clover has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that malice and gross negligence may be attributable to Clover because of an act by its employee(s) if, but only if:[128]

1. Clover authorized the doing and the manner of the act, or
2. The employee(s) was employed as a vice-principal or in a managerial capacity and was acting in the scope of employment, or
3. Clover or a vice-principal of Clover ratified or approved the act.

The term "vice-principal" means:

1. A corporate officer; or
2. A person who has authority to employ, direct, and discharge an employee of Clover; or
3. A person engaged in the performance of non-delegable or absolute duties of Clover; or
4. A person to whom the entity has confided the management of the whole or a department or division of the business of Clover.

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124 Texas Pattern Jury Charge (2014) § 115.37.
125 *Id.*
126 *Id.*
127 *Id.*
128 Texas Pattern Jury Charge (2014) § 115.39.

If you answered "Yes" to Question 3(d), then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 3(e)[129]

What sum of money, if any, if paid now in cash, should be assessed against Clover and awarded to Nukote as exemplary damages, if any, for the conduct found in response to Question 3(a)?

Answer in dollars and cents, if any.

Answer: _____

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

7. The nature of the wrong.
8. The character of the conduct involved.
9. The degree of culpability of Clover.
10. The situation and sensibilities of the parties concerned.
11. The extent to which such conduct offends a public sense of justice and propriety.
12. The net worth of Clover.

[129] Texas Pattern Jury Charge (2014) § 115.38.

Nukote's Monopoly Claims[130]

QUESTION NO. 4

Did Clover attempt to acquire or maintain monopoly power by anticompetitive conduct within a relevant market?

Answer "Yes" or "No": _____

130 Because the Texas statute was modeled after the federal Sherman Act and Clayton Act, courts are to interpret and apply the state law in the same manner as the federal precedent. *See* TEX. BUS. & COMM. CODE § 15.04; *Apani Sw., Inc. v. Coca-Cola Enterprises, Inc.*, 128 F. Supp. 2d 988, 995 (N.D. Tex. 2001) (explaining that Texas courts are statutorily instructed to follow federal precedent); *Caller-Times Pub. Co., Inc. v. Triad Commc'ns, Inc.*, 826 S.W.2d 576, 580 (Tex. 1992).

QUESTION NO. 5

Did Clover acquire or maintain monopoly power by anticompetitive conduct within a relevant market?[131]

Answer "Yes" or "No": _____

131 *Retractable Tech.*, No 2:08-CV-16-LED-RSP, Dkt No. 577.

If you answered "yes" to Questions 4 or 5 then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 6

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Nukote for its damages, if any, that were proximately caused by the conduct found by you in Question 4 or 5?

"Proximate cause" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.[132]

Consider the following elements of damages, if any, and none other:

> The diminution in value of Nukote or lost business opportunities that were the natural, probable, and foreseeable consequence of the conduct found by you in Question No. 4 or 5.[133]

Answer in dollars and cents, if any.

Answer: _____

Do not add any amount for interest on damages, if any.[134]

Do not increase or reduce the amount of damages because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.[135]

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132 Texas Pattern Jury Charge (2014) § 100.12

133 *Id.* at § 115.5.

134 *Id.* at § 115.22 (Prejudgment interest).

135 *Id.* at § 115.22 (Parallel theories).

If you entered an amount of damages in response to question 6, then answer Question 7. Otherwise, do not answer Question 7.

QUESTION NO. 7

Was Clover part of a conspiracy to accomplish the unlawful conduct found by you in response to Question 4 or 5?[136]

To be part of a conspiracy, Clover and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to Nukote. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Answer "Yes" or "No": _____

136 Texas Pattern Jury Charge (2014) § 109.1.

If you entered an amount of damages in response to question 6, then answer Question 8. Otherwise, do not answer Question 8.

QUESTION NO. 8

Do you find that Clover's unlawful conduct found by you in response to Questions 4 or 5 was willful or flagrant?[137]

Answer "Yes" or "No": _____

Clover's actions were "willful or flagrant" if they were taken in reckless or callous disregard of, or with indifference to, the rights of Nukote. An actor is indifferent to the rights of another, regardless of the actor's state of mind, when it proceeds in disregard of a high and excessive degree of danger that is known to it or was apparent to a reasonable person in its position.[138]

137 TEX. BUS. & COMM. CODE ANN. § 15.21(a)(1) (Vernon 1987); *see also* Caller-Times Pub. Co., Inc. v. Triad Communications, Inc., 826 S.W.2d 576, 587-88 (Tex. 1992) ("Section 15.21(b) of the Texas Antitrust Act provides that the trier of fact must award treble damages if the unlawful conduct was willful or flagrant."); *Reynolds Metals Co. v. Mumphord*, 47 S.W.3d 141 (Tex. App.—Corpus Christi 2001) ("Upon a finding by the trier of fact that the unlawful conduct was willful or flagrant, as appellees have alleged, the plaintiffs may also recover statutory damages of treble the actual damages, costs and attorney's fees.")

138 Fifth Circuit Pattern Jury Charge (2014) § 4.9.