IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NUKOTE OF ILLINOIS, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	
CLOVER HOLDINGS, INC. and	§	3:10-CV-00580-P
CLOVER TECHNOLOGIES GROUP, LLC,	§	
	§	
Defendants.	§	

DEFENDANTS' SECOND TENTATIVE PROPOSED JURY CHARGE

Defendants Clover Holdings, Inc. ("Clover Holdings") and Clover Technologies Group, LLC ("Clover") submit this second set of tentative proposed jury instructions and jury questions to comprise part of the Charge of the Court in this matter. In submitting these potential jury instructions and issues, Defendants do not concede that any issue on which Plaintiff has the burden of proof should be submitted to the jury. Defendants reserve all rights to alter, amend, add, or delete as appropriate and allowed by the pleadings, testimony, evidence and law. (A redline version of this document was delivered to Plaintiff several days ago for purposes of its jury charge objections.)

Dated: May 20, 2015

Respectfully submitted,

/s/ David S. Coale

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Attorneys for Defendants Clover Holdings, Inc. and Clover Technologies Group, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this document was served on all counsel of record by the Court's ECF system on May 20, 2015.

/s/ David S. Coale
David S. Coale

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INSTRUCTION 1
Charge of the Court

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.

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.

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.

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 be- tween 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.

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 a defendant in arriving at your verdict.[1]

In this charge, I will use the following names for the parties:

"Nukote" refers to Plaintiff Nukote of Illinois, Inc.

"Clover" refers to Defendant Clover Technologies Group, Inc.

Plaintiff Nukote has asserted claims against Clover for monopolization, attempted monopolization, unfair competition by misappropriation, tortious interference with contracts, and conspiracy. Clover has denied each of those claims and argued that Nukote's alleged damage resulted from other factors.

Plaintiff 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

[1] COMMITTEE ON PATTERN JURY INSTRUCTIONS DISTRICT JUDGES ASSOCIATION FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 3.1 (2014).

not so. If you find that Plaintiff Nukote has failed to prove any element of a claim by a preponderance of the evidence, then it may not recover on that claim.[2]

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.

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 fit the facts from a preponderance of all the evidence, both direct and circumstantial.[3]

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.

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.

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.[4]

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.[5]

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[2] *Id.* § 3.2

[3] *Id.* § 3.3

[4] *Id.* § 3.4

[5] *Id.* § 3.5

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 re- examine 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.

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.

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.

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.

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 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.

You may now proceed to the jury room to begin your deliberations.[6]

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[6] *Id.* § 3.7

QUESTION 1
Assignment[7]

Did Nukote Inc. agree to assign all rights to each of the following claims to Nukote?[8]

An assignment is the transfer of a right or interest from one to another.[9]

In deciding whether parties reached such an agreement, you may consider what they said and did in light of the surrounding circumstances.[10]

Answer "Yes" or "No" as to each claim.

Monopolization and Attempted Monopolization: _____

Misappropriation of Trade Secrets: _____

Misappropriation of Products: _____

Tortious Interference With Contract: _____

Conspiracy: _____

If you answered "No" to all parts of Question 1, then your deliberations are over and you may so inform the court security officer. Otherwise, proceed to Question 4.

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7 Defendants acknowledge the Assignment dated February 25, 2010, and that it may be conclusive proof as to some or all of the matters in this Question. At the same time, however, Defendants believe that some of these claims may not be assignable under applicable law. Because this is a threshold issue of proof, Defendants submit this Question to frame these issues – all of which the Court may well resolve as a matter of law without submitting this Question for the jury's consideration.

8 *See* TEXAS PATTERN JURY CHARGES – BUSINESS, CONSUMER, INSURANCE EMPLOYMENT ["PJC"] ¶ 101.1(2014). *See generally Delaney v. Davis*, 81 S.W.3d 445, 448-49 (Tex. App.—Houston [14th Dist.] 2002, no pet.) ("To recover on an assigned cause of action, the party claiming the assigned rights must prove that the cause of action was in fact assigned to her.").

9 *See, e.g.*, *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 113 (Tex. App.—Houston [14th Dist.] 1996, no writ).

10 *See* PJC ¶ 101.3

QUESTION 2
Monopolization

Nukote alleges that it was injured by Clover's unlawful monopolization of the market for remanufactured printer cartridges sold to large office suppliers in Texas. To prevail on this claim, Nukote must prove each of the following elements by a preponderance of the evidence:

> ***First***, that Clover possessed monopoly power in the relevant market;
>
> ***Second***, that Clover willfully acquired or maintained monopoly power in that market by engaging in anticompetitive conduct; and
>
> ***Third***, that Nukote was injured in its business or property because of Clover's anticompetitive conduct.

If you find that Nukote has failed to prove any one or more of these elements, then you must find for Clover on this claim. If you find that Nukote has proved each of these elements by a preponderance of the evidence, then you must find for Nukote and against Clover on this claim.[11]

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 the output of remanufactured printer cartridges sold to large office suppliers in Texas. The most likely and most import restraining force will be actual and potential competition from other firms and their products. This includes all firms and products that act as restraints on Clover's power to set prices as it pleases. All the firms and products that exert this restraining force are within what is called the relevant market.

There are two aspects you must consider in determining whether Nukote has met its burden to prove the relevant market by a preponderance of the evidence. The first is the relevant product market; the second is the relevant geographic market.[12]

Relevant Product Market. The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view; that

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[11] The basic structure of this Question and most of its content comes from AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES [hereinafter "ABA ANTITRUST INSTRUCTIONS"] C-2 (2005 ed.); *see also Caller-Times Pub. Co., Inc. v. Triad Comm'ns, Inc.*, 826 S.W.2d 576, 580 (Tex. 1992). For a recent example of a Texas federal court applying these ABA model instructions, see *Retractable Technologies, Inc. v. Becton, Dickinson & Co.*, No. 2:08-cv-00016-Led-RSP, United States District Court for the Eastern District of Texas (Pacer Entry 567, Sept. 19, 2013) [hereinafter "*Retractable* Charge"].

[12] ABA ANTITRUST INSTRUCTIONS at C-6.

is, the products compete with 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. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. Thus, for example, if consumers seeking to cover leftover food for storage considered certain types of flexible wrapping material – such as aluminum foil, cellophane, or even plastic containers – to be reasonable alternatives, then all those products would be in the same relevant product market.

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. If you find that such switching would occur, then you may conclude that the products are in the same product market.

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.

In this case, Nukote contends that the relevant product market is remanufactured printer cartridges sold to large office suppliers in Texas.[13] By contrast, Clover asserts that Nukote has failed to allege the proper relevant product market. Clover contends that the relevant product market is all printer cartridges, whether remanufactured of "OEM," and whether sold to large office suppliers or not. If you find that Nukote has proven a relevant product market, then you should continue to evaluate the remainder of Nukote's claim. However, if you find that Nukote has failed to prove such a market, then you must find in Clover's favor on this claim.[14]

In deciding whether Nukote has proven a relevant product market, you may also consider what the law refers to as "the cross-elasticity of supply" or, in other words, "the extent to which the producers of one product would be willing to shift their resources – such as manufacturing facilities or personnel – to producing another product in response to an increase in the price of the other product." Such producers, to the extent that they exist, can increase supply and, therefore, drive prices back to competitive levels – defeating any effort by a would-be monopolist to charge significantly higher prices.

Take two shoe manufacturers, for example. The first manufacturer produces shoes for women, while the second manufacturer produces shoes for men. Generally speaking, men's and women's shoes are not reasonably interchangeable and, therefore, might be thought of as being

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[13] *See e.g.* First Amended Complaint at 20 ¶ (May 27, 2011) (Dkt. 55.)

[14] *See* ABA ANTITRUST INSTRUCTIONS at C-7 to C-9.

in separate product markets. However, it is possible that the men's shoe manufacturer could quickly shift its resources to start producing women's shoes if the women's shoe manufacturer raised its prices significantly and vice versa. Although women would not buy men's shoes, nor would men buy women's shoes, the ability of each manufacturer to alter its production could prevent the other manufacturer from raising prices significantly. Thus, in this example, men's and women's shoes would be included in the same market.

If, in determining the parameters of the relevant product market, you find that there are manufacturers that have the ability to alter their production to manufacture product that can reasonably be substituted with Clover's – you may consider whether the existence of these potential alternative suppliers can influence the prices that Clover charges for its product and, if so, the amount of the product that these suppliers are likely to produce. However, if you find that no cross-elasticity of supply exists, you may define the market solely on your evaluation of whether the allegedly competing products are reasonable substitutes for each other from the consumer's perspective.[15]

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. When analyzing the relevant geographic market, you should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town or even smaller.

Nukote has the burden of proving the relevant geographic market by a preponderance of the evidence. In this case, Nukote claims that the relevant geographic market is Texas. By contrast, Clover asserts that the relevant geographic market is national, if not global. In determining whether Nukote has met its burden and demonstrated that its proposed geographic market is proper, you may consider several factors, including:

- the geographic area in which Clover sells and where Clover's customers are located;
- the geographic area to which customers turn for supply of the product;
- the geographic area to which customers have turned or have seriously considered turning;
- the geographic areas that suppliers view as potential sources of competition;
- whether governmental licensing requirements, taxes, or quotas have the effect of limiting competition in certain areas.[16]

If, after considering all of the evidence, you find that Nukote has proven by a preponderance of the evidence both a relevant product market and a relevant geographic market, then you must find that Nukote has met the relevant market requirement and you must consider

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[15] *Id.* at C-11, C-12.

[16] *Id.* at C-13, C-14.

the remaining elements of this claim. If, however, you find that Nukote has failed to prove by a preponderance of the evidence either a relevant product market or a relevant geographic market, then you must find for Clover and against Nukote on this claim.[17]

Monopoly Power

If you find that Nukote has proven a relevant market, then 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 antitrust market. More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level for a significant period of time. However, monopoly power, in and of itself, is not unlawful.[18]

Pricing. 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.

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.[19]

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.

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.[20]

Monopoly power may also be proven indirectly, by evidence of the structure of the market, market share, and barriers to entry into the market. If this evidence establishes that

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[17] *Id.* at C-15.

[18] *Id.* at C-4.

[19] *Id.* at C-23.

[20] *Id.* at C-24, 25.

Clover has the power to control prices or exclude competition in the relevant market, then you may conclude that Clover has monopoly power in the market.

Market Share. 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 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.

A market share below 50 percent is ordinarily not sufficient to support a conclusion that a defendant has monopoly power, but this is not an absolute threshold. 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.[21]

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.

Entry Barriers. You may also consider whether there are barriers to entry into the relevant market. Barriers to entry are long-run costs that were not incurred by the existing companies in a relevant market but must be incurred by new competitors to enter the market, or other factors in a market that deter entry of new competitors while permitting existing companies to earn monopoly profits. Barriers to entry make it difficult for new competitors to enter the relevant market in a meaningful and timely way.

Evidence of low or no entry barriers may be evidence that Clover does not have monopoly power, regardless of Clover's market share, 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 along with high market share may support an inference that Clover has monopoly power.

The history of entry and exit in the relevant market may be helpful to consider. 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, particularly if prices and profit margins are relatively high, may support an inference that Clover has monopoly power.

You may consider whether Clover's competitors are capable of effectively competing. In other words, you should consider whether the financial strength, market shares and number of competitors act as a check on defendant's ability to price its products. If Clover's competitors are vigorous or have large or increasing market shares, this may be evidence that Clover lacks

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[21] *Id.* at C-17.

monopoly power. On the other hand, if you determine that Clover's competitors are weak or have small or declining market shares, this may support an inference that Clover has monopoly power.

If you find that Clover has monopoly power in the relevant market, then you must consider the remaining elements of this claim. If you find that Clover does not have monopoly power, then you must find for Clover and against Nukote on this claim.[22]

Anticompetitive Conduct

Anticompetitive acts are 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 of monopoly power through anticompetitive conduct from the acquisition or maintenance of monopoly power by supplying better products or services, possessing superior business skills, or because of luck, which is not unlawful.[23]

Mere possession of monopoly power, if lawfully acquired, does not violate the antitrust laws. A company with monopoly power may compete aggressively without violating the antitrust laws, and may charge monopoly prices without violating the antitrust laws. A monopolist's conduct only becomes unlawful where it involves anticompetitive acts.

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 the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.[24]

Harm

Competitive harm occurs when a reduction in competition results in the loss of some of the benefits of competition – for example, lower prices, increased output, or higher product quality. If the challenged conduct has not resulted in higher prices, decreased output, or lower quality, or the loss of some other competitive benefit, then there is no competitive harm. Your focus here should be on harm to competition as a whole, not just to an individual competitor—although, harm to an individual competitor can be relevant and may help to establish harm to competition.[25]

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22 *Id.* at C17, C-18, C-19.

23 *Id.* at C-26.

24 *See id.* at C26, C-27.

25 *Retractable* Charge at 17.

Answer "Yes" or "No." Continue answering the parts of this Question unless and until you answer "No" to a part, at which point stop and move to Question 4.

Do you find that Clover:

(a) the relevant product market is remanufactured printer cartridges sold to large office supply retailers;

Answer: _____

(b) the relevant geographic market is Texas;

Answer: _____

(c) Clover possessed monopoly power in the relevant antitrust market;

Answer: _____

(d) Clover willfully acquired or maintained monopoly power in that market by engaging in anticompetitive conduct;

Answer: _____

(e) Clover injured Nukote in its business or property because of that anticompetitive conduct.

Answer: _____[26]

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[26] *See generally Retractable* Verdict Form (Docket 577) at 2.

If you answered "Yes" to Question 2, then answer the following Question. Otherwise, proceed to Question 4.

QUESTION 3[27]
Monopolization – 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 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.

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 attorneys 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.

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.

Causation

If you find that Clover violated the antitrust laws and that Nukote was injured by that violation, plaintiff is entitled to recover for such injury that was the direct and proximate result of the unlawful acts of Clover. Nukote is not entitled to recover for injury that resulted from other causes.

Nukote claims that it suffered injury because it lost sales and profits as a result of Clover's antitrust violation. In the normal course of competitive business activity, competitors will lose sales to each other, and to third parties, for various causes that have nothing to do with antitrust law violations; and businesses can be unprofitable for causes that have nothing to do with the antitrust laws. Nukote may not recover for lost sales if it lost those sales because of the superior business acumen or salesmanship of a competitor, because a competitor offered a superior product, or because of lawful competition from Clover or other competitors. Nukote also may not recover if it lost profits as a result of causes that had nothing to do with Clover's alleged unlawful conduct, such as changes in demand, increased competition from new

[27] *See* ABA ANTITRUST INSTRUCTIONS at F-2 *et seq.*

competitors, changes in product technology, changes in market conditions, or poor management or missed opportunities by plaintiff.

Nukote bears the burden of showing that its injuries were caused by Clover's alleged antitrust violation – as opposed to any other factors, such as those just described. If you find that Nukote's alleged injuries were caused by factors other than Clover's alleged antitrust violation, then you must return a verdict for Clover. If you find that Nukote's alleged injuries were caused in part by Clover's alleged antitrust violation and in part by other factors, then you may award damages only for that portion of Nukote's alleged injuries that were caused by Clover's alleged antitrust violation.

Nukote bears the burden of proving damages with reasonable certainty, including apportioning damages between lawful and unlawful causes. If you find that there is no reasonable basis to apportion Nukote's alleged injury between lawful and unlawful causes, or that apportionment can only be accomplished through speculation or guesswork, then you may not award any damages at all. If you find that Nukote has proven with reasonable certainty the amount of damage caused by Clover's alleged antitrust violation, then you must return a verdict for Nukote.

Mitigation

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.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Nukote for its damages, if any, directly and proximately caused by Clover's monopolization?

Answer in dollars and cents:

Answer: _____

QUESTION 4
Attempted Monopolization

Nukote also alleges that it was injured by Clover's unlawful attempt to monopolize. To prevail on its claim of attempted monopolization, Nukote must prove each of the following elements by a preponderance of the evidence:[28]

First, that Clover engaged in anticompetitive conduct;

Second, that Clover had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that Clover would achieve its goal of monopoly power in the relevant market; and

Fourth, that Nukote was injured in its business or property by Clover's anticompetitive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for Clover and Nukote on Nukote's claim of attempted monopolization. If you find that the evidence is sufficient to prove all four elements as to Clover, then you must find for Nukote and against Clover on Nukote's claim of attempted monopolization.

You should rely on the instructions given to you previously about anticompetitive conduct, relevant markets, monopoly power, and antitrust injury.[29]

Specific Intent

The second element that Nukote must prove is that Clover had a specific intent to monopolize a relevant market. 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 that Clover acted with the conscious aim of acquiring the power to control prices and to exclude or destroy competition in the relevant market.

There are several ways in which Nukote may prove that Clover had the specific intent to monopolize. There may be evidence of direct statements of Clover's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of Clover at or about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of Clover. You

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[28] As with monopolization, the structure of this question comes from ABA ANTITRUST INSTRUCTIONS C-84 (analyzing and applying *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993)); *see also Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.2d 671, 690 (Tex. 2006).

[29] *See Retractable* Charge at 19.

must be careful, however, to distinguish between a party's intent to compete aggressively (which is lawful), which may be accompanied by aggressive language, and a true intent to acquire monopoly power by using anticompetitive means.

Even if you decide that the evidence does not prove directly that Clover actually intended to obtain a monopoly, specific intent may be inferred from what Clover did. For example, if the evidence shows that the natural and probably consequence of Clover's conduct in the relevant market was to give Clover control over prices and to exclude or destroy competition, and that this was plainly foreseeable by Clover, then you may (but are not required to) infer that Clover specifically intended to acquire monopoly power.[30]

Dangerous Probability of Success

If you find that Clover had the specific intent to achieve a monopoly and engaged in significant anticompetitive conduct, you also must determine if the evidence shows that next element of attempt to monopolize: namely, that there was a dangerous probability that Clover would succeed in achieving monopoly power if it continued to engage in the same or similar conduct.

In determining whether there was a dangerous probability that Clover would acquire the ability to control price in the market, you should consider such factors as ***first***, Clover's market share; ***second***, the trend in Clover's market share; ***third***, whether the barriers to entry into the market made it difficult for competitors to enter the market; and ***fourth***, the likely effect of any anticompetitive conduct on Clover's share of the market.

Again, the purpose of looking at these and other factors is to determine whether there was a dangerous probability that Clover would ultimately acquire monopoly power. 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.[31]

Answer "Yes" or "No." Continue answering the parts of this Question unless and until you answer "No" to a part, at which point stop and move to Question 6.

Do you find that:

(a) the relevant product market is remanufactured printer cartridges sold to large office supply retailers;

Answer: _____

(b) the relevant geographic market is Texas;

Answer: _____

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[30] ABA ANTITRUST INSTRUCTIONS C-90, 91.

[31] *Id.* at C-95, 96.

(c) Clover engaged in anticompetitive conduct;

Answer: _____

(d) Clover had a specific intent to achieve monopoly power in a relevant antitrust market;

Answer: _____

(e) there was a dangerous probability that Clover would achieve its goal of monopoly power in the relevant market;

Answer: _____

(f) Nukote was injured in its business or property by Clover's anticompetitive conduct.

Answer: _____

If you answered "Yes" to Question 4, then answer the following Question. Otherwise, do not answer it and proceed to Question 6.

QUESTION 5
Attempted Monopolization – Damages

If you find that Clover violated the antitrust laws by attempting to monopolize and that this violation caused injury to Nukote, then you must determine the amount of damages, if any, Nukote is entitled to recover.

You should rely on the instructions given to you previously about the purpose of compensatory damages, causation, and mitigation.[32]

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Nukote for its damages, if any, directly and proximately caused by Clover's attempted monopolization?

Answer in dollars and cents:

Answer: _____

[32] *See Retractable* Charge at 19.

QUESTION 6
Tortious Interference – Contract Existence

To prove its claim for tortious interference with contract, Nukote must first prove the existence of a valid contract subject to interference, at the time of the alleged interference.[33]

In deciding whether parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.[34]

For each alleged contract, answer "Yes" or "No," as of the time of the alleged interference with that contract.

A. In the Vendor Purchasing Profile, did Nukote and Office Depot agree that Office Depot was required to purchase its private brand of printer cartridges from Nukote?[35]

Answer: _____

B. In the Vendor Program and Requirements Document, did Nukote and S.P. Richards agree that S.P. Richards was required to purchase its private brand of printer cartridges from Nukote?

Answer: _____

C. In Nukote's Business Practices and Conflict of Interest Statement, did Nukote and Steve Noyes agree that he would not disclose Nukote's confidential business information in the future?

Answer: _____

D. In Nukote's Business Practices and Conflict of Interest Statement and Compliance Certification, did Nukote and Mike Ducey agree that he would not disclose Nukote's confidential business information in the future?

Answer: _____

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33 *See ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997) ("The focus in evaluating a tortious interference claim begins, and in this case remains, on whether the contract is subject to the alleged interference.")

34 *See* PJC ¶ 101.1

35 PJC ¶ 101.3

E. In Nukote's Business Practices and Conflict of Interest Statement and Compliance Certification, did Nukote and Dino Gaspardo agree that he would not disclose Nukote's confidential business information in the future?

Answer: _____

Do not answer any part of Question 7 for which you answered "No" as to that contract in Question 6. Answer all parts of Question 7 for which you answered "Yes" as to that contract in Question 6. If you did not answer "Yes" to any part of Question 6, proceed to Question 10.

QUESTION 7
Tortious Interference – Liability

Did Clover intentionally interfere with any of the following contracts?[36]

To prove its claim for tortious interference with contract, Nukote must prove an act of interference that was intentional. Interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.[37]

It is not interference to induce another party to do what it has a right do under a contract.[38]

Answer "Yes" or "No" for each Nukote contract.

A. Office Depot

Answer: _____

B. S.P. Richards

Answer: _____

C. Steve Noyes

Answer: _____

D. Mike Ducey

Answer: _____

E. Dino Gaspardo

Answer: _____

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36 PJC ¶ 106.1

37 *Id.; ACS Investors*, 943 S.W.2d at 430.

38 *ACS Investors*, 943 S.W.2d at 431.

Do not answer any part of Question 8 for which you answered "No" as to that contract in Question 7. Answer all parts of Question 8 for which you answered "Yes" as to that contract in Question 7. If you did not answer "Yes" to any part of Question 7, proceed to Question 10.

QUESTION 8
Tortious Interference – Defenses

A. Did Clover have a good-faith belief that its actions with respect to the contract were legally justified?[39]

Answer "Yes" or "No" for each Nukote contract where you said "Yes" in Question 2.

1. Office Depot

Answer: _____

2. S.P. Richards

Answer: _____

3. Steve Noyes

Answer: _____

4. Mike Ducey

Answer: _____

5. Dino Gaspardo

Answer: _____

B. Did Nukote repudiate its agreement with Office Depot?

A party repudiates an agreement when it indicates, by its words or actions, that it is not going to perform its obligations under the agreement in the future, showing a fixed intention to abandon, renounce, and refuse to perform under the agreement.[40]

Answer: _____

C. Is Nukote estopped from claiming interference by Clover with Nukote's contract with Office Depot?

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[39] PJC ¶ 106.3

[40] *Id.* ¶ 101.23

Interference by Clover is excused by the doctrine of equitable estoppel if the following circumstances occurred:[41]

1. Nukote –

   a. by words or conduct made a false representation or concealed material facts, and

   b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and

   c. with the intention that Clover would rely on the false representation or concealment in acting or deciding not to act; and

2. Clover –

   a. did not know and had no means of knowing the real facts and

   b. relied to its detriment on the false representation or concealment of material facts.

Answer "Yes" or "No."

Answer: _____

D. Is Nukote estopped from claiming interference by Clover with Nukote's contract with Mike Ducey?

Rely on the instructions given to you in the previous part of this Question.
Answer "Yes" or "No."

Answer: _____

E. Has Nukote waived its claim of interference by Clover with Nukote's contract with Mike Ducey?

Interference by Clover is excused if waived by Nukote. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.[42]

Answer "Yes" or "No."

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[41] PJC ¶ 101.25
[42] PJC ¶ 101.24

Answer: _____

F. Did Nukote agree to release its claim of interference by Clover with Nukote's contract with Mike Ducey? [43]

A release gives up a party's right or claim.[44]

Answer "Yes" or "No."

Answer: _____

[43] Because a release is a contract, see *Vera v. North Star Dodge Sales, Inc*., 989 S.W.2d 13, 17 (Tex. App.—San Antonio 1998, no pet.), this question uses the PJC contract formation question.

[44] *See* BLACK'S LAW DICTIONARY 1480 (10th ed. 2014).

Do not answer any part of Question 9 for which you answered "Yes" as to that contract in Question 8. Answer all parts of Question 9 for which you answered "No" as to that contract in Question 8. If you did not answer "No" to any part of Question 8, do not answer Question 9 and proceed to Question 10.

QUESTION 9
Tortious Interference – Damages

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 such interference?[45]

"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.[46]

Consider only the elements of damages listed. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find. Do not increase or reduce the amount in one answer because of your answer to any other question about damages.[47]

Do not include in your answer any amount that you find Nukote could have avoided by the exercise of reasonable care.[48]

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

Defendants submit that these damage elements are best detailed after all parties and the Court have had the benefit of the actual claims asserted at trial and the supporting evidence.

Answer in dollars and cents for each Nukote contract.

A. Office Depot

Answer: _____

B. S.P. Richards

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45 PJC ¶ 115.22

46 PJC ¶ 100.12

47 PJC ¶ 115.14

48 *See* PJC ¶ 115.8

Answer: _____

C. Steve Noyes

Answer: _____

D. Mike Ducey

Answer: _____

E. Dino Gaspardo

Answer: _____

QUESTION 10
Product Misappropriation – Existence

To prove its claim for product misappropriation, Nukote must first prove its creation of a protectable product.

A "product" is something that is distributed commercially for use or consumption, and is usually (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption.[49]

Did Nukote create a product through extensive time, labor, skill and money, as to any of the matters listed below?[50]

Answer "Yes" or "No" as to each category:

Category 1: _____

Category 2: _____

Category 3: _____

Category 4: _____

Defendants submit that these categories are best detailed after all parties and the Court have had the benefit of the actual claims asserted at trial and the supporting evidence.

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[49] BLACK'S LAW DICTIONARY 1402 (10th ed. 2014); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §19(a) (1998) ("Definition of 'Product' For purposes of this Restatement: (a) A product is tangible personal property distributed commercially for use or consumption. . . .")

[50] *See U.S. Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214, 218 (Tex. App.—Waco 1993, writ denied) (analyzing a cause of action for "unfair competition by misappropriation," in the context of a dispute among news organizations as to whether information in the form of a news story can be misappropriated).

Answer this Question only if you answered "Yes" to any part of Question 10. Otherwise, proceed to Question 14.

QUESTION 11
Product Misappropriation – Liability

Did Clover misappropriate a product created by Nukote?

To find misappropriation of a product, you must find that (1) Clover used that product in competition with Nukote, and (2) thereby gained a special advantage in that competition because Clover was burdened with little or none of the expense incurred by Nukote.[51]

Answer "Yes" or "No" as to each category.

Category 1: _____

Category 2: _____

Category 3: _____

Category 4: _____

[51] *U.S. Sporting*, 865 S.W.2d at 218.

If you did not answer "Yes" to any part of Question 10, do not answer this question and proceed to Question 14.

QUESTION 12
Product Misappropriation – Defenses[52]

Answer with respect to any product as to which you answered "Yes" in response to Question 15, and which Clover obtained and used as a result of its dealings with Mike Ducey

A. Is Nukote estopped from asserting a claim for misappropriation of product obtained by Clover from Mike Ducey?

Misappropriation by Clover is excused by the doctrine of equitable estoppel if the following circumstances occurred:

1. Nukote –

   a. by words or conduct made a false representation or concealed material facts, and

   b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and

   c. with the intention that Clover would rely on the false representation or concealment in acting or deciding not to act; and

2. Clover –

   a. did not know and had no means of knowing the real facts and

   b. relied to its detriment on the false representation or concealment of material facts.

Answer "Yes" or "No."

Answer: _____

B. Has Nukote waived its claim for misappropriation of product obtained by Clover from Mike Ducey?

Misappropriation by Clover is excused if waived by Nukote. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

Answer "Yes" or "No."

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[52] The authority for the language in this section is cited on *supra* page 23 for Question 8.

Answer: _____

C. Did Nukote agree to release its claim for misappropriation of product obtained by Clover from Mike Ducey?

A release gives up a party's right or claim.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to any part of Question 11, answer the following Question. Otherwise, proceed to Question 14.

QUESTION 13
Product Misappropriation – Damages[53]

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 such misappropriation?

"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.

Consider only the elements of damages listed. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find. Do not increase or reduce the amount in one answer because of your answer to any other question about damages.

Do not include in your answer any amount that you find Nukote could have avoided by the exercise of reasonable care.

If you answered "Yes" to any part of Question 16, do not include in your answer any amount of damage attributable to trade secrets obtained from Mike Ducey

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

Defendants submit that these elements are best detailed after all parties and the Court have had the benefit of the actual claims asserted at trial and the supporting evidence.

Answer in dollars and cents as to each category:

Category 1: _____

Category 2: _____

Category 3: _____

Category 4: _____

[53] The authority for the language in this section is cited on *supra* page 25 for Question 9.

QUESTION 14[54]
Trade Secret Misappropriation – Existence[55]

To prove its claim for misappropriation of trade secrets, Nukote must first prove its ownership of a protectable trade secret.

A trade secret is any formula, pattern, device, or compilation of information that is used in one's business and presents an opportunity to attain an advantage over competitors who do not know or use it. In determining whether a trade secret exists, consider the following factors: (1) the extent to which the information was known outside Nukote's business; (2) the extent to which it was known by employees and others involved in Nukote's business; (3) the extent of the measures taken by Nukote to guard the secrecy of the information; (4) the value of the information to Nukote and to its competitors; (5) the amount of effort or money expended by Nukote in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[56]

To qualify as a trade secret, the information must be substantially secret.[57] Matters of general knowledge in an industry are not trade secrets.[58] Information that is readily ascertainable by inspection or independent investigation, or that is publicly disclosed, is not a trade secret.[59] The general knowledge, skills, and experience acquired by an employee during his employment

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54 Defendants do not concede that Plaintiff has pleaded this claim, or that it can prove this claim. Nevertheless, in an abundance of caution and for the sake of completeness, Defendants submit this Question and Instructions without waiver of any right to challenge the submission of this claim to the jury, for procedural or substantive reasons.

55 On submission of a separate question on trade secret existence, see generally *Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 Fed. Appx. 259, 265 (5th Cir. 2014) and *Bishop v. Miller*, 412 S.W.3d 758, 768 (Tex. App.—Houston [14th Dist.] 2013, no pet.). *See also Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 95-96 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (reviewing and rejecting the viability of a claim for misappropriation of "confidential and proprietary" information that is not otherwise a trade secret); *West Fork Advisors, LLC v. Sunguard Consulting Servs., LLC*, 437 S.W.3d 917, 921-22 (Tex. App.—Dallas 2014, pet. filed) (rejecting the viability of a claim for aiding and abetting an alleged theft of trade secrets).

56 *In re: Bass*, 113 S.W.3d 735, 740 (Tex. 2003).

57 *See Luccous v. J.C. Kimley Co.*, 376 S.W.2d 336, 339 (Tex. 1964); *Wissman v. Boucher*, 240 S.W.2d 278, 280 (Tex. 1951).

58 *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1204 (5th Cir. 1986) (quoting *Wissman*, 240 S.W.2d at 280).

59 *Bass*, 113 S.W.3d at 740; *see also In re: Union Pacific R.R.*, 294 S.W.3d 590, 592 (Tex. 2009).

are not trade secrets.[60]

Did Nukote own a trade secret as to any of the matters listed below?

Answer "Yes" or "No" as to each category:

Category 1: _____

Category 2: _____

Category 3: _____

Category 4: _____

Defendants submit that these trade secret categories are best detailed after all parties and the Court have had the benefit of the actual claims asserted at trial and the supporting evidence. To date, Plaintiff has not identified trade secrets with adequate specificity in its live pleading or the Pre-Trial Order.

[60] *See, e.g.*, *Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co.*, 764 S.W.2d 274, 278 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Phillips v. Frey*, 20 F.3d 623, 628 (5th Cir. 1994).

Answer Question 15 only if you answered "Yes" to any part of Question 14. If you did not answer "Yes" to any part of Question 14, proceed to Question 18.

QUESTION 15
Trade Secret Misappropriation – Liability

Did Clover misappropriate a trade secret owned by Nukote?

To find misappropriation of a trade secret, you must find (1) that Clover used the trade secret, without a privilege to do so, and (2) learned the secret from a third person with notice of the facts that it was a secret and that the third person's disclosure of it was a breach of his duty.[61]

"Use" of a trade secret means commercial use, by which a person seeks to profit from the use of the secret.[62] Standing alone, mere receipt of information does not establish commercial use.[63]

Answer "Yes" or "No" as to each category for which you answered "Yes" in Question 10.

Category 1: _____

Category 2: _____

Category 3: _____

Category 4: _____

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61 *Metallurgical*, 790 F.2d at 1204 (applying Texas law and citing RESTATEMENT (FIRST) OF TORTS § 757 comment b (1939)).

62 *See id.; see also Atlantic Richfield Co. v. Misty Prods, Inc.*, 820 S.W.2d 414, 422 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

63 *Bishop*, 412 S.W.3d at 768.

If you did not answer "Yes" to any part of Question 15, do not answer the following Question and proceed to Question 18.

QUESTION 16
Trade Secret Misappropriation – Defenses[64]

Answer with respect to any trade secret as to which you answered "Yes" in response to Question 11, and which Clover obtained and used as a result of its dealings with Mike Ducey

A. Is Nukote estopped from asserting a claim for misappropriation of trade secrets obtained by Clover from Mike Ducey?

Misappropriation by Clover is excused by the doctrine of equitable estoppel if the following circumstances occurred:

1. Nukote –

   a. by words or conduct made a false representation or concealed material facts, and

   b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and

   c. with the intention that Clover would rely on the false representation or concealment in acting or deciding not to act; and

2. Clover –

   a. did not know and had no means of knowing the real facts and

   b. relied to its detriment on the false representation or concealment of material facts.

Answer "Yes" or "No."

Answer: _____

B. Has Nukote waived its claim for misappropriation of trade secrets obtained by Clover from Mike Ducey?

Misappropriation by Clover is excused if waived by Nukote. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

Answer "Yes" or "No."

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[64] The authority for the language in this section is cited on *supra* page 23 for Question 8.

Answer: _____

C. Did Nukote agree to release its claim for misappropriation of trade secrets obtained by Clover from Mike Ducey?

A release gives up a party's right or claim.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to any part of Question 15, answer the following Question. Otherwise, proceed to Question 18.

QUESTION 17
Trade Secret Misappropriation – Damages[65]

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 such misappropriation?

"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.

Consider only the elements of damages listed. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find. Do not increase or reduce the amount in one answer because of your answer to any other question about damages.

Do not include in your answer any amount that you find Nukote could have avoided by the exercise of reasonable care.

If you answered "Yes" to any part of Question 12, do not include in your answer any amount of damage attributable to trade secrets obtained from Mike Ducey

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

Defendants submit that these damage elements are best detailed after all parties and the Court have had the benefit of the actual claims asserted at trial and the supporting evidence.

Answer in dollars and cents as to each category. Answer only for categories as to which you answered "Yes" in Question 6:

Category 1: _____

Category 2: _____

Category 3: _____

Category 4: _____

[65] The authority for the language in this section is cited on *supra* page 25 for Question 9.

If you answered any part of Question 3, 5, 9, 13, or 17 with a positive number, answer the following Question. Otherwise, proceed to Question 19.

QUESTION 18
Civil Conspiracy

A civil conspiracy is a combination of two or more persons (or companies) to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.[66]

For Clover to have conspired with another person or company, Clover and that other person or company must:

(1) have known of, agreed to, and intended a common goal to damage Nukote in the way you have found in response to a previous question;

(2) Clover, the other person or company, or both, must have performed one or more overt act or acts to further that common goal; and

(3) the other person or company also must have agreed to engage in Clover's wrongdoing that caused injury to Nukote.[67]

Nukote must prove that Clover intended to do more than engage in the conduct that resulted in the injury. Nukote must prove that from the inception of the alleged conspiracy, Clover intended to cause the injury or was aware of the harm likely to result from the wrongful conduct.[68] Thus, Nukote must prove that Clover knew the object and purpose of the conspiracy and had a meeting of the minds with the other person or company to accomplish that object and purpose, intending to bring about the resulting injury.[69] An improper motive in performing a lawful action will not support liability for conspiracy.[70]

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66 *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996).

67 PJC § 109.1; *Triplex Communications, Inc. v. Riley*, 900 SW 2d 716 (Tex. 1995*); see also Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005*); Johl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996).. With respect to claims as to which the alleged primary actor has not been joined as a defendant, see *Sunguard Consulting*, 437 S.W.3d at 921-22.

68 *Triplex*, 900 S.W.2d at 720; *Great Nat'l Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964).

69 *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp*., 435 S.W.2d 854, 857 (Tex. 1968).

70 *Kingsberry v. Phillips Petroleum Co.*, 315 S.W.2d 561, 576 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.).

Did Clover conspire with another person or company?

Answer Yes" or "No" for each of the below, for each claim as to which you have awarded damages:

Claim:	Other Person or Company					
	Noyes	Ducey	Gaspardo	Office Depot	S.P. Richards	*Other Customers*[71]
9A						
9B						
9C						
9D						
9E						
13A						
13B						
13C						
13D						
17A						
17B						
17C						
17D						

[71] Nukote's pleadings allege a conspiracy between Clover and unspecified other customers, besides Office Depot. If Nukote pursues those allegations at trial, this question should include those additional parties.

If you answered any part of Question 3, 5, 9, 13, or 17 with a positive number, then answer the following question. Otherwise, do not answer the following Question.

QUESTION 19
Proportionate Responsibility[72]

Assign percentages of responsibility only to those you found caused or contributed to cause Nukote's damages. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found.

For each party you found caused or contributed to cause damages to Nukote, find the percentage of responsibility attributable to each:

1. Nukote: _____ %
2. Clover: _____ %
3. Steve Noyes: _____ %
4. Mike Ducey: _____ %
5. Dino Gaspardo: _____ %
6. Office Depot: _____ %
7. S.P. Richards _____ %
8. "Other Customers" _____ %

TOTAL 100%

Defendants submit that the issues of (1) what parties to submit in this Question, and (2) whether it should have subparts for each of Nukote's causes of action, are best resolved after all parties and the Court have had the benefit of the actual claims asserted at trial and the supporting evidence.[73]

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[72] PJC 115.36; *see* Tex. Civ. Prac. & Rem. Code § 33.002(a) (Texas proportionate responsibility statute applies to "any cause of action based on tort").

[73] *See generally Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 215, 225-28 (Tex. 2005) (finding reversible error when the jury, in apportioning responsibility, considered a claim with no evidence to support its submission).