IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

INNOVATIVE SOLUTIONS AND SUPPORT, INC.,

Plaintiff,

v. NO.: 05-2665-JPM/tmp

J2, INC., JOSEPH CAESAR, JAMES ZACHARY, ZACHARY TECHNOLOGIES, INC., and KOLLSMAN, INC.,

Defendants.

ZACHARY TECHNOLOGIES, INC.,

Counter-Claimants,

v.

INNOVATIVE SOLUTIONS AND SUPPORT, INC.,

Counter-Defendant.

JURY INSTRUCTIONS

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JURY INSTRUCTIONS

Ladies and gentleman of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence. You must not be influenced by sympathy, bias, prejudice, or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

I. GENERAL INSTRUCTIONS

Corporation Not To Be Prejudiced

The fact that a corporation is a party must not influence you in your deliberations or in your verdict. Corporations and persons are equal in the eyes of the law. Both are entitled to the same fair and impartial treatment and to justice by the same legal standards.

In this case, Innovative Solutions and Support, Inc., J2, Inc., Zachary Technologies, Inc. and Kollsman, Inc. are corporations. The fact that a corporation is a party must not prejudice or influence you in your deliberations or in your verdict.

You may not discriminate between corporations, and natural individuals, such as Joseph Caesar and James Zachary. Each are persons in the eyes of the law, and each are entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life.

Each corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

When a corporation is a party in a case, that does not mean that only one body can be considered by you in determining its claims or its liability in the case. A corporation acts not only through the policies and decisions that it makes, but also through its designated supervisory employees and others designated by the corporation to act on its behalf.

As you apply subsequent portions of these instructions you will have to determine whether or not individual corporate employees or others were authorized to act on behalf of the corporation when that individual did what he or she did.

Separate Consideration

Although there is more than one party on the defense side in this case, it does not follow from the fact alone that if one is liable all are liable. Each party is entitled to fair and separate consideration of the case and is not to be prejudiced by your decision concerning the other party or parties.

In our system of justice, it is your duty to separately consider the evidence as to each party and to return a separate verdict for each one. For each party, you must decide what the evidence establishes as to that particular party.

Your decision as to one party, whatever that decision is, should not influence your decision as to any of the other parties.

Each party is entitled to fair and separate consideration of his or its own case and is not to be prejudiced by your decision concerning any other party or parties.

Burden of Proof and
Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the legal theories in the case.

When, as in this case, a party denies the material allegations of a complaining party's claim, the law places upon the claiming party the burden of supporting and making out such claim upon every material issue in controversy by the applicable burden of proof.

The burden of proof will be by a preponderance of the evidence for all of the claims in this case unless I instruct you otherwise.

The preponderance of the evidence means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue must fail.

You must consider all the evidence pertaining to every issue, regardless of who presented it.

Credibility and Weighing the Evidence

You, members of the jury, are judges of the facts concerning the controversies involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you or whose deposition has been presented to you and to give the testimony of the witnesses the weight, faith, credit and value to which you think it is entitled.

You should consider the manner and demeanor of each witness while on the stand. You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do

something at any other time that is inconsistent with what the witness said while testifying.

These are the rules that should guide you, along with your common judgment, your common experience and your common observations gained by you in your various walks in life, in weighing the testimony of the witnesses who have appeared before you in this case.

If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

The preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular set of facts. Rather, it depends on the weight, credit and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then the jury must find against the party upon whom the burden of proof has been cast in accordance with these instructions.

Remember, you are the sole and exclusive judges of the credibility or believability of the witnesses who have testified in this case. Ultimately, you must decide which witnesses you believe and how important you think their testimony was. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

Stipulated Facts

Before the trial of this case, the parties agreed to the truth of certain facts in this action. As a result of this agreement, the plaintiff and the defendants entered into certain stipulations in which they agreed that the stipulated facts could be taken as true without the parties presenting further proof on the matter. This procedure is often followed to save time in establishing facts which are undisputed.

Facts stipulated to by the parties in this case include the following:

Uncontested Issues Of Facts

1. Plaintiff Innovative Solutions and Support, Inc. ("ISS") is a company headquartered in Exton, Pennsylvania which designs, manufactures and sells avionics (or aircraft-related) equipment.
2. ISS designs, manufactures and sells avionics equipment for commercial aircraft and for the United States military.
3. Defendant Joseph Caesar ("Caesar") worked for ISS from November 1999 through June 2004.

4. Defendant James Zachary ("Zachary") and ISS executed an Independent Sales Representative Agreement dated March 18, 1996.
5. Zachary is the sole shareholder of Defendant Zachary Technologies, Inc. ("ZTI").
6. ZTI is a Georgia corporation formed in 1998 by Zachary.
7. From October 2002, to August 2005, ZTI was an independent sales representative for ISS pursuant to an Independent Sales Representative Agreement dated October 25, 2002.
8. The parties agree that both the contract involving Zachary and ISS dated March 18, 1996, and the contract involving ZTI and ISS dated October 25, 2002, were executed and entered into.
9. ZTI provided consulting services for J2.
10. Defendant J2, Inc. ("J2") is a Tennessee corporation which assists in the development, sales and marketing of avionics equipment.
11. J2 was incorporated on November 5, 2003.
12. Caesar and Zachary each own 50% of the stock of J2.
13. Defendant Kollsman, Inc. ("Kollsman") is a Delaware corporation headquartered in New Hampshire.
14. Kollsman designs, manufactures and sells avionics equipment for commercial aircraft and for the United States military.

15. The Federal Aviation Administration ("FAA") issued Reduced Vertical Separation Minimum ("RVSM") standards to increase the number of aircraft that may safely fly in the most popular and most fuel-efficient flying altitude range of 29,000 to 41,000 feet. Those standards went into effect in January, 2005.

16. If they are RVSM-compliant, aircraft may fly as close as 1,000 vertical feet from another aircraft, as opposed to the previous minimum separation of 2,000 vertical feet, within the 29,000 to 41,000-foot flying altitude range.

17. A Supplemental Type Certificate ("STC") is a document issued by the FAA approving the installation of a product or set of products into an existing aircraft.

18. The FAA requires STC authorization for performing any major modification, such as installing a new ADC, on an aircraft.

19. The FAA maintains a database repository of approved STCs.

20. An STC may be "One-Only" - meaning that it applies only to one aircraft-engine- propeller serial number, or an STC may be "Multiple" - meaning that it applies to two or more aircraft if it can be demonstrated that the modification can be duplicated.

21. Computer Instruments Corporation ("CIC") was a Delaware corporation with its headquarters in Westbury, New York.

22. Among other avionics products, CIC manufactured and sold non-RVSM compliant ADCs, including an ADC with model number 04471.

23. On August 31, 2004, Kollsman and CIC entered into an "Asset Purchase Agreement."

24. To date, Kollsman has sold to J2 a minimum of 107 units of ADC model number 24471, 46 units of ADC model number 49970, and 27 units of ADC model number 50042.

25. To date, J2 has sold a total of 162 ADCs to its customers.

26. To date, ISS has sold a total of 45 units of its RADM/ADC product.

27. Steven Tomlinson is a former employee of ISS.

28. Strathmann Associates formerly performed work for ISS as an independent consultant.

29. Avionics experience is not necessary in order for a software expert to provide testimony on the reading and comparison of source code in this case.

30. Kollsman and ISS agree that Trial Exhibit 251(a) is admissible and the data contained therein is accurate.

Furthermore, the Court instructs you that with respect to the checksum, there was no proof in the record that Fred Strathmann wrote that specific ISS checksum.

Deposition Testimony and Rule 30(b)(6) Testimony

Certain testimony has been read into evidence from depositions or previously given testimony or has been presented by video tape recording. A deposition is testimony taken under oath before this trial and preserved in writing or on video tape. Previous testimony is testimony taken under oath in either the same or different proceedings. You are to consider all such testimony as if it had been given in this court.

While most depositions are simply the testimony of an individual regarding what that individual personally knows, certain witnesses in this case have been designated by the corporation to testify on its behalf at a deposition on designated topics. It is not literally possible to take the deposition of a corporation; instead, when a corporation is involved, the testimony must be obtained from natural persons designated by the corporation to speak on its behalf on the designated topics. Testimony given by such a person, designated to speak on behalf of the corporation, is testimony on behalf of the corporation; such testimony is binding upon the corporation on those designated topics as if given by the corporation itself.

Impeachment -
Inconsistent Statement or Conduct

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves; you may, of course, accept any part you decide is true. This is all for you, the jury, to decide.

An act or omission is "knowing," if committed voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Direct and Circumstantial Evidence

There are two kinds of evidence - direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Evidence

You are to decide this case only from the evidence that was received, that is, evidence that was presented for your consideration during the trial. The evidence consists of:

1. The sworn testimony of the witnesses who have testified, both in person and by deposition;

2. The exhibits that were received and marked as evidence; and

3. Any facts to which the lawyers for both sides have agreed or stipulated.

"Inferences" Defined

Although you are to consider only the evidence in the case, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions that reason and common sense lead you to make from facts established by the evidence in the case.

Juror Notes

Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. The notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence. If you have taken notes, remember that your notes are solely to assist you, individually, in refreshing your recollection regarding the testimony and other evidence in the case. Your notes are personal and are not to be shared with your fellow jurors.

Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. Of course, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you may regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

Comments by the Court

During the course of a trial on a few occasions, I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Please do not assume that I hold any opinion on the matters to which my questions may have related. Remember that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

Expert Testimony

You have heard the testimony of expert witnesses Bruce Eisenstein, Ernest Johnson, Daniel M. Kasper, Michael P. Dewalt, and Philip Green. An expert is allowed to express his or her opinion on those matters about which the expert has special knowledge, training, or experience. Expert testimony is presented to you on the theory that someone who is experienced or knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing each expert's testimony, you may consider the expert's qualifications, the expert's opinions, the expert's reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness' testimony merely because he is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Limited Admission of Evidence

You will recall that during the course of this trial certain evidence was admitted for a limited purpose only. You must not consider such evidence for any other purpose.

For example, evidence has been admitted for the limited purpose of showing a witness's state of mind, or that the witness had notice of a particular issue. Evidence of a witness's state of mind is relevant only to show what the witness believed. Such evidence cannot be considered for the truth or accurateness of the belief. Likewise, evidence admitted only to show notice cannot be considered for the truth or accurateness of the matter it concerns.

Evidentiary Summaries

Certain summaries have been received in evidence in order to help explain the contents of records or other evidence in the case. If the summary does not correctly reflect the facts or figures shown by the evidence in the case, you should disregard the summary and determine the facts from the underlying evidence.

Demonstrative Charts and Summaries

Certain demonstrative charts and summaries have been shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. These demonstrative charts and summaries are not themselves evidence or proof of any facts. If the demonstrative charts/summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

Documents

You may notice that certain documents in this case have been stamped as “confidential” and/or “attorneys eyes only” as part of this litigation. You should ignore the stamps as they are not evidence in the case. However, if the “confidential” or “proprietary” markings were on the document apart from this litigation, then you should consider those designations as evidence in the case.

Nevertheless, any documents containing any of the markings discussed above should not be disclosed or used by you or others outside this lawsuit. Additionally, any testimony presented which is confidential or of a sensitive proprietary nature should not be disclosed or used by you or anyone else outside of this case.

Failure to Produce Evidence

You have heard evidence that Mr. Zachary/ZTI's computer was destroyed, and that information on the ISS laptop computer used by Mr. Caesar was lost, and that those computers may have contained evidence that is at issue in this case.

If a party fails to produce evidence that is under his or its control and reasonably available to that party and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not. On the other hand, sometimes evidence is lost or destroyed for an innocent reason or a reason out of the control of a party. In such circumstances, the loss or destruction of the evidence should not lead to an inference that is unfavorable to that party.

Decision Must Be Based on the Record

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

If either party has failed to call a witness, you must ask yourself if the witness was equally available to the other party. Neither party is required to call witnesses who are equally available to the other party.

"Equally available" simply means that there is no legal impediment to the witness talking to a party. Other than a party's employees, generally other witnesses are "equally available" under the law to all parties, despite the fact that it may be inconvenient or expensive for a party to obtain the witness' testimony.

You must decide this case based on the record presented in the courtroom (i.e., the testimony, exhibits, and stipulations placed in evidence) and must not speculate about witnesses or documents that were not presented in the courtroom.

Successor Liability

A corporation that purchases the assets of another does not assume any of the obligations or liabilities of the company whose assets it purchased, unless such obligations are expressly assumed by the purchaser in the contract. In this case, Kollsman and CIC entered into an agreement whereby Kollsman purchased certain assets of CIC, including its air data computer line of products.

The contract between Kollsman and CIC does not contain a clause under which Kollsman assumed CIC's liabilities and obligations, and in this case, ISS does not assert that the asset purchase by Kollsman of CIC is, in and of itself, sufficient to establish ISS's claim against Kollsman for misappropriation of trade secrets.

Principal and Agent - Definitions

In this case, it will be necessary for you to determine the relationship between certain parties and non-parties (such as Fred Strathmann and Steve Tomlinson) and how their relationships may affect the liability of each party defendant in the case. In order to do that I will instruct you as to the law of agency that you must follow and apply in this case.

A principal can be held responsible for the acts or omissions of the principal's agent.

A person who is authorized to act for another person or in place of another person is an agent of that person. A person may be an agent whether or not payment is received for services.

An important factor in determining whether the relationship between parties is that of principal and agent or master and servant, on the one hand, and employer and independent contractor, on the other, is the character of control reserved by the employer over the doing of the work, and if he/it reserves the right to control or direct the time, place, methods and means by which work is being done, the relationship is that of “principal and agent” or “master and servant,” but if he/it is concerned with results only and the employee is allowed to

perform work in manner he pleases as to time, place, means and methods, and is accountable only for results, he is an “independent contractor.”

For purposes of this case, the term "agent" includes both a servant and an employee and may include independent contractors and consultants under the instructions I am about to give you.

The person who authorizes the agent to act is called a principal. For purposes of this case, the term "principal" includes an employer.

An agent may serve two masters/principals simultaneously so long as the objectives of one master are not contrary to the objectives of the other.

An agent has a fiduciary duty to act loyally for the principle’s benefit in all matters connected with the agency relationship.

Principal and Agent — Scope of Authority

In order to be considered the act of the principal, the act of the agent must be within the scope of the agent's employment.

It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority. Conduct is within the scope of the agent's authority if it occurs while the agent is engaged in the duties that the agent was authorized to perform and if the conduct relates to those duties. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary to perform an authorized act is within the scope of the agent's authority.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Zachary and ZTI

ZTI and Zachary are sued as principal and agent. It has been established that the defendant ZTI is the principal and the defendant Zachary is the agent.

If you find that the agent is responsible, you must also find that the principal is responsible.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Caesar and J2

J2 and Caesar are sued as principal and agent. It has been established that the defendant J2 is the principal and the defendant Caesar is the agent.

If you find that the agent is responsible, you must also find that the principal is responsible.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Zachary and J2

J2 and Zachary are sued as principal and agent. It has been established that the defendant J2 is the principal and the defendant Zachary is the agent.

If you find that the agent is responsible, you must also find that the principal is responsible.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Tomlinson and ZTI

The plaintiff claims that Tomlinson, who is not a party to this suit, was acting as agent for defendant ZTI within the scope of agent's employment at the time that the event(s) occurred.

If you find that Tomlinson was the agent of defendant ZTI and was acting within the scope of his authority during that time, then any act or omission of Tomlinson was in law the act or omission of ZTI.

However, if you find that at the time of the events Tomlinson was not the agent of the defendant ZTI or was not acting within the scope of his authority for ZTI, then you may not find against ZTI on this theory.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Tomlinson and Zachary

The plaintiff claims that Tomlinson, who is not a party to this suit, was acting as agent for defendant James Zachary within the scope of agent's employment at the time that the event(s) occurred.

If you find that Tomlinson was the agent of defendant James Zachary and was acting within the scope of his authority during that time, then any act or omission of Tomlinson was in law the act or omission of James Zachary.

However, if you find that at the time of the events Tomlinson was not the agent of the defendant James Zachary or was not acting within the scope of his authority for James Zachary, then you may not find against James Zachary on this theory.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Tomlinson and J2

The plaintiff claims that Tomlinson, who is not a party to this suit, was acting as agent for defendant J2 within the scope of agent's employment at the time that the event(s) occurred.

If you find that Tomlinson was the agent of defendant J2 and was acting within the scope of his authority during that time, then any act or omission of Tomlinson was in law the act or omission of J2.

However, if you find that at the time of the events Tomlinson was not the agent of the defendant J2 or was not acting within the scope of his authority for J2, then you may not find against J2 on this theory.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Tomlinson and Caesar

The plaintiff claims that Tomlinson, who is not a party to this suit, was acting as agent for defendant Joseph Caesar within the scope of agent's employment at the time that the event(s) occurred.

If you find that Tomlinson was the agent of defendant Joseph Caesar and was acting within the scope of his authority during that time, then any act or omission of Tomlinson was in law the act or omission of Joseph Caesar.

However, if you find that at the time of the events Tomlinson was not the agent of the defendant Joseph Caesar or was not acting within the scope of his authority for Joseph Caesar, then you may not find against Joseph Caesar on this theory.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Tomlinson and Kollsman

The plaintiff claims that Tomlinson, who is not a party to this suit, was acting as agent for defendant Kollsman within the scope of agent's employment at the time that the event(s) occurred.

If you find that Tomlinson was the agent of defendant Kollsman and was acting within the scope of his authority during that time, then any act or omission of Tomlinson was in law the act or omission of Kollsman.

However, if you find that at the time of the events Tomlinson was not the agent of the defendant Kollsman or was not acting within the scope of his authority for Kollsman, then you may not find against Kollsman on this theory.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Strathmann and ZTI

The plaintiff claims that Strathmann, who is not a party to this suit, was acting as agent for defendant ZTI within the scope of agent's employment at the time that the event(s) occurred.

If you find that Strathmann was the agent of defendant ZTI and was acting within the scope of his authority during that time, then any act or omission of Strathmann was in law the act or omission of ZTI.

However, if you find that at the time of the events Strathmann was not the agent of the defendant ZTI or was not acting within the scope of his authority for ZTI, then you may not find against ZTI on this theory.

Principal and Agent – Responsibility of Agent Imputed to the Principal: Strathmann and James Zachary

The plaintiff claims that Strathmann, who is not a party to this suit, was acting as agent for defendant James Zachary within the scope of agent's employment at the time that the event(s) occurred.

If you find that Strathmann was the agent of defendant James Zachary and was acting within the scope of his authority during that time, then any act or omission of Strathmann was in law the act or omission of James Zachary.

However, if you find that at the time of the events Strathmann was not the agent of the defendant James Zachary or was not acting within the scope of his authority for James Zachary, then you may not find against James Zachary on this theory.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Strathmann and J2

The plaintiff claims that Strathmann, who is not a party to this suit, was acting as agent for defendant J2 within the scope of agent's employment at the time that the event(s) occurred.

If you find that Strathmann was the agent of defendant J2 and was acting within the scope of his authority during that time, then any act or omission of Strathmann was in law the act or omission of J2.

However, if you find that at the time of the events Strathmann was not the agent of the defendant J2 or was not acting within the scope of his authority for J2, then you may not find against J2 on this theory.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Strathmann and Caesar

The plaintiff claims that Strathmann, who is not a party to this suit, was acting as agent for defendant Joseph Caesar within the scope of agent's employment at the time that the event(s) occurred.

If you find that Strathmann was the agent of defendant Joseph Caesar and was acting within the scope of his authority during that time, then any act or omission of Strathmann was in law the act or omission of Joseph Caesar.

However, if you find that at the time of the events Strathmann was not the agent of the defendant Joseph Caesar or was not acting within the scope of his authority for Joseph Caesar, then you may not find against Joseph Caesar on this theory.

Principal and Agent — Responsibility of Agent Imputed to the Principal: Strathmann and Kollsman

The plaintiff claims that Strathmann, who is not a party to this suit, was acting as agent for defendant Kollsman within the scope of agent's employment at the time that the event(s) occurred.

If you find that Strathmann was the agent of defendant Kollsman and was acting within the scope of his authority during that time, then any act or omission of Strathmann was in law the act or omission of Kollsman.

However, if you find that at the time of the events Strathmann was not the agent of the defendant Kollsman or was not acting within the scope of his authority for Kollsman, then you may not find against Kollsman on this theory.

Independent Contractor — Distinguished from Agent

One of the issues which you must decide is whether, at the time of the events, Tomlinson and/or Strathmann was the agent of ZTI, J2, Kollsman, Zachary, and/or Caesar or whether Tomlinson and/or Strathmann was an independent contractor.

While both an agent and independent contractor work for another person, there is an important distinction between them.

An "agent" of another person, called the principal, is authorized to act for or in place of the principal. A principal has the right to control the agent's actions. A principal ordinarily is legally responsible for the acts or omissions of the principal's agent.

An independent contractor exercises an independent employment or occupation in providing services. The independent contractor is answerable to the employer only as to the results of the work and not as to how the work is to be performed. A person who employs an independent contractor ordinarily is not legally responsible to others for the acts or omissions of the independent contractor.

An independent contractor may consider and follow any suggestions that the employer may make. These actions do not change the independent contractor into an agent so long as the

independent contractor retains the right of control over the methods and manner in which the work is done.

Whether one is an agent or independent contractor depends upon who has the right to general and immediate control over the methods and manner in which the work is done. If the one who performs the work has that right, then that person is an independent contractor. If the employer has that right, then the employer is a principal and the one who performs the work is the agent.

However, merely because a person or company refers to someone as an “independent contractor” or “consultant” does not mean that the person or company is not an agent of a principal or that the person’s or company’s acts cannot be attributed to a principal. That is for you to decide. In other words, the title of “independent contractor” is of no importance if you find that the acts of a person or company are properly attributable to the principal under these instructions.

Agency — Employer's Vicarious Liability for Acts of Independent Contractor

An employer can be held vicariously liable when he directs, orders, or knowingly authorizes an independent contractor or consultant to engage in wrongful conduct when the independent contractor or consultant acts pursuant to the orders of the employer. If you find that the independent contractor or consultant acted pursuant to the order of the employer, then the employer is subject to the same liability as though the act or omission were that of the employer itself.

Joint and Several Liability

You may choose to hold all Defendants, or any subset of Defendants, jointly and severally liable if you find that they either: (1) acted in concert; (2) acted as part of a joint enterprise with mutual agency; or (3) acted pursuant to a common plan.

II.

CLAIMS OF THE PARTIES AND THE LAW REGARDING LIABILITY

In this case, there is one (1) claim by Innovative Solutions and Support, Inc. against Kollsman, Inc.; there are two (2) claims by Innovative Solutions and Support, Inc. against J2, Inc.; there are five (5) claims by Innovative Solutions and Support, Inc. against Joseph Caesar; there are five (5) claims by Innovative Solutions and Support, Inc. against Zachary Technologies, Inc.; and there are five (5) claims by Innovative Solutions and Support, Inc. against James Zachary. There is one (1) claim by Zachary Technologies, Inc. against Innovative Solutions and Support, Inc. Remember, the number of claims is of no significance. Each claim must be considered separately and must be decided without regard to your determination as to any other claim.

The claim by Innovative Solutions and Support, Inc. against Kollsman, Inc. is a misappropriation of trade secrets claim. The claims by Innovative Solutions and Support, Inc. against J2, Inc. are (1) misappropriation of trade secrets and (2) unfair competition. The claims by Innovative Solutions and Support, Inc. against Joseph Caesar are (1) misappropriation of trade secrets, (2) breach of non-disclosure agreement, (3) unfair

competition, (4) breach of statutory fiduciary duty, and (5) breach of common law fiduciary duty/duty of loyalty. The claims by Innovative Solutions and Support, Inc. against Zachary Technologies, Inc. are (1) misappropriation of trade secrets, (2) breach of non-disclosure agreement, (3) breach of other contract provisions, (4) unfair competition, and (5) breach of common law fiduciary duty/duty of loyalty. The claims by Innovative Solutions and Support, Inc. against James Zachary are (1) misappropriation of trade secrets, (2) breach of non-disclosure agreement, (3) unfair competition, (4) breach of common law fiduciary duty/duty of loyalty, and (5) alter ego. The claim by Zachary Technologies, Inc. against Innovative Solutions and Support, Inc. is a breach of contract claim.

I will first instruct you regarding the elements that must be established by a preponderance of the evidence as to the misappropriation of trade secrets claims. I will then instruct you regarding the contract and contract related claims: (1) breach of non-disclosure agreement and (2) breach of contract. I will then instruct you regarding the unfair competition claims. I will then instruct you regarding the breach of fiduciary duty claims. I will then instruct you regarding the alter ego claim.

A. Misappropriation of Trade Secrets

The Court will now instruct you regarding Innovative Solutions and Support, Inc.'s first theory of relief - Misappropriation of Trade Secrets.

ISS has asserted a claim of misappropriation of trade secrets under Tennessee statutory law against all of the Defendants in this case.

ISS has identified the following alleged trade secrets which it claims have been misappropriated by the Defendants:

1. ISS's RADM Business Plan and the market analysis and forecasting associated with it;
2. ISS's Checksum Comments;
3. ISS's Checksum Source Code;
4. ISS's Checksum Algorithm;
5. ISS's Altitude Rate Algorithm;
6. ISS's Combined Recipe incorporated in the ISS ADDU and AIU Interface;
7. ISS's RS 422 Logical Message Protocol;
8. ISS's Test Values;
9. ISS's Testing and Calibration Procedures relating to Pressure Transducer Stability, i.e., the pressure transducer stability problem and how to solve the problem.

ISS claims each of the forgoing is a trade secret, and that the Defendants have misappropriated each of them by improperly acquiring and/or using them in their designing, manufacturing, and selling of their competing products. The Defendants deny that this information is protectible as a trade secret and deny that they misappropriated this information.

ISS also claims that the Defendants' alleged misappropriation caused harm and continues to cause harm to Plaintiff.

You must decide these trade secret issues in accordance with the instructions as I give them to you.

Misappropriation of Trade Secrets - Elements

To prevail on its misappropriation of trade secrets claim, ISS must prove:

1. The existence of a trade secret;
2. The Defendants misappropriated that trade secret; and
3. The misappropriation resulted in detriment to ISS.

First Element - Definition of a Trade Secret

I will now explain the first element in more detail. The first element that the plaintiff must prove by the greater weight or preponderance of the evidence is the existence of a trade secret.

A trade secret is:

(1) Any information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan; which

(2) Derives independent economic value, either actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(3) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The law does not require the plaintiff to prove that it owns the asserted trade secret information. Instead, ISS is only required to show that it has possession of the information and that the information satisfies the three requirements set out above.

Independent Economic Value

Information which gives the owner or possessor of the information a competitive advantage in the marketplace over those who do not have knowledge of the information could be considered to “derive independent economic value” from not being generally known.

Secrecy of Information

ISS is required to take reasonable steps under the circumstances to protect any information which it claims is its trade secret(s). This does not require absolute secrecy or that ISS use all conceivable efforts to maintain secrecy. If ISS did not take reasonable steps to protect its trade secrets, you must find for Defendants.

You may find that a party who fails to notify an independent contractor that it regards information it disclosed to the independent contractor as trade secret or proprietary information pursuant to a non-disclosure agreement that expressly requires the party to delineate which of its information is proprietary, has failed to take reasonable steps to protect its trade secrets.

In addition, if the information could be readily learned by legitimate methods, no one may claim it as a trade secret. Reverse engineering is a process where a person starts with a known product and works backward to determine the secret process by which the product was designed, developed, or manufactured. Evidence regarding the capability to reverse engineer a product may be considered as part of your determination whether the information claimed to be a trade secret was readily ascertainable by proper means.

If the information is readily ascertainable by means other than reverse engineering, such as by reading publicly available

literature, examining publicly available products, or if the information is commonly known in an industry, then the information cannot qualify as a “trade secret.”

Duty to Maintain Secrecy

An employee that leaves an employer may use the knowledge, memory, skill and experience that the employee gained while working for the former employer for his or her own benefit or for the benefit of a new employer as long as that knowledge, memory, skill and experience is not a trade secret. Trade secrets belong to the former employer and the employee cannot use them without the permission of the former employer.

Certain types of information are not confidential and therefore cannot be considered “trade secret” information: (1) specific needs and business habits of certain customers; and (2) an employee’s personality and the relationships that he has established with certain customers.

Secrecy Requirement

Although efforts must be made to maintain an alleged trade secret's secrecy, absolute secrecy is not required in order to find that it qualifies as a trade secret. Additionally, the alleged trade secret may be disclosed to employees involved in ISS's use of the trade secret, or to non-employees, if the people to whom the disclosure was made are obligated to keep the information secret.

The fact that some or all of the components of the trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements. Hence, a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which in unique combination, affords a competitive advantage and is a protectible secret.

Information which was acquired by the defendant through the confidential relationship may be protected even if the information potentially could have otherwise been obtained through independent research. This is particularly true where acquisition of the information through independent research would be difficult, costly, or time consuming.

Factors in Determining the Existence of a Trade Secret

In determining whether a particular piece of information qualifies as a trade secret, you may consider the following:

1. the extent to which the information is known outside of the business;

2. the extent to which it is known by employees and others involved in the business;

3. the extent of measures taken by the business to guard the secrecy of the information;

4. the value of the information to the business and to its competitors;

5. the amount of money or effort expended by the business in developing the information;

6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

If the plaintiff has established by a preponderance of the evidence each of the facts necessary to prove the existence of a trade secret(s), you must then determine whether each defendant, individually, misappropriated that trade secret or trade secrets.

Second Element - Misappropriation

I will now explain the second element in more detail. The second element that the plaintiff must prove by the greater weight or preponderance of the evidence is the misappropriation of the trade secret by the defendant that you are considering.

There are 5 ways in this case in which a "person" may be found to have misappropriated a trade secret under the law. A "person" means a natural person, such as Mr. Caesar or Mr. Zachary, or a corporation, such as Kollsman Inc., J2 Inc., or Zachary Technologies, Inc.

"Misappropriation" can occur in any of the following ways:

(1) Acquisition of a trade secret is improper if the person acquiring the trade secret from another knows or has reason to know that the other used improper means to acquire the trade secret.

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who used improper means to acquire knowledge of the trade secret.

(3) Disclosure or use of a trade secret of another without express or implied consent by a person who, at the time of disclosure or use, knew or had reason to know that that person's knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it.

(4) Disclosure or use of a trade secret of another without express or implied consent by a person who, at the time of disclosure or use, knew or had reason to know that that person's knowledge of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.

(5) Disclosure or use of a trade secret of another without express or implied consent by a person who, at the time of disclosure or use, knew or had reason to know that that person's knowledge of the trade secret was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use. In other words, disclosure or use of a trade secret is improper if, at the time of the disclosure or use, the person disclosing or using the trade secret knew or had reason to know that the information was derived from or through a person who owed a duty to ISS to maintain its secrecy or limit its use.

"Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy or limit use, or espionage through electronic or other means.

To "know" means to have actual knowledge of or to be aware of.

"Reason to know" means having actual knowledge or knowledge sufficient that a reasonable person would have inquired further.

Actual knowledge is not required; constructive notice is sufficient. A defendant is on constructive notice when, from the information he/it has, a reasonable person would infer a

misappropriation of trade secret, or if, under the circumstances, a reasonable person would be put on notice and an inquiry pursued with reasonable intelligence and diligence would disclose the misappropriation.

To be liable for misappropriation of trade secrets, a defendant need not use the trade secret in exactly the same form in which he/it received it. You do not need to find that Defendants copied or used each and every part of the trade secret. A defendant may be liable even if it uses the trade secret with modifications or improvements that defendant made to it.

Disclosure or use of a trade secret is not improper if the owner of the information consented to the disclosure or use.

Under the law, more than one person can rightfully possess a trade secret.

No Vicarious Liability
Misappropriation of Trade Secrets

In deciding whether any particular defendant misappropriated ISS's trade secrets, a defendant who is an employer is not liable for the acts of an agent or an independent contractor unless the evidence shows that the employer knew or had reason to know that the agent or independent contractor misappropriated a trade secret. There is no vicarious liability, or liability imputed from one to another, for misappropriation of trade secrets. Any liability must be based on evidence that establishes that a party knew or had reason to know about a misappropriation.

Summary - Second Element

If you find by the greater weight or preponderance of the evidence that the defendant you are considering has misappropriated a trade secret of ISS by any one of the five (5) ways set out above in these instructions, then as to that defendant, the second element has been satisfied, and you must determine whether the evidence establishes the third element - that the misappropriation resulted in a detriment to ISS.

Third Element - Detriment

In order to establish the third element, the plaintiff must establish by the greater weight or preponderance of the evidence that the misappropriation proximately caused economic harm or detriment to ISS.

A proximate cause of any detriment or economic harm is a cause which, in natural and continuous sequence, produces a harm or detriment, and without which the harm or detriment would not have occurred. Harm or detriment can be caused by the acts or omissions of one or more persons acting at the same or different times.

If you find that a party misappropriated a trade secret or trade secrets and that the misappropriation was a cause of the harm or detriment for which a claim was made, you have found that party to be liable for misappropriation of a trade secret or trade secrets.

Summary - Misappropriation of Trade Secrets

If Innovative Solutions and Support, Inc. has proven the three elements of misappropriation of trade secrets by a preponderance of the evidence as to the Defendant you are considering, then you must return a verdict for Innovative Solutions and Support, Inc. by answering the appropriate questions under Verdict Form Questions 1 and 2 with a “Yes.” If Innovative Solutions and Support, Inc. has failed to show any of the three elements by a preponderance of the evidence as to the Defendant you are considering, then you must return a verdict for the Defendant you are considering and answer either the questions under Verdict Form Question No. 1 or the questions under Verdict Form Question No. 2, depending on your particular findings in the case, so as to reflect your finding.

B. Breach of Contract

Summary of Contract Issues

The Court will now instruct you regarding the parties' second theory of relief - Breach of Contract.

ISS asserts breach of contract claims against Mr. Caesar (1 claim), Zachary Technologies, Inc. (2 claims), and Mr. Zachary (2 claims). Zachary Technologies asserts a claim of breach of contract against ISS.

You must decide the contract issues according to the instructions that I will give to you. There are four contracts that are the subject of some of the claims that you must decide in this case. The contracts are:

1. An agreement entered into between ISS and Joseph Caesar titled "Agreement For Assignment Of Inventions And Copyrights And Covenant Against Disclosure";
2. An agreement entered into between ISS and Joseph Caesar titled "Departing Employee's Agreement Concerning Disclosure Of Confidential Information, Assignment Of Inventions, And Return Of Company Property";

3. An agreement entered into in 1996 between ISS and James Zachary titled “Independent Sales Representative Agreement”; and
4. An agreement entered into in 2002 between ISS and James Zachary and ZTI titled “Independent Sales Representative Agreement.”

Contract Law

I will now instruct you as to the law regarding the contract claims.

The following three elements must be proven by the greater weight or preponderance of the evidence in order to prove a breach of contract:

1. The existence of the contract;

2. An unexcused non-performance of an obligation under the contract amounting to a breach of contract; and

3. Damages caused by the breach.

Once an unexcused breach of contract has been proven, at least nominal damages are presumed. I will instruct you concerning damages later in these instructions.

I will now further define the terms I have just set out regarding breach of contract.

Contract—Defined

A contract is an agreement or exchange of promises between two or more persons to do or not to do certain things. This agreement or exchange of promises can be oral or in writing and must be supported by something of value. The requirements for a valid contract are an offer, an acceptance, consideration, competent parties, and a legal purpose.

There is no dispute in this case regarding the existence of the contracts asserted. Therefore you can accept this fact as established.

Contract-Interpretation

In construing a contract, you shall use the following rules of construction. In the construction or interpretation of a contract, common sense and good faith are the leading touchstones of the inquiry. All contracts should receive a sensible and reasonable construction and not such a construction as will lead to an absurd consequence. The language of the contract records the agreement of the parties.

When a provision is ambiguous, the intent of the parties controls. The intent of the parties is a question of fact to be resolved by you, the jury, when the contract is ambiguous. In attempting to ascertain the parties' intention, the situation of the parties, as well as their purposes at the time the contract was entered, must be determined.

A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation. A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one. An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner.

Ambiguities must be construed against the party who prepared the contract. A provision of a contract which does not clearly express the intention of the parties should be construed against

the one for whose benefit it was inserted. Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity. Where a contract is entered into upon a printed form prepared by a party, the language of the contract will be strictly construed against that party.

Parties to a contract are not expected to exercise clairvoyance in spotting hidden ambiguities in the contract and they are protected if they innocently construe in their own favor an ambiguity susceptible of another interpretation.

When there is no ambiguity in a contract, it must be construed according to the terms which the parties have used and terms used in the contract should be taken and understood in their plain, ordinary, and popular sense. Language used in a contract must be interpreted in its natural and ordinary sense.

The rights of the parties to a contract must be measured by the contract which the parties themselves made. The jury is not in the business of making a contract for a party.

The intention of a contract is to be determined from the language. Language which is perfectly clear determines the full force and effect of the document.

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. The

intent and purport of a written contract must be gathered from the contents of the entire agreement and not from any particular clause or provision therein. Every term contained in a contract must be considered and given effect if possible.

If the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.

Contract–Waiver Defined

Waiver is the voluntary surrender of a known right. It can be proved by statements, acts, or conduct of a party showing an intent not to claim a right.

The parties may jointly agree to waive one or more requirements of the contract. If a party to the contract claims the other party waived a contract right, the burden of proof is on the party claiming the waiver to show that the other party gave up a contract right and did so with full and complete knowledge of the relevant facts.

If a party waived a particular term in the contract, that party can no longer enforce that part of the contract. ISS claims that ZTI waived its right to receive commission under the 2002 Independent Sales Representative Agreement. ZTI denies this.

Contract–Breach of Contract Defined

When a valid contract has been established, you must determine whether the defendant breached the contract. If a party does not perform according to the contract terms, that party has committed a breach of the contract. Any unexcused breach of contract allows a non-breaching party to recover damages.

The breach of contract must be a material breach. A minor and insubstantial failure of a party to meet the terms of a contract does not entitle the other party to reject the contract and not be responsible under it.

If a party does not perform according to contract terms, that party has committed a breach of contract. Any unexcused breach of a contract allows the non-breaching party to recover damages. In addition, in order for a breach of contract to provide a claim for relief in a lawsuit, the breach must be material. "Material" in this context means a substantial breach, or more than a minor or insubstantial failure of a party to meet the terms of the contract. Factors you may consider in determining whether a breach is material include the following: (1) the extent to which the injured party will be deprived of the expected benefits under the contract; (2) the extent to which the injured party can be adequately compensated for loss of benefit; (3) the extent to which the non-performing party will suffer

forfeiture (i.e., a divestiture of specific property without compensation); (4) the likelihood that the non-performer will cure, that is, correct the failure or has cured the failure, taking into account the circumstances including any reasonable assurances; and (5) the extent to which the behavior of the non-performing party comports to standards of good faith and fair dealing. Although none of the above factors alone is dispositive on the question of whether a breach is material, they should guide your decision.

The agreements in this case were contained in written documents. The law is that contracts are to be applied as they are written. This means that a party to a contract is required to do what he or it agreed; however, the party is not required to do things he or it did not agree to, as determined by the contract's language. Language in a contract should be interpreted according to its ordinary plain meaning.

Thus, the first thing that you must determine in deciding these breach of contract claims is whether the party accused of breach of contract did something that was prohibited by the specific provisions of their contracts, or failed to do something that their contracts specifically required.

In order for a party who/that asserts a breach of contract to be entitled to relief on these breach of contract claims, it must first prove by a preponderance of the evidence that the

accused party breached its/his agreement(s) and that the breach was material.

If you determine that there was a material breach of a contract or contracts, then you must determine whether the party asserting breach of contract has proved by a preponderance of the evidence that a breach caused the party claiming breach to sustain damages, and if so, what amount of damages that breach caused.

ISS's Contract Claims Against Joseph Caesar under the "Agreement For Assignment Of Inventions And Copyrights And Covenant Against Disclosure"

You must decide the following contract issues according to the instructions that I have given to you:

Has Plaintiff proven by a preponderance of the evidence that Mr. Caesar breached the "Agreement For Assignment Of Inventions And Copyrights And Covenant Against Disclosure" by one of more of the following:

1. Failing to keep in strictest confidence during and subsequent to the time of Mr. Caesar's employment all information identified as secret or confidential or which, from the circumstances, in good faith and good conscience ought to be treated as confidential, relating to the products, machines, methods of manufacture, compositions, inventions, discoveries, trade secrets or secret processes, price lists, logical flow diagrams including computer programs, customer lists, business plans or any other information of the business or affairs of ISS which Mr. Caesar might acquire or develop in connection with or as a result of his employment; or

2. Using, except as instructed by ISS during Mr. Caesar's employment, any trade secret or proprietary information of ISS;

3. Failing to comply with the provision requiring Mr. Caesar to not directly or indirectly publish, communicate, divulge or describe to any unauthorized person any trade secret or proprietary information of ISS during the period of Mr. Caesar’s employment or at any time subsequent thereto, without prior written consent of ISS.

ISS's Contract Claims Against Joseph Caesar under the "Departing Employee's Agreement Concerning Disclosure Of Confidential Information, Assignment Of Inventions, And Return Of Company Property"

You must decide the following contract issues according to the instructions that I have given to you:

Has Plaintiff proven by a preponderance of the evidence that Mr. Caesar breached the "Departing Employee's Agreement Concerning Disclosure Of Confidential Information, Assignment of Inventions, And Return Of Company Property" by one of more of the following:

1. Failing to comply with the provision requiring Mr. Caesar to not use or disclose confidential or trade secret information even after his employment is terminated; or

2. Failing to return to ISS all company property in Mr. Caesar's possession.

ISS's Contract Claims Against James Zachary under the 1996 "Independent Sales Representative Agreement"

You must decide the following contract issues according to the instructions that I have given to you:

Has Plaintiff proven by a preponderance of the evidence that Mr. Zachary breached the "Independent Sales Representative Agreement" entered into in 1996 by one or more of the following:

1. Failing to comply with the requirement to keep in strictest confidence during and subsequent to the agreement all information identified as secret or confidential or which, from the circumstances, in good faith and good conscience ought to be treated as confidential, relating to products, machines, methods of manufacture, compositions, inventions, discoveries, trade secrets or secret processes, price lists, logical flow diagrams including computer programs, customer lists, business plans or any other information of the business or affairs of IS&S which Mr. Zachary acquired or developed in connection with or as a result of his work for IS&S.

2. Failing to comply with the requirement to not use any such information as listed above under 1 without prior written consent of IS&S and to not communicate, divulge or describe to any unauthorized person any such information during the period of the agreement or at any time subsequent thereto.

ISS's Contract Claims Against James Zachary under the 2002 "Independent Sales Representative Agreement"

You must decide the following contract issues according to the instructions that I have given to you:

Has Plaintiff proven by a preponderance of the evidence that ZTI or Mr. Zachary breached the "Independent Sales Representative Agreement" entered into in 2002 by one or more of the following:

1. Failing to use best efforts to actively promote sales of ISS's products; or

2. Failing to comply with the requirement that Zachary/ZTI not sell or act as a distributor, sales agent, representative or consultant in the Territory for any products competitive with products sold by ISS unless ISS has been advised of such competitive products in advance and has given its consent in writing.

3. Failing to comply with the requirement to keep in strictest confidence during and subsequent to the agreement all information identified as secret or confidential or which, from the circumstances, in good faith and good conscience ought to be treated as confidential, relating to products, machines, methods of manufacture, compositions, inventions, discoveries, trade secrets or secret processes, price lists, logical flow diagrams

including computer programs, customer lists, business plans or any other information of the business or affairs of ISS which ZTI or Mr. Zachary acquired or developed in connection with or as a result of his work for ISS.

4. Failing to comply with the requirement to not use any such information as listed above under 3 without prior written consent of ISS and to not communicate, divulge or describe to any unauthorized person any such information during the period of the agreement or at any time subsequent thereto.

“BEST EFFORTS” Clause in the 2002 Zachary/ZTI “Independent Sales Representative Agreement”

The “Best Efforts” clause in the 2002 “Independent Sales Representative Agreements” provides:

“Provision 3.1 Best Efforts. Representative shall use its best efforts to actively promote sales of Products within the Territory and shall maintain resources necessary for performance of this Agreement.”

ISS's Contract Claims Against James Zachary under the "Agreement For Assignment Of Inventions And Copyrights And Covenant Against Disclosure" attached as Exhibit 4 to Mr. Zachary/ZTI's Independent Sales Representative Agreements in 1996 and 2002

You must decide the following contract issues according to the instructions that I have given to you:

Has Plaintiff proven by a preponderance of the evidence that Mr. Zachary breached the "Agreement For Assignment Of Inventions And Copyrights And Covenant Against Disclosure" attached as Exhibit 4 to Mr. Zachary/ZTI's Independent Sales Representative Agreements in 1996 and 2002 by one of more of the following:

1. Failing to disclose to ISS and its attorney all designs, inventions, improvements and developments made or conceived while employed by ISS;

2. Failing to assign to ISS any and all designs and inventions, improvements and developments Mr. Zachary/ZTI made or conceived either solely or jointly with others, resulting from or suggested by Mr. Zachary/ZTI's work for ISS during his employment by ISS;

3. Failing to keep in strictest confidence during and subsequent to the time of Mr. Zachary/ZTI's employment all information identified as secret or confidential or which, from

the circumstances, in good faith and good conscience ought to be treated as confidential, relating to the products, machines, methods of manufacture, compositions, inventions, discoveries, trade secrets or secret processes, price lists, logical flow diagrams including computer programs, customer lists, business plans or any other information of the business or affairs of ISS which Mr. Zachary/ZTI might acquire or develop in connection with or as a result of his employment;

4. Using, except as instructed by ISS during Mr. Zachary/ZTI's employment, any trade secret or proprietary information of ISS; or

5. Failing to comply with the provision requiring Mr. Zachary/ZTI to not directly or indirectly publish, communicate, divulge or describe to any unauthorized person any trade secret or proprietary information of ISS during the period of Mr. Zachary/ZTI's employment or at any time subsequent thereto, without prior written consent of ISS.

Contract Instruction/October 25, 2002 Contract

The Court has made certain legal findings concerning the contract entered into between ZTI and ISS on October 25, 2002. That contract controls the payment of commissions by ISS to ZTI.

The Court has determined that the October, 2002 contract entered into between ZTI and ISS replaced the previous 1996 contract, and provided a new formula for the computation of commissions. Specifically, the controlling contract language in paragraph 12.0 of the contract provides that the October 25, 2002 agreement "supercedes and cancels all prior and contemporaneous agreements, claims, representations and understandings . . . ." This language terminated the previous commissions formula and instituted a new method for calculation of commissions as reflected in Exhibit 3 to the contract. I should note that this language did not terminate the language in the 1996 Sales Agreement, Exhibit 4.0, paragraph 6 (Covenant Against Disclosure), which remained in effect.

Using the calculation formula in the 2002 contract, I must instruct you that the calculation reflected in Trial Exhibit 223 "ISSC Zachary Commission" is inconsistent with the 2002 contract language and should not be considered by you in the calculation of any contract damages due ZTI unless you find that ZTI acquiesced in that calculation as set out in the Court's instructions on

“acquiescence.” Unless ZTI acquiesced in ISS’ calculation, the $3 million cap must be calculated from October 25, 2002 and must be calculated “by product, by customer, by application.”

The Court has determined that a product, for purposes of the 2002 Contract, is an item sold by ISS that has a name and a price. “Customer” is “the purchaser of the product by whom an order is placed.”

The term "Application" is undefined in the contract. Moreover, the only use of the term "Application" in the contract is in the phrase "per Product per Customer per Application," which is only used in the commission formula. The term "Application" is susceptible to different constructions, can be understood in more than one sense, and is therefore ambiguous.

While the Court has determined the manner in which the law requires that the terms of the October 25, 2002 contract must be interpreted, it remains the jury’s duty, and yours alone, to determine all of the disputed facts in the case, including the disputed facts regarding the October 25, 2002 contract.

Defense of Acquiescence

Plaintiff has raised the affirmative defense of acquiescence against ZTI's counterclaim for breach of contract. In order for you to determine that the defense of acquiescence bars ZTI's counterclaim, you must find that ZTI engaged in conduct that amounted to an assurance, either express or implied, to Plaintiff that ZTI would not later assert a claim for breach of contract against Plaintiff.

The burden of proof on the defense of acquiescence is on ISS - the party asserting that defense.

Summary of Contract Issues

If Innovative Solutions and Support, Inc. has proven by a preponderance of the evidence that Joseph Caesar, James Zachary, and/or Zachary Technologies, Inc. breached the Non-Disclosure Agreement, you must return a verdict for Innovative Solutions and Support, Inc. and answer Verdict Form Question No. 4 “Yes.” If Innovative Solutions and Support, Inc. has failed to prove by a preponderance of the evidence that Joseph Caesar, James Zachary, and/or Zachary Technologies, Inc. breached the Non-Disclosure Agreement, you must return a verdict for the Defendants and answer Verdict Form Question No. 4 “No.”

If Innovative Solutions and Support, Inc. has proven by a preponderance of the evidence that Zachary Technologies, Inc. breached the other provisions of the Independent Sales Representative Agreements, you must return a verdict for Innovative Solutions and Support, Inc. and answer Verdict Form Question No. 5 “Yes.” If Innovative Solutions and Support, Inc. has failed to prove by a preponderance of the evidence that Zachary Technologies, Inc. breached the Independent Sales Representative Agreements, you must return a verdict for the Defendants and answer Verdict Form Question No. 5 “No.”

If Zachary Technologies, Inc. has proven by a preponderance of the evidence that Innovative Solutions and Support, Inc. breached the 2002 Independent Sales Representative Agreement, you must return a verdict for Zachary Technologies, Inc. and answer Verdict Form Question No. 6 “Yes.” If Zachary Technologies, Inc. has failed to prove by a preponderance of the evidence that Innovative Solutions and Support, Inc. breached the Independent Sales Representative Agreements, you must return a verdict for Innovative Solutions and Support, Inc. and answer Verdict Form Question No. 6 “No.”

C. Unfair Competition

The Court will now instruct you regarding ISS's third theory of relief - Unfair Competition. ISS asserts unfair competition claims against J2, Inc., Joseph Caesar, Zachary Technologies, Inc., and James Zachary.

You must decide the unfair competition issues according to the instructions that I will give to you.

A defendant is liable for unfair competition when it engages in any conduct that amounts to a recognized tort and when that tort deprives a plaintiff of customers or other prospects.

If you find J2, Inc., Joseph Caesar, James Zachary, and/or Zachary Technologies, Inc. liable for breach of fiduciary duty under Tenn. Code Ann. § 48-18-403, and/or breach of fiduciary duty and/or breach of duty of loyalty in violation of Tennessee common law, and such wrongful actions are shown to have deprived Plaintiff of its customers or prospective customers, then you must enter a verdict in favor of Innovative Solutions and Support, Inc., and answer Verdict Form Question No. 7 "Yes." If you find that Innovative Solutions and Support, Inc. has failed to prove by the preponderance of the evidence that J2, Inc., Joseph Caesar, James Zachary, and/or Zachary Technologies, Inc. unfairly competed with Innovative Solutions and Support, Inc., you must enter a verdict

against Innovative Solutions and Support, Inc., and answer Verdict Form Question No. 7 “No.”

D. Breach of Fiduciary Duty

The Court will now instruct you regarding ISS's fourth theory of relief - Breach of Fiduciary Duty. ISS asserts a breach of fiduciary duty against Joseph Caesar first under the Tennessee statute 48-18-403(a). Secondly, ISS asserts a common law breach of fiduciary duty/duty of loyalty against Joseph Caesar, Zachary Technologies, Inc., and James Zachary. I will first explain the law as to the statutory claim against Joseph Caesar. I will then explain the law regarding the common law claim against Joseph Caesar, Zachary Technologies, Inc., and James Zachary.

In order to recover on its breach of fiduciary duty claim against Defendant Caesar in accordance with Tennessee Code § 48-18-403, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. Caesar was an officer of ISS; and

2. he had discretionary authority; and

3. he failed to discharge his duties under that discretionary authority:

    a. with good faith, and

b. with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and

c. in a manner the officer reasonably believes to be in the best interests of the corporation; and

4. plaintiff ISS was damaged by the alleged failure to discharge his duties.

To be an “officer” of ISS, Caesar must have been described in the bylaws of ISS, or appointed by the Board of Directors of ISS in accordance with the bylaws of ISS. Unless the charter or bylaws of ISS provide otherwise, officers shall be elected or appointed by the Board of Directors of ISS. Caesar also could have been appointed as an officer of ISS by another officer of ISS if the appointing officer has authority from the bylaws of ISS or from the Board of Directors of ISS.

Common Law Fiduciary Duty/Duty of Loyalty

I will now explain the law regarding the common law claim of breach of fiduciary duty/duty of loyalty against Joseph Caesar.

Employees generally owe a duty of loyalty to their employers. This duty of loyalty means that the employee must act in the best interests of their employer and must not engage in any conduct that is adverse or harmful to the employer's interest. This duty of loyalty exists only so long as the employee is employed by the employer.

Although an employee owes a duty of loyalty while employed, that employee has every right to compete with his or her former employer immediately after his or her employment ends. In addition, an employee, while still working for his or her employer, may organize or purchase a competing business and make arrangements to compete, but may not make improper use of the employer's trade secrets in doing so. After his or her employment ends, the employee may immediately compete. Conduct including setting up and/or purchasing a competing business, without actually competing, is not considered a breach of the duty of loyalty.

In order to prevail on its claim against Defendant Joseph Caesar for breach of his duty of loyalty as an employee, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

(1) An employment relationship existed between Defendant Joseph Caesar and the Plaintiff which gave rise to a duty of loyalty; and

(2) While employed by the Plaintiff, Defendant Joseph Caesar breached his duty of loyalty;

and

(3) Plaintiff was damaged because of this breach.

Corporate officers owe a high degree of loyalty to their corporation and are not permitted to deal with the corporation or its assets for their own private gain. Moreover, they cannot deal for themselves and for the corporation at one and the same time. They also may not take a business opportunity that rightfully belongs to the corporation.

Ordinarily, employees must act solely for the benefit of the employer in matters within the scope of their employment and not engage in conduct that is adverse to the employer’s interest. This includes an obligation not to compete with the employer during the employment relationship.

I will now explain the law regarding the common law claim of breach of fiduciary duty/duty of loyalty against James Zachary and ZTI.

A fiduciary duty and/or duty of loyalty relationship does not require that one of the parties be an officer or employee. Any relationship where one reposes confidence in another and acts in reliance upon the other’s representations may create such duties.

A breach of fiduciary duty occurs when one of the parties in the relationship abuses the confidence between the parties or obtains an advantage at the expense of the confiding party.

A breach of duty of loyalty occurs when one of the parties in the relationship fails to act in good faith in a manner that he/she reasonably believes to be in the best interest of the other party.

Basis for ZTI and Zachary's Common Law Fiduciary Duty and/or Duty of Loyalty

Plaintiff alleges that paragraphs 3.4 and 10.0(b) of the March 1996 and October 2002 Agreement creates a fiduciary duty and/or duty of loyalty owed to Plaintiff by Zachary and ZTI.

Paragraph 3.4 incorporates Exhibit 4 which states:

Covenant Against Disclosure. Representative agrees to keep in strictest confidence during and subsequent to Agreement all information identified as secret or confidential or which, from the circumstances, in good faith and good conscience ought to be treated as confidential, relating to products, machines, methods of manufacture, compositions, inventions, discoveries, trade secrets or secret processes, price lists, logical flow diagrams including computer programs, customer list, business plans or any other information of the business or affairs of IS&S (all herein referred to without limitation as information) which Representative may acquire or develop in connection with or as a result of my work for IS&S.

Paragraph 10.0(b) states:

Representative covenants and agrees that, except as instructed by IS&S during the term of the Agreement, Representative will not directly use any such information and, without prior written consent of IS&S, Representative will not directly or indirectly publish, communicate, directly or indirectly publish, communicate, divulge or describe to any unauthorized person nor patent any such information during the period of Agreement or at any time subsequent thereto.

Exhibit 4 also states in subsection (c):

The covenant shall not apply to information already in the public domain or information which has been dedicated to the public by IS&S.

Breach of Fiduciary Duty and/or Duty of Loyalty

If you find that Joseph Caesar owed a statutory fiduciary duty to Innovative Solutions and Support, Inc. and breached that duty, you must enter a verdict in favor of Innovative Solutions and Support, Inc. and answer Verdict Form Question No. 8 “Yes.” If Innovative Solutions and Support, Inc. has failed to prove by a preponderance of the evidence that the Defendant owed a fiduciary duty and breached that duty, then you must return a verdict for the Defendant and answer Verdict Form Question No. 8 “No.”

If you find that Joseph Caesar, James Zachary, and/or Zachary Technologies, Inc. owed a common law fiduciary duty/duty of loyalty to Innovative Solutions and Support, Inc. and breached either duty, you must enter a verdict in favor of Innovative Solutions and Support, Inc. and answer Verdict Form Question No. 9 “Yes.” If Innovative Solutions and Support, Inc. has failed to prove by a preponderance of the evidence that the Defendants owed a duty of loyalty and breached that duty, then you must return a verdict for the Defendants and answer Verdict Form Question No. 9 “No.”

E. Alter Ego

The Court will now instruct you regarding ISS's fifth theory of relief - Alter Ego. ISS asserts an alter ego claim against James Zachary. You must decide the alter ego issues according to the instructions that I will give to you.

Plaintiff claims that Zachary is the alter ego of ZTI and accordingly, any liability for ZTI's actions should be assessed against Zachary individually.

Although a corporation is presumptively treated as a distinct entity from its officers, that distinction may be disregarded, or "pierced," under certain circumstances. If other words, under some circumstances, you may disregard the separate existence of a corporation. One such circumstance is when the corporation is shown to be a "sham or dummy," sometimes referred to as the "alter ego theory" of piercing the corporate veil.

To find that a corporation is the alter ego of another individual(s), you must consider the following factors:

(1) Whether there was a failure to collect paid in capital;

(2) Whether the corporation was grossly undercapitalized;

(3) The nonissuance of stock certificates;

(4) The sole ownership of stock by one individual;

(5) The use of the same office or business location;

(6) The employment of the same employees or attorneys;

(7) The use of the corporation as an instrumentality or business conduit for an individual or another corporation;

(8) The diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another;

(9) The use of the corporation as a subterfuge in illegal transactions;

(10) The formation and use of the corporation to transfer to it the existing liability of another person or entity; and

(11) The failure to maintain arms length relationships among related entities.

Plaintiff bears the burden of presenting facts in support of the above factors, but it is not necessary for all of the factors to weigh in Plaintiff’s favor.

Liability for Tortious Acts of a Corporate Officer

Generally, corporate officers are afforded immunity from individual liability for their tortious actions taken on behalf of a corporation. However, a corporate officer only receives individual immunity from his/her tortious acts if he/she was performing duties of a corporate officer in good faith and in furtherance of the perceived best interest of the corporation. If the officer does not meet these conditions, liability may be assessed against him or her individually for tortious actions even though he/she is an officer of a corporation.

To the extent ZTI is found to have committed tortious actions, Plaintiff alleges that Zachary should be held individually liable for these actions because he was not performing his duties in good faith and in furtherance of the perceived best interest of ZTI.

To the extent J2 is found to have committed tortious actions, Plaintiff alleges that Zachary and/or Caesar should be held individually liable for these actions because they were not performing their duties in good faith and in furtherance of the perceived best interest of J2.

If you determine that Innovative Solutions and Support, Inc. has presented sufficient facts to find Zachary Technologies, Inc. to the be alter ego of James Zachary, you must enter a verdict

finding Zachary Technologies, Inc. to be the alter ego of James Zachary, and answer Verdict Form Question No. 10 “Yes.” If you find that Innovative Solutions and Support, Inc. has not proven by a preponderance of the evidence that Zachary Technologies, Inc. is the alter ego of James Zachary, you must return a verdict for James Zachary and answer Verdict Form Question No. 10 “No.”

III. DAMAGES

Consider Damages Only If Necessary

I will now instruct you on the law as it relates to damages. If a party has proven by a preponderance of the evidence that another party is liable on a claim, then you must determine the damages if any to which that party is entitled but only under the instructions I will give you as to how to calculate damages. However, you should not infer that any party is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide upon liability, and I am instructing you on damages only so that you will have guidance should you decide that a party is entitled to recovery.

In this case two parties seek to recover damages. ISS seeks to recover damages against each of the Defendants under various theories. ZTI seeks to recover damages against ISS under the theory of breach of contract.

First, I will discuss the law as it relates to damages under the theory of misappropriation of trade secrets. I will then discuss the law regarding damages relating to breach of contract, followed by discussion on damages under the remaining theories.

Multiple Claims

At the outset, however, I instruct you that you cannot award compensatory damages more than once for the same loss, harm, or detriment. For example, if a party were to prevail on two claims and establish a total injury of one dollar, you could not award him one dollar compensatory damages on each claim - he or it is only entitled to be made whole again, not to recover more than he or it lost.

Further, you must be careful to impose any damages that you may award on a claim solely upon the party or parties that you find to be liable on that claim. Although there are five parties in this case, it does not follow that if one is liable, all or any one of the others are liable as well. Each party is entitled to fair, separate and individual consideration of the case without regard to your decision as to the other parties. If you find that only one party is responsible for a particular loss, harm, or detriment, then you must impose damages, if any, for that loss, harm, or detriment only upon that party.

Prejudgment Interest

Prejudgment interest is the interest that money would earn before the trial of the case had the party who is entitled to that money had the money when it would have been received but for the wrongful conduct or failure to pay that money by the opposite party.

In this case, the parties have agreed that the question of prejudgment interest, should it be applicable, should be answered by the Court after the trial. Therefore, you are instructed not to include prejudgment interest for any party in any award that you might make in your verdict form.

No Speculative Damages

You may not award remote or speculative damages. You may not, therefore, include any damages which compensate for loss or harm that, although possible, are based on conjecture, speculation, or are not reasonably certain.

To state this principle in another way, damages are prohibited as speculative when their existence is uncertain, not when merely their amount is uncertain. Mathematical certainty is not required. Instead, the amount of damages must be shown with such reasonable degree of certainty as the situation permits.

In determining whether the proof meets the requisite degree of certainty, you may consider whether a party is responsible for creating the difficulty in ascertaining the exact amount of damages. If you make that determination, then you may, but are not required to, resolve any doubt about the amount of damages against the party responsible.

Reasonable Certainty

A party is not entitled to recover damages for a particular loss or type of harm unless the party proves that it is reasonably certain that the party has suffered such a loss or type of harm as a result of an action or inaction by the accused party. However, once a party proves that it is reasonably certain that the party has suffered a particular loss or type of harm as a result of an action or inaction by the accused party, the law does not require the party to prove the exact amount of that loss or harm.

If it is reasonably certain that the party has suffered a particular loss or type of harm as a result of a wrongful action or failure to act by the accused party, the injured party is entitled to recover damages for that loss or harm as long as there is some reasonable basis for estimating or approximating the amount of the loss or harm. A party may not be denied damages merely because the amount of the loss or harm is uncertain or difficult to determine.

A. Trade Secret Misappropriation

Trade Secret Misappropriation:
Damages – Types of Compensatory Damages

If you find that Defendants are liable to ISS for misappropriation of trade secrets, then you should consider whether ISS has suffered monetary damages as a result of that misappropriation.

The party seeking damages has the burden to prove to you that it has suffered harm due to the wrongful conduct. Damages are designed to restore an injured party to the position it would have been in had the wrongful conduct not occurred except to the extent a defendant can show a material and prejudicial change of position prior to acquiring knowledge or reason to know of the misappropriation.

In regard to ISS's claim for misappropriation of trade secrets, you may award damages for:

(1) actual loss to ISS; and

(2) benefits gained by Defendants that have not been taken into account in computing (1) actual loss.

Trade Secret Misappropriation:
Damages - Standard of Proof

Because damages in trade secret cases may be difficult to compute, ISS only has to provide a reasonable basis from which an amount of damages can be inferred or approximated. ISS does not have to prove the exact amount of its damages or prove these damages with mathematical certainty.

I caution you, however, that you may not award damages based on speculation. Any award of damages must be reasonable in light of all of the evidence in the case.

ISS claims that it has suffered actual monetary loss from misuse of its trade secrets. This actual loss can include both out-of-pocket expenses and lost profits. If you find, for example, that ISS would have realized profits from using trade secrets in its business that it has lost due to the wrongful conduct of Defendants, then you may measure damages by the amount of such lost profits for the particular periods of time that I will cover with you in a moment.

ISS may establish its lost profits by applying its own calculation of profit, or its own profit margin, to the Defendants' sales. ISS has the burden of establishing the Defendants' gross sales from the products whose sales were the result of any misappropriation. ISS does not need to negate all possibilities that someone other than ISS would have sold the product but for the Defendants' misappropriation.

Remember, however, that any award of damages for trade secret misappropriation must be reasonable and must not be based on speculation.

Trade Secret Misappropriation:
Damages – Ancillary Products

If you find the Defendants liable for trade secret misappropriation, you must determine the amount of ISS's lost profits, if any, attributable to the Defendants' misappropriation. ISS is not limited to recovering lost profits only on the sale of products that incorporated or included its trade secrets. ISS may recover profits lost from other products as a result of the misappropriation.

ISS is entitled to damages resulting from losses on products which incorporate or include its trade secrets, but also on other devices that are intimately connected with the misappropriation and ancillary thereto.

Trade Secret Misappropriation:
Damages - Determining Defendants' Gain

If you find the Defendants liable for trade secret misappropriation, you must determine the amount of the Defendants' monetary gain, if any, attributable to the Defendants' misappropriation. ISS is entitled to recover the Defendants' net profits attributable to any trade secret misappropriation. In measuring ISS's damages, you may consider what benefit Defendants have gained from misuse of ISS's trade secrets. Regardless of whether you find that ISS itself suffered losses, if you find that Defendants benefited from using a trade secret belonging to ISS, then you may award the monetary value that you attribute to those benefits as the measure of ISS's damages.

ISS has the burden of establishing the Defendants' gross sales from the products whose sales were the result of any misappropriation. The Defendants have the burden of establishing any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.

The Defendants must establish that any supposedly deductible costs are directly attributable to the products at issue, and are not attributable to other products or business endeavors, such as future products. In determining the amount of the Defendants' profits attributable to any trade secret misappropriation, it is appropriate to deduct from the relevant sales revenues only those costs and expenses that were directly incurred in the creation and sale of those products. It is not appropriate to deduct from revenues any general overhead, administrative and other costs that would have been incurred even if the Defendants had not made the sales at issue.

It is also not appropriate to deduct any compensation paid by Defendants to any trade secret infringer or conscious wrongdoer, including the value of labor of any of the Defendants.

Trade Secret Misappropriation:
Damages – Willful and Malicious Appropriation

If you should find from the preponderance of the evidence that ISS is entitled to a verdict for actual or compensatory damages for misappropriation of trade secrets, you may consider whether Defendants acted willfully and maliciously and record your answer on Question No. 22 of the Verdict Form.

Under the applicable law concerning damages under Tennessee Code Annotated § 47-25-1704, an act is willfully done if done voluntarily and intentionally and with the specific intent to commit such an act. An act is maliciously done if prompted or accompanied by ill will or such gross indifference to the rights of others as to amount to a willful act done intentionally without just cause or excuse.

ISS seeks an award of exemplary damages for misappropriation under the Tennessee Uniform Trade Secret Act. Under the TUTSA, you may consider an award of exemplary damages only if you find that the plaintiff has suffered actual damage as a legal result of the defendant's fault and you have made an award for compensatory damages.

Exemplary damages may be considered if, and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted both willfully and maliciously. Unlike other

exemplary damages, exemplary damages under the Tennessee Uniform Trade Secret Act are determined by the Court and are limited under the statute.

Clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that the defendant's wrong, if any, must be so clearly shown that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

If you determine under this claim (the trade secret misappropriation claim under the TUTSA) that the plaintiff has proven by clear and convincing evidence that the defendant you are considering willfully and maliciously misappropriated trade secret(s), then it will be up to the Court to determine the amount, if any, of exemplary damages as to that defendant.

Joint and Several Liability

If you find that ISS is entitled to money damages for Defendants' misappropriation of trade secrets, you may choose to hold all Defendants jointly and severally liable for the amount of damages. This means that each Defendant is individually liable for the entire amount, but ISS is not entitled to recover more than the total amount of the judgment.

B. Breach of Contract

Damages for Breach of Contract

When a contract is breached, the complaining party is entitled to be placed in as good a position as would have been occupied had the contract been fulfilled in accordance with its terms. The complaining party is not entitled to be put in a better position by a recovery of damage for breach of contract than would have been realized had there been full performance. The damages to be awarded are those that may fairly and reasonably be considered as arising out of the breach or those that may reasonably have been in the contemplation of the parties when the contract was made. Damages that are remote or speculative may not be awarded.

C. Unfair Competition

Damages

I have already instructed you regarding damages under the theory of misappropriation of trade secrets. Those damage instructions also apply should you determine that a defendant is liable under the theory of unfair competition. You may award damages for loss of business and goodwill, loss of profits, loss of customers, and recoupment of profits from the offending party.

Remember, ISS has the burden of establishing as to each defendant the amount of any actual damages, if any, that were caused by that defendant's wrongful conduct. As you know, damages must be determined with reasonable certainty. Mathematical precision need not be shown, but you are not to guess or speculate as to damages.

You may award an amount that would fairly compensate ISS for damages proximately caused by the defendant you are considering.

This, of course, is all for you the jury to determine.

D. Breach of Fiduciary Duty

Breach of Fiduciary Duty in Accordance with Tenn. Code Ann. § 48-18-403: Damages

If you find the Plaintiff has proven by a preponderance of the evidence Defendant Joseph Caesar breached the fiduciary duty he owed to Plaintiff in accordance with Tenn. Code Ann. § 48-18-403, you may award the Plaintiff such damages as you deem necessary to reasonably compensate the Plaintiff, including the following:

(1) Any profit or benefit Defendant Joseph Caesar received as a result of his breach; or

(2) Any compensation the Plaintiff paid to Defendant Joseph Caesar during the period of the breach.

Breach of Common Law Fiduciary Duty/Duty of Loyalty - Damages

If you find the Plaintiff has proven by a preponderance of the evidence Defendant Joseph Caesar, James Zachary, and/or ZTI breached the duty of loyalty he owed to Plaintiff, you may award the Plaintiff such damages as you deem necessary to reasonably compensate the Plaintiff, including the following:

(1) Any profit or benefit Defendant received as a result of his/its breach; or

(2) Any compensation the Plaintiff paid to Defendant during the period of the breach.

An agent's breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent's disloyalty. The availability of forfeiture is not limited to its use as a defense to the agent's claim for compensation.

E. Punitive Damages

Common Law Causes of Action:
Damages – Punitive Damages

ISS has asked that you make an award of punitive damages under the theories of breach of non-disclosure agreement, breach of other contract provisions, breach of statutory fiduciary duty, breach of common law fiduciary duty/duty of loyalty against defendants J2, Joseph Caesar, James Zachary, and ZTI. This award may be made only under the following circumstances. You may consider an award of punitive damages only if you find that ISS has suffered actual damage as a legal result of the Defendants' fault and you have made an award for compensatory damages. The purpose of punitive damages is not to further compensate ISS but to punish a wrongdoer and deter others from committing similar wrongs in the future. Punitive damages may be considered if, and only if, ISS has shown by clear and convincing evidence that a Defendant has acted either intentionally, recklessly, maliciously, or fraudulently.

As I told you earlier in discussing trade secret misappropriation exemplary damages, clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that the defendant's wrong, if any, must be so

clearly shown that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

A person acts intentionally when it is the person's purpose or desire to do a wrongful act or to cause the result.

A person acts recklessly when the person is aware of, but consciously disregards a substantial and unjustifiable risk of injury or damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person would use under all the circumstances.

A person acts maliciously when the person is motivated by ill will, hatred or personal spite.

A person acts fraudulently when: (1) the person intentionally either misrepresents an existing material fact or causes a false impression of an existing material fact to mislead or to obtain an unfair or undue advantage; and (2) another person suffers injury or loss because of reasonable reliance upon that representation.

If you decide to award punitive damages, you will not assess an amount of punitive damages at this time. You will, however, report your finding to the court.

State of Mind

Finally, I want to explain something about proving a defendant's state of mind.

Ordinarily, there is no way that either a corporation or an individual defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person or corporation is thinking. Remember that a corporation acts not only through the policies and decisions that it makes, but also through its designated supervisory employees and others designated by the corporation to act on its behalf. Therefore in determining the state of mind of a corporation you may consider the state of mind of those individuals designated to act on its behalf, as well as the policies and decisions of the corporation.

Moreover, both an individual defendant and a corporate defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

You may also consider the natural and probable results of any acts that the defendant knowingly did or did not do, and whether it

is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

IV. VERDICT FORM

Finally, ladies and gentlemen of the jury, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form which reflects your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a presiding juror after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your presiding juror will fill in and sign the verdict form.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, each of your verdicts must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgments. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your

own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits in the case. You may not have seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating but do not begin to deliberate and do not discuss the case at any time unless all twelve of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.