

**INSTRUCTION NO. 1**

Members of the Jury: Now that you have heard all of the evidence and the arguments of the attorneys, it is my duty to instruct you as to the law of the case.

A copy of these instructions will be sent with you to the jury room when you deliberate.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence of what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

**INSTRUCTION NO. 2**

All parties are equal before the law and a corporation is entitled to the same fair and conscientious consideration by you as any party.

### **INSTRUCTION NO. 3**

Under the law, a corporation is considered to be a person. Capstone is a corporation that can only act through its employees, agents, directors, or officers. Therefore, Capstone as a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

#### **INSTRUCTION NO. 4**

An agent is a person who performs services for another person or corporation under an express or implied agreement and the agent is subject to the other's control or right to control the manner and means of performing the services. The other person or corporation is called a principal.

**INSTRUCTION NO. 5**

An agent is acting within the scope of authority of the principal if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

**INSTRUCTION NO. 6**

Any act or omission of an agent within the scope of authority is same as if the act or omission was performed by the principal.

**INSTRUCTION NO. 7**

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

**INSTRUCTION NO. 8**

Hanger contends that Defendants Capstone, Ellis, Kimzey, and/or Fulton obtained Hanger's confidential information from a Hanger computer without authorization and/or in excess of authorization in violation of the federal Computer Fraud and Abuse Act.

To prevail on this claim, Hanger must prove each of the following elements by a preponderance of the evidence:

First, that Kimzey and/or Fulton individually and/or as agents for Capstone or Ellis accessed a Hanger computer without authorization or in excess of authorization;

Second, that Kimzey and/or Fulton, individually and/or as agents for Capstone or Ellis, did so knowingly and with the intent to defraud;

Third, that accessing the Hanger computer without authorization and/or in excess of authorization, Kimzey and Fulton furthered the intended fraud;

Fourth, that Capstone, Ellis, Kimzey, and Fulton by accessing the Hanger computer without authorization and/or in excess of authorization obtained information or documents that have value; and

Fifth, that Hanger suffered damages.

**INSTRUCTION NO. 9**

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

**INSTRUCTION NO. 10**

“Intent to Defraud” means an intent to deceive or cheat.

**INSTRUCTION NO. 11**

Hanger claims Capstone, Ellis, Kimzey and/or Fulton violated California Penal Code sections 502(c)(1), 502(c)(2) and 502(c)(7).

**INSTRUCTION NO. 12**

To prevail on its claim that Defendants violated California Penal Code Section 502(c)(1), Hanger must prove each of the following elements by a preponderance of the evidence:

First, that Kimzey and/or Fulton, individually and/or as agents of Capstone and Ellis, knowingly accessed and altered, damaged, deleted, destroyed or otherwise used data stored on Hanger's computers, computer systems and/or computer network in a manner that was not authorized by Hanger;

Second, that Defendant did so in order to wrongfully control or obtain data belonging to Hanger or to deceive Hanger; and

Third, that Hanger has been damaged by Defendant's unauthorized use of Hanger's computers, computer systems and/or computer network.

**INSTRUCTION NO. 13**

To prevail on its claim that Defendants violated California Penal Code Section 502(c)(2), Hanger must prove each of the following elements by a preponderance of the evidence:

First, that Kimzey and/or Fulton, individually and/or as agents of Capstone and Ellis, knowingly accessed and without permission took, copied, or used any data from a Hanger computer, computer system, or computer network and;

Second, that Hanger has been damaged by Defendant's unauthorized use of Hanger's computers, computer systems and/or computer network.

**INSTRUCTION NO. 14**

To prevail on its claim that Defendants violated California Penal Code Section 502(c)(7), Hanger must prove each of the following elements by a preponderance of the evidence:

First, that Defendants Kimzey and/or Fulton, individually and/or as agents of Capstone and Ellis, knowingly and without permission accessed or caused to be accessed Hanger's computers, computer systems and/or computer network; and

Second, that Hanger has been damaged by Defendant's unauthorized access of Hanger's computers, computer systems and/or computer network.

## INSTRUCTION NO. 15

Hanger is the owner of confidential patient information including social security numbers, medical diagnoses, prescriptions, treatment records, insurance data, addresses, telephone numbers and other contact information. This information is referred to as Hanger's "Confidential Information."

Hanger's Confidential Information constitutes trade secrets. Hanger claims that Defendants "misappropriated" its trade secrets.

"Trade Secret" means information used by a business that is not generally known or easily discovered by its competitors and for which reasonable efforts have been made to maintain secrecy because it has competitive value.

"Misappropriation" means improperly taking, using or disclosing a Trade Secret.

Hanger also claims that Defendant's taking, using and/or disclosing of its Confidential Information caused it harm and caused Defendant to be unjustly enriched.

**INSTRUCTION NO. 16**

To prevail on its claims that the defendant took, used or disclosed its Trade Secrets, Hanger must prove each of the following elements by a preponderance of the evidence:

First, that Hanger owned the Confidential Information;

Second, that the Confidential Information was a Trade Secret at the time it was taken, used or disclosed;

Third, that Defendant improperly took, used or disclosed one or more Trade Secrets;

Fourth, that Hanger was harmed or Defendant was unjustly enriched; and

Fifth, that Defendant's taking, using or disclosing Hanger Trade Secrets was a substantial factor in causing Hanger's harm or causing Defendant to be unjustly enriched.

**INSTRUCTION NO. 17**

Hanger has the burden of proving each of the following elements to establish that its Confidential Information was a Trade Secret:

First, that the Confidential Information was secret;

Second, that the Confidential Information was actually or potentially valuable, giving Hanger an important business advantage over its competitors, and

Third, that Hanger took steps to keep the Confidential Information secret.

## **INSTRUCTION NO. 18**

The secrecy required to prove that something is a Trade Secret does not have to be absolute in the sense that no one else in the world possesses the information. It may be disclosed to employees involved in Hanger's use of the Trade Secret as long as they are instructed to keep the information secret. It may also be disclosed to non-employees if they are obligated to keep the information secret. However, it must not have been generally known to the public or to people who could obtain value from knowing it.

**INSTRUCTION NO. 19**

A Defendant misappropriated Hanger's Trade Secrets by acquisition if Defendant acquired the Trade secret and knew or had reason to know that he or she used improper means to access and acquire the Trade Secrets.

**INSTRUCTION NO. 20**

A Defendant misappropriated Hanger's Trade Secret by use if Defendant:

1. Used it without Hanger's consent; and
2. Did any one of the following:
  - a. Acquired knowledge of the Trade Secret by improper means, or
  - b. At the time of use, Defendant knew or had reason to know that the knowledge of Hanger's Trade Secret came from another Defendant and that Defendant had previously acquired the Trade Secret by or for improper means, or
  - c. At the time of use, Defendant knew or had reason to know that the knowledge of Hanger's Trade Secret was acquired under circumstances requiring that Defendant to limit the use or disclosure of the Confidential Information; or
  - d. At the time of use, Defendant knew or had reason to know that the knowledge of Hanger's Trade Secret came from or through a Defendant that a duty to Hanger to limit the use or disclosure of the Confidential Information.

**INSTRUCTION NO. 21**

Improper means of acquiring a trade secret or knowledge of a trade secret is the theft of, misrepresentation of, or breach of or inducing a breach of a duty to maintain secrecy.

**INSTRUCTIONS NO. 22**

If Hanger proves that one or more Defendants took, used or disclosed one or more of its Trade Secrets, then Hanger is entitled to recover damages if Hanger suffered an actual loss or if the Defendant's acts caused Defendant to be unjustly enriched.

**INSTRUCTION NO. 23**

Capstone, Ellis, Rosales, Kimzey and Fulton were unjustly enriched if their taking, using and/or disclosing Hanger's Trade Secrets caused them to receive a benefit that they otherwise would not have achieved.

To decide the amount of any unjust enrichment, first determine the value of the benefit that Defendant received by taking, using and/or disclosing Trade Secrets. Then subtract from that amount Defendant's reasonable expenses.

**INSTRUCTION NO. 24**

Hanger claims that Defendant wrongfully exercised control over its personal property. To establish this claim, Hanger must prove each of the following elements by a preponderance of the evidence:

First, that Hanger owned, possessed, or had a right to possess the Confidential Information as defined in these instructions;

Second, that Defendant intentionally took possession of the Confidential Information;

Third, that Hanger did not give its permission;

Fourth, that Hanger was harmed; and

Fifth, that Defendant's conduct was a substantial factor in causing Hanger's harm.

**INSTRUCTION NO. 25**

Hanger claims that Capstone, Ellis, Rosales, Kimzey and Fulton intentionally interfered with two relationships: the relationship between Hanger and its patients and the relationship between Hanger and its employees. Hanger further contends that these relationships provide an economic benefit to Hanger. To prevail on this claim Hanger must prove each of the following elements beyond a preponderance of the evidence:

First, that these relationships result in or provide an economic benefit to Hanger;

Second, that Defendant knew of these relationships;

Third, that Defendant intended to disrupt these relationships;

Fourth, that Defendant engaged in wrongful acts by taking and using Hanger's Confidential Information to solicit Hanger's patients and employees;

Fifth, that these relationships were disrupted;

Sixth, that Hanger was harmed; and

Seventh, that Defendant's wrongful conduct was a substantial factor in causing Hanger's harm.

**INSTRUCTION NO. 26**

In deciding whether Defendant acted intentionally, you may consider whether Defendant knew that a disruption of such economic advantage would be substantially certain to result from Defendant's conduct.

**INSTRUCTION NO. 27**

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

Conduct is not a substantial factor in causing harm if the same harm would have occurred without the conduct.

## INSTRUCTION NO. 28

Hanger claims that it was harmed because Defendants misappropriated its trade secrets, accessed Hanger's computers without permission, used the trade secrets to unfairly compete with Hanger and took control of Hanger's property. Hanger also claims that Defendants are responsible for the harm because they were part of a conspiracy to commit these acts. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing or may be determined by the conduct of the parties.

If you find that any Defendant misappropriated Hanger's trade secrets, accessed Hanger's computers without permission, used trade secrets to unfairly compete with Hanger, and/or took control of Hanger's property in a manner that harmed Hanger, then you must decide whether any other Defendant is also responsible for the harm. To prevail on this claim, Plaintiff must prove each of the following by a preponderance of the evidence:

First, that each defendant was aware that the other Defendants planned to misappropriate Hanger's trade secrets, access Hanger's computers without permission, used Hanger's trade secrets to unfairly compete with Hanger, and/or took control of Hanger's property; and

Second, that each defendant agreed with another one of the defendants and intended that the misappropriating of Hanger's trade secrets, accessing of Hanger's computers without permission, competing unfairly with Hanger, and/or taking control of Hanger's property be committed.

Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make Defendants responsible for the harm.

A conspiracy may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged co-conspirators. Hanger is not required to prove that a Defendant personally committed a wrongful act or that he, she or it knew all of the details of the agreement or the identities of all the other participants.

**INSTRUCTION NO. 29**

If you decide that Defendants Capstone, Ellis, Rosales, Kimzey and Fulton joined the conspiracy to commit misappropriation of Hanger's trade secrets, access Hanger's computers without permission, use trade secrets to unfairly compete with Hanger, and/or take control of Hanger's property then each defendant who joined the conspiracy is responsible for all acts done as part of the conspiracy, whether the acts occurred before or after he or she joined the conspiracy.

**INSTRUCTION NO. 30**

Hanger claims that it and Rosales and Kimzey entered into an agreement titled “Confidentiality Acknowledgment/Training Attestation.” Hanger claims that Rosales and Kimzey each breached this contract by taking, using and/or disclosing Hanger’s Confidential Information.

Hanger also claims this breach caused harm to Hanger.

**INSTRUCTION NO. 31**

Hanger claims that it and Ellis entered into an agreement titled “Employment and Non-Solicitation Agreement” in which Ellis agreed to refrain from soliciting Hanger employees for a two year period after leaving Hanger. Hanger claims that Ellis breached this agreement by soliciting Hanger employees to work for Capstone within the two year time period after leaving Hanger.

“Soliciting” means an attempt to obtain something by persuasion or enticement.

Hanger also claims that Ellis’ breach of his agreement caused harm to Hanger.

**INSTRUCTION NO. 32**

To prevail on its breach of contract claim against Ellis, Rosales and/or Kimzey, Hanger has the burden of proving each of the following elements by a preponderance of the evidence:

First, that Defendant agreed to the terms and provisions of the document;

Second, that Hanger did all, or substantially all, of the significant things that the document required it to do;

Third, that Defendant failed to do something that the document required defendant to do; and

Fourth, that Hanger was harmed by that failure.

**INSTRUCTION NO. 33**

Hanger claims that it was harmed by Defendants Rosales', Kimzey's and Fulton's breach of the duty of loyalty. An employee owes its employer undivided loyalty. The duty of loyalty binds even lower-level employees, such as sales clerks or laborers. To prevail on this claim Hanger must prove each of the following elements by a preponderance of the evidence:

First, that Rosales, Kimzey and Fulton were Hanger's employees;

Second, that Rosales, Kimzey and/or Fulton, individually and/or as agents for Capstone or Ellis, knowingly acted against Hanger's interests or acted on behalf of Capstone's interests;

Third, that Hanger did not give permission to Rosales', Kimzey's and/or Fulton's conduct;

Fourth, that Hanger was harmed; and

Fifth, that Rosales', Kimzey's and/or Fulton's conduct was a substantial factor in causing Hanger's harm.

**INSTRUCTION NO. 34**

Hanger claims that it was harmed by Rosales', Kimzey's and Fulton's breach of the fiduciary duty of confidentiality. To prevail on this claim, Hanger must prove each of the following elements by a preponderance of the evidence:

First, that Rosales, Kimzey and Fulton were Hanger's employees;

Second, that Rosales, Kimzey and/or Fulton, individually and/or as agents for Capstone or Ellis, had information relating to Hanger that they knew or should have known was confidential;

Third, that Rosales, Kimzey and/or Fulton, individually and/or as agents for Capstone or Ellis, used Hanger's confidential information for their own benefit or communicated Hanger's confidential information to third parties;

Fourth, that Hanger did not give permission to Rosales', Kimzey's and/or Fulton's conduct;

Fifth, that the confidential information was not a matter of general knowledge;

Sixth, that Hanger was harmed; and

Seventh, that Rosales', Kimzey's and/or Fulton's conduct was a substantial factor in causing Hanger's harm.

**INSTRUCTION NO. 35**

I am required to instruct you about the amount of damages. By instructing you on damages, I do not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff, you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant.

In determining the measure of damages, you should consider:

The nature and extent of Hanger's injuries;

The reasonable value of the lost business opportunities;

The reasonable value of business opportunities which with reasonable probability will be lost in the future; and

The reasonable value of out-of-pocket costs expended by Hanger.

**INSTRUCTION NO. 36**

If you decide that Hanger has proved its claim against Ellis, Rosales, and Kimzey for breach of contract, you also must decide how much money will reasonably compensate Hanger for the harm caused by the breach. This compensation is called “damages.” The purpose of such damages is to put Hanger in as good a position as it would have been if Ellis, Rosales, and Kimzey had performed as they promised.

To award damages for any harm to Hanger, you must find:

1. That the harm was likely to arise in the ordinary course of events from the breach of the contract; or
2. That when the contract was made, both parties could have reasonably foreseen the harm as the probable result of the breach.

Hanger does not have to prove the exact amount of damages that resulted from the individual breach of contract, but you must not speculate or guess in awarding damages.

**INSTRUCTION NO. 37**

To recover damages for lost profits, Hanger must prove it is reasonably certain it would have earned profits but for Defendant's conduct.

To decide the amount of damages for lost profits, you must determine the total amount Hanger would have received but for Defendant's conduct and then subtract from that amount Hanger's expenses. The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

**INSTRUCTION NO. 38**

You may also award Hanger damages in the form of unjust enrichment. In order to receive unjust enrichment damages, you must find that Defendant received a direct benefit from Hanger, and that the benefit was something of value for which the Defendant did not pay.

If you determine that Hanger is entitled to the remedy of unjust enrichment, then you must determine the amount. You may award Hanger both the amount equal to the Hanger's actual damages and the amount by which the Defendant was unjustly enriched. However, your award of unjust enrichment cannot be provided if that award is already taken into account in calculating the actual damages.

**INSTRUCTION NO. 39**

Hanger has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

Defendant has the burden of proving by a preponderance of the evidence:

1. Hanger failed to use reasonable efforts to mitigate damages; and
2. The amount by which damages would have been mitigated.

#### **INSTRUCTION NO. 40**

If you decide that Defendant's acts caused Hanger harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed Hanger and to discourage similar conduct in the future.

In order to recover punitive damages, Hanger must prove by clear and convincing evidence that each Defendant who engaged in tortious conduct acted willfully and maliciously. You must determine whether Defendant acted willfully and maliciously, but you will not be asked to determine the amount of any punitive damages. You will calculate the amount later if necessary.

"Willfully" means that Defendant acted with a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances at the time and was not undertaken in good faith.

"Maliciously" means that Defendant acted with an intent to cause injury, or that Defendant's conduct was done with a willful and knowing disregard for the rights of others. Defendant acted with "knowing disregard" if defendant was aware of the probable consequences of defendant's conduct and deliberately failed to avoid those consequences.

**INSTRUCTION NO. 41**

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means you must be persuaded by the evidence that the claim or defense is highly probable. This is a higher standard of proof than proof by a preponderance of the evidence and should be used only in reference to an award of punitive damages.

You should base your decision on all of the evidence, regardless of which party presented it.

## **INSTRUCTION NO. 42**

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decisions. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

**INSTRUCTION NO. 43**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, you may continue your deliberations while waiting for the answers to any questions. Remember that you are not to tell anyone – including me – how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the Court.

**INSTRUCTION NO. 44**

A verdict form has been prepared for you. After you have reached a unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.