

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARTIS SPECIALTY INSURANCE
COMPANY,

Plaintiff,

v.

AQUA SCIENCES ENGINEERS, INC.,

Defendant.

Case No. 11-cv-03669-JST

DRAFT JURY INSTRUCTIONS

Following is a draft set of the jury instructions the Court tentatively intends to give in this matter. The Court will hold a hearing on these instructions on January 27, 2014 at 2:30 p.m.

These instructions are in draft form and have been posted for discussion purposes only. The parties will notice typographical errors and are encouraged to bring them to the Court's attention.

The parties should be prepared to answer the following questions at the jury instruction conference:

1. What are Lowe's/Chartis' claimed tort damages?
2. What are the damages, if any, for the subrogation claim?
3. If Chartis has a valid assignment, as the parties' jointly submitted instruction indicates, then why is the jury required to determine anything about subrogation?

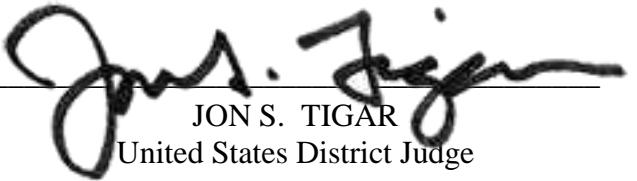
These questions are also relevant to the special verdict form, which cannot be drafted until they are answered.

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These draft instructions may not be cited, argued to the jury, or used in for any other purpose absent further order from the Court.

Dated: January 26, 2014



JON S. TIGAR
United States District Judge

CACI 5000. Duties of the Judge and Jury

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Members of the jury, you have now heard all the evidence. The attorneys will have one last chance to talk to you in closing argument. But before they do, it is my duty to instruct you on the law that applies to this case. You must follow these instructions as well as those that I previously gave you. You will have a copy of my instructions with you when you go to the jury room to deliberate. I have provided each of you with your own copy of the instructions.

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial.

Do not allow anything that happens outside this courtroom to affect your decision. Do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not do any research on your own or as a group. Do not use dictionaries or other reference materials.

These prohibitions on communications and research extend to all forms of electronic communications. Do not use any electronic devices or media, such as a cell phone or smart phone, PDA, computer, tablet device, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial. You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys say anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others. In addition, the order in which the instructions are given does not make any difference.

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Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final form.

CACI 5002. Evidence

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You must decide what the facts are in this case only from the evidence you have seen or heard during the trial, including any exhibits that I admit into evidence. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. However, the attorneys for both sides have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness already answered, you must ignore the answer.

During the trial I granted a motion to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.

CACI 5003. Witnesses

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A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness’s testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?
- (b) How well did the witness remember and describe what happened?
- (c) How did the witness look, act, and speak while testifying?
- (d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?
- (e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.

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CACI 5006. Nonperson Party

A corporation, Chartis Specialty Insurance Company (“Chartis”) and a corporation, Aqua Sciences Engineers (“ASE”), are parties in this lawsuit. Chartis and ASE are entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to Chartis and ASE.

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CACI 200. Obligation to Prove—More Likely True Than Not True

A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as "the burden of proof."

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

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CACI 202. Direct and Indirect Evidence

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

Direct evidence can prove a fact by itself. For example, if a witness testifies she saw a jet plane flying across the sky, that testimony is direct evidence that a plane flew across the sky. Some evidence proves a fact indirectly. For example, a witness testifies that he saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as “circumstantial evidence.” In either instance, the witness’s testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

CACI 209. Use of Interrogatories of a Party

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Before trial, each party has the right to ask the other parties to answer written questions. These questions are called interrogatories. The answers are also in writing and are given under oath. You must consider the questions and answers that were read to you the same as if the questions and answers had been given in court.

CACI 215. Exercise of a Communication Privilege

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Tom Maddox and Sharon Montgomery has an absolute right not to disclose what he told his attorney in confidence because the law considers this information privileged. Do not consider, for any reason at all, the fact that Tom Maddox and Sharon Montgomery did not disclose what he told his attorney. Do not discuss that fact during your deliberations or let it influence your decision in any way.

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CACI 219. Expert Witness Testimony

During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in his or her field of expertise even if he or she has not witnessed any of the events involved in the trial.

You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider:

1. The expert's training and experience;
 2. The facts the expert relied on; and
 3. The reasons for the expert's opinion.
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CACI 221. Conflicting Expert Testimony

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If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications.

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CACI 223. Opinion Testimony of Lay Witness

A witness who was not testifying as an expert gave an opinion during the trial. You may, but are not required to, accept that opinion. You may give the opinion whatever weight you think is appropriate.

Consider the extent of the witness’s opportunity to perceive the matters on which the opinion is based, the reasons the witness gave for the opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

CACI 300. Breach of Contract—Introduction

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Chartis claims that Lowe's and ASE entered into contracts for ASE to conduct a Phase I environmental site assessment.

Chartis claims that ASE breached this contract.

Chartis also claims that ASE's breach of this contract caused harm to CHARTIS for which ASE should pay.

ASE denies Chartis' claims.

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CACI 303. Breach of Contract—Essential Factual Elements

To recover damages from ASE for breach of contract, Chartis must prove all of the following:

1. That Chartis and ASE entered into a contract;
 2. That ASE failed to do something that the contract required it to do; and
 3. That Chartis was harmed by that failure.
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CACI 315. Interpretation—Meaning of Ordinary Words

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You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

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CACI 316. Interpretation—Meaning of Technical Words

You should assume that the parties intended technical words used in the contract to have the meaning that is usually given to them by people who work in that technical field, unless you decide that the parties clearly used the words in a different sense.

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CACI 317. Interpretation—Construction of Contract as a Whole

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

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CACI 318. Interpretation—Construction by Conduct

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

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Special Instruction No. 1. Acceptance of Performance – Affirmative Defense

If ASE proves that Lowe’s was fully aware of any defects in ASE’s performance at the time Lowe’s paid ASE’s invoices, then ASE did not breach its contract with Lowe’s.

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CACI 327. Assignment Not Contested

Chartis was not a party to the original contract. However, it may bring a claim for breach of contract because Lowe's transferred the rights under the contract to Chartis. This transfer is referred to as an "assignment."

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CACI 350. Introduction to Contract Damages

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

To recover damages for any harm, Chartis must prove that when the contract was made, ASE and Lowe’s knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as a result of the breach of the contract.

Chartis also must prove the amount of its damages according to the following instructions. It does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.

Chartis claims damages for the amount it paid to clean up the contamination at the property purchased by Lowe’s.

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CACI 400. Negligence: Essential Factual Elements

Chartis claims that Lowe’s was harmed by ASE’s negligence. To establish this claim, Chartis must prove all of the following:

1. That ASE was negligent;
 2. That Lowe’s was harmed; and
 3. That ASE’s negligence was a substantial factor in causing Lowe’s’ harm.
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CACI 600. Professional Negligence Standard of Care

An environmental consultant is negligent if he or she fails to use the skill and care that a reasonably careful environmental consultant would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

You must determine the level of skill and care that a reasonably careful environmental consultant would use in similar circumstances based only on the testimony of the expert witnesses who have testified in this case.

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CACI 430. Causation: Substantial Factor

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 that conduct.

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CACI 431. Causation: Multiple Causes

A person's negligence may combine with another factor to cause harm. If you find that ASE's negligence was a substantial factor in causing Chartis's harm, then ASE is responsible for Chartis's harm. ASE cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing Chartis's harm.

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Special Instruction No. 2. Subrogation

Chartis seeks to recover damages from ASE based upon a claim of subrogation.

To prevail on a claim for subrogation, Chartis must prove:

- 1) Lowe's has suffered a loss for which ASE is liable;
 - 2) Chartis has compensated for the loss;
 - 3) Lowe's has existing, assignable causes of action against the party to be charged, which Lowes could have pursued had the insurer not compensated the loss;
 - 4) Chartis has suffered damages caused by the act or omission which triggers the liability of ASE;
 - 5) Justice requires that the loss be shifted entirely from Lowe's to ASE;
 - 6) Chartis' damages are in a stated sum, which is usually the amount paid to or on the behalf of the insured;
 - (7) Chartis' payment was not voluntary; and
 - (8) The amount paid was reasonable.
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CACI 3900. Introduction to Tort Damages – Liability Contested

If you decide that Chartis has proved its claim against ASE, you also must decide how much money will reasonably compensate Chartis for the harm. This compensation is called “damages.” The amount of damages must include an award for each item of harm that was caused by ASE’s wrongful conduct, even if the particular harm could not have been anticipated.

Chartis does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

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**QUESTIONS REGARDING DAMAGES INSTRUCTIONS: WHAT ARE
LOWE’S/CHARTIS’ TORT DAMAGES? WHAT ARE THE DAMAGES, IF ANY, FROM
“SUBROGATION”? IF CHARTIS HAS A VALID ASSIGNMENT, WHY IS THE JURY
EVEN REQUIRED TO DETERMINE ANYTHING ABOUT SUBROGATION?**

THESE QUESTIONS ARE ALSO RELEVANT TO THE SPECIAL VERDICT FORM.

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CACI 3934. Damages on Multiple Legal Theories

Chartis seeks damages from ASE under more than one legal theory. However, each item of damages may be awarded only once, regardless of the number of legal theories alleged.

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CACI 3964. Jurors Not to Consider Attorney Fees and Court Costs

You must not consider, or include as part of any award, attorney fees or expenses that the parties incurred in bringing or defending this lawsuit.

CACI 5009. Predeliberation Instructions

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When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the courtroom deputy. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

CACI 5010. Taking Notes During the Trial

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If you have taken notes during the trial you may take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict. You should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

At the end of the trial, your notes will be collected and destroyed.

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CACI 5011. Reading Back of Trial Testimony in Jury Room

You may request in writing that trial testimony be read to you. I will have the court reporter read the testimony to you. You may request that all or a part of a witness's testimony be read.

Your request should be as specific as possible. It will be helpful if you can state:

1. The name of the witness;
2. The subject of the testimony you would like to have read; and
3. The name of the attorney or attorneys asking the questions when the testimony was given.

The court reporter is not permitted to talk with you when she or he is reading the testimony you have requested.

While the court reporter is reading the testimony, you may not deliberate or discuss the case.

You may not ask the court reporter to read testimony that was not specifically mentioned in a written request. If your notes differ from the testimony, you must accept the court reporter's record as accurate.

CACI 5012. Introduction to Special Verdict Form

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I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form in the order they appear. After you answer a question, the form tells you what to do next. All of you must deliberate on and answer each question. All of you must agree on an answer before you can move on to the next question.

When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the courtroom deputy that you are ready to present your verdict in the courtroom.

CACI 5017. Polling the Jury

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After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as “polling” the jury and is done to ensure that at least nine jurors have agreed to each decision.

The verdict form that you will receive asks you to answer several questions. You must vote separately on each question. Although nine or more jurors must agree on each answer, it does not have to be the same nine for each answer. Therefore, it is important for each of you to remember how you have voted on each question so that if the jury is polled, each of you will be able to answer accurately about how you voted.

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CACI 5019. Questions From Jurors

If, during the trial, any of you had a question that you believed should be asked of a witness, you were instructed to write out the question and provide it to me through my courtroom staff. I shared your questions with the attorneys, after which, I decided whether the question could be asked.

If a question was asked and answered, you are to consider the answer as you would any other evidence received in the trial. Do not give the answer any greater or lesser weight because it was initiated by a juror question.

If the question was not asked, do not speculate as to what the answer might have been or why it was not asked. There are many legal reasons why a suggested question cannot be asked of a witness. Give the question no further consideration.

CACI 5020. Demonstrative Evidence

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During the trial, materials have been shown to you to help explain testimony or other evidence in the case.

You will not be able to review them during your deliberations because they are not themselves evidence or proof of any facts. You may, however, consider the testimony given in connection with those materials.

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APPENDIX:
PRELIMINARY JURY INSTRUCTIONS

CACI 100. Preliminary Admonitions

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You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant -messaging service, any Internet chat room, blog, or website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to the court attendant as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. I have no information that there will be news reports concerning this case. This prohibition extends to the use of the Internet in any way, including reading any blog about the case or about anyone involved with it. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court attendant. It is important that all jurors see and hear the same evidence at the same time.

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case or use any Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony. If you happen to pass by the scene, do not stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You

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must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.

You must decide what the facts are in this case. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

CACI 101. Overview of Trial

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To assist you in your tasks as jurors, I will now explain how the trial will proceed. I will begin by identifying the parties to the case. Chartis Specialty Insurance Company (“Chartis”) filed this lawsuit. It is called a plaintiff. It seeks damages from Aqua Sciences Engineers (“ASE”), which is called a defendant.

First, each side may make an opening statement, but neither side is required to do so. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence. You cannot use it to make any decisions in this case.

Next, the jury will hear the evidence. Chartis will present evidence first. When Chartis is finished, ASE will have an opportunity to present evidence.

Each witness will first be questioned by the side that asked the witness to testify. This is called direct examination. Then the other side is permitted to question the witness. This is called cross-examination.

Documents or objects referred to during the trial are called exhibits. Exhibits are given a number so that they may be clearly identified. Exhibits are not evidence until I admit them into evidence. During your deliberations, you will be able to look at all exhibits admitted into evidence.

There are many rules that govern whether something will be admitted into evidence. As one side presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of your presence.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

CACI 102. Taking Notes During the Trial

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You have been given notebooks and may take notes during the trial. Do not take the notebooks out of the courtroom or jury room at any time during the trial. You may take your notes into the jury room during deliberations.

You should use your notes only to remind yourself of what happened during the trial. Do not let your note-taking interfere with your ability to listen carefully to all the testimony and to watch the witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be influenced by whether or not other jurors are taking notes. Your independent recollection of the evidence should govern your verdict, and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

The court reporter is making a record of everything that is said. If during deliberations you have a question about what the witness said, you should ask that the court reporter's records be read to you. You must accept the court reporter's record as accurate.

At the end of the trial, your notes will be collected and destroyed.

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CACI 104. Nonperson Party

A corporation, Chartis and a corporation, ASE, are parties in this lawsuit. Chartis and ASE are entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to Chartis and ASE.

CACI 106. Evidence

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You must decide what the facts are in this case only from the evidence you see or hear during the trial. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you see or hear when court is not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys will talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a "stipulation." No other proof is needed and you must accept those facts as true in this trial.

Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

An attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

CACI 107. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?
- (b) How well did the witness remember and describe what happened?
- (c) How did the witness look, act, and speak while testifying?
- (d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?
- (e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

CACI 112. Questions from Jurors

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If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys and decide whether it may be asked.

Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

Remember that you are not an advocate for one side or the other. Each of you is an impartial judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any question asked by any juror with any other juror until after deliberations begin.

CACI 113. Bias

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Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

United States District Court
Northern District of California

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CACI 114. Bench Conferences and Conferences in Chambers

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess to discuss matters outside of your presence. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence. Do not be concerned about our discussions or try to guess what is being said.

I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of my view of the evidence.

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CACI 116. Why Electronic Communications and Research Are Prohibited

I know that many of us are used to communicating and perhaps even learning by electronic communications and research. However, there are good reasons why you must not electronically communicate or do any research on anything having to do with this trial or the parties.

In court, jurors must make important decisions that have consequences for the parties. Those decisions must be based only on the evidence that you hear in this courtroom.

The evidence that is presented in court can be tested; it can be shown to be right or wrong by either side; it can be questioned; and it can be contradicted by other evidence. What you might read or hear on your own could easily be wrong, out of date, or inapplicable to this case.

The parties can receive a fair trial only if the facts and information on which you base your decisions are presented to you as a group, with each juror having the same opportunity to see, hear, and evaluate the evidence.

Also, a trial is a public process that depends on disclosure in the courtroom of facts and evidence. Using information gathered in secret by one or more jurors undermines the public process and violates the rights of the parties.
