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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ALIFAX HOLDING SPA,

Plaintiff,

V.

ALCOR SCIENTIFIC INC.; and  
FRANCESCO A. FRAPPA,

Defendants.

C.A. No. 14-440 WES

## CONCLUDING JURY INSTRUCTIONS

## Phase I: Liability

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DUTY OF THE JURY

Members of the jury, you have now heard all of the evidence. Now I will instruct you on the law. 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.

In applying the law that I am about to explain, you must consider my instructions as a whole. My instructions are equally important; you may not single out some and disregard others. You must accept and apply the law as I give it to you in its entirety.

You must accept and apply the rules of law that I give to you whether you agree with those rules or not. It would be a violation of the oath you took as jurors to base a decision on any version of the law other than that contained in my instructions, just as it would be a violation of that oath to return a decision upon anything but the evidence in this case. It is not up to you to decide what the law is or should be. Your duty is to apply the law as I explain it to you.

You must not be influenced by any personal likes, dislikes, opinions, prejudices, or sympathy. You must decide the case solely on the evidence before you. All parties - and the law - expect that you will carefully and impartially consider all the evidence, follow the law as I explain it to you, and reach a just verdict, regardless of the consequences.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case. Furthermore, you should not interpret anything I have said or done during this trial as expressing an opinion on my part as to what the facts in this case are. I have not intended to express any opinion and you should not be concerned about what my opinions might be. It is not my function to determine the facts; that is a matter entirely up to you.

You should not worry about memorizing or writing down all of the instructions as I state them, because I will send into the jury room a written copy of my instructions. However, you must know that the law is as I will give it

to you from the bench. The written copy is merely a guide to assist you.

**EVIDENCE - DEFINITION - UNCONSCIOUS BIAS**

You must find the facts of this case solely based on the evidence properly before you and from all reasonable and legitimate inferences that can be drawn from that evidence.

Evidence that is properly before you consists of:

1. The testimony of the witnesses; and
2. The exhibits that I have admitted into evidence.

From that evidence, you may draw whatever conclusions are reasonable under the circumstances.

The evidence that is properly before you does not include:

1. Comments or statements by the attorneys;
2. Answers given by witnesses which I ordered stricken and instructed you to disregard;
3. Documents, photographs, or other items which may have been referred to but have not been admitted into evidence. Since they are not proper evidence, you should not speculate or guess as to what they might say or show

and you may not consider them except to the extent that, and for the purpose that, they may have been read or shown to you during the course of the trial; and

4. Anything you may have heard or seen outside of this courtroom regarding the events in question or the participants in this case.

Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientific studies of the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence. Studies have also taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case.

Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.

Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.

Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group.

You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.

Working together will help achieve a fair result.



EVIDENCE - DIRECT & CIRCUMSTANTIAL

As I mentioned in my preliminary instructions, evidence may be direct or may be circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is proof of one or more facts from which you can infer the existence of another fact. You should consider both kinds of evidence. As a general rule, the law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Direct evidence can prove a material fact by itself. It does not require any other evidence. It does not require you to draw any inferences. A witness's testimony is direct evidence when the witness testifies concerning what he or she saw, heard, or felt. In other words, when a witness testifies about what is known from his or her own knowledge by virtue of her own senses - what he or she sees, touches, or hears - that is direct evidence. The only question is whether you believe the witness's testimony. A document or a physical object may

also be evidence when it can prove a material fact by itself without any other evidence or inference. You may, of course, have to determine the genuineness of the document or the object.

Circumstantial evidence is different from direct evidence. It cannot prove a material fact by itself. Rather, it is evidence that tends to prove a material fact when considered together with other evidence and by drawing inferences. Inferences from circumstantial evidence may be drawn on the basis of reason, experience, and common sense. Inferences may not, however, be drawn from guesswork, speculation, or conjecture. The strength of the inferences arising from circumstantial evidence is for you to decide, and it is for you to decide how much weight to give to any evidence that has been presented.

The law does not require a party to introduce direct evidence. A party may prove a fact entirely by circumstantial evidence or by a combination of direct and circumstantial evidence. Circumstantial evidence is not

less valuable than direct evidence. So, as I have said, you are to consider all of the evidence in the case, both direct and circumstantial, to determine what the facts of the case are and to arrive at your verdict.

WITNESSES - NUMBER - WEIGHT OF TESTIMONY

In evaluating testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in the light of all of the evidence, you believe that the witness is mistaken or has testified falsely or that he or she is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness's testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of an issue that determines where the weight of the evidence lies. Rather, it is the quality of the witnesses' testimony that counts.

WITNESSES - CREDIBILITY - GENERAL FACTORS

One of the things jurors must do is assess whether courtroom testimony is credible and this is a difficult task. For one thing, some time has passed between the events at issue and this trial. For another, witnesses' testimony is given in response to lawyers' questions, subject to our evidence rules, which is different from the conversations you might have with others in your daily life.

In considering the testimony, there are a number of factors you may consider, including:

- what the witness said and how he or she said it;
- what motives, biases, or interests the witness may have in giving this testimony;
- The opportunity or lack of opportunity the witness had to acquire knowledge of the facts about which the witness testified. In other words, was the witness in a position to have accurately perceived the facts that the witness related to you;

- whether the witness hopes for, expects, or received any benefit for giving this testimony or was under any pressure to give this testimony;
- whether testimony makes sense from the witness's perspective and after looking at all of the evidence in the case; and
- whether the witness's testimony is supported or contradicted by independent evidence

If the witness has made a prior statement about the facts in this case, consider what the witness said and whether the statement was recorded at the time; the circumstances of that statement; what information the witness may have been exposed to before making that statement; and what happened between that statement and the trial testimony.

During the trial, evidence may have been introduced to attempt to show that a witness lied under oath or gave different testimony on a prior occasion. This evidence may be considered, along with all other evidence, in deciding whether to believe the witness and how much

weight to give the testimony of the witness. It may not be considered for any other purpose.

Once you have decided whether a witness is accurate and believable, you may give the witness's testimony whatever weight you think appropriate. You may believe everything a witness says, or only part of it, or none of it.

WITNESSES - EXPERT WITNESS TESTIMONY

During this trial, you have heard testimony from several witnesses who claim to have specialized knowledge in a technical field. Such persons are sometimes referred to as expert witnesses. Because of their specialized knowledge, they are permitted to express opinions which may be helpful to you in determining the facts. You are not required, however, to accept such opinions just because the witnesses have specialized knowledge.

In determining what weight to give to the testimony of a so-called expert witness, you should apply the same tests of credibility that apply to the testimony of any other witness. That is to say, you should consider factors such as the witness's:

- opportunity to have observed the facts about which he testified; and
- apparent candor or lack of candor.

In addition, you should consider the witness's:

- qualifications;



- the soundness of the reasons given for any opinions;
- the accuracy of the facts upon which the witness's opinions were based; and
- all the other evidence in the case.

In short, you should carefully consider the opinions of expert witnesses, but they are not necessarily conclusive.

WITNESSES - FOREIGN LANGUAGE TESTIMONY

You heard testimony of multiple witnesses who testified in Italian. As I explained in my preliminary instructions, some of you may know or understand the Italian language, but it is important that all jurors consider the same evidence. Therefore, you must accept the interpreter's translation of the witness's testimony. You may not substitute your own understanding of what the witness may have been saying, and you must disregard any different meaning. You are furthermore prohibited from making any assumptions about a witness or a party based solely on the use of an interpreter to assist that witness or party in testifying or presenting evidence.

WITNESSES - DEPOSITION TESTIMONY

This trial included evidence in the form of deposition testimony. You should consider this testimony in just the same way as if the witness had been present to testify. In other words, you should give deposition testimony the credibility or weight, if any, you think it deserves.

EXHIBITS

In addition to assessing the credibility of the witnesses and the weight to be given to their testimony, you should also evaluate the exhibits which you will have with you in the jury room. Please examine them and consider them carefully. However, bear in mind that merely because an exhibit has been admitted into evidence does not mean that you are required to accept it at face value. Like the testimony of a witness, the significance of an exhibit or the weight you attach to it should depend upon your evaluation of that exhibit in light of all the facts and circumstances of the case.

OBJECTIONS BY COUNSEL

There were occasions during the presentation of evidence in this case when the attorneys objected to a question that was asked of a witness. You should not penalize an attorney, or more importantly, his or her client, for objecting. It is the attorney's right, and indeed the attorney's duty, to protect a client's interests by objecting to what the attorney may believe is evidence that does not satisfy the requirements of the rules of evidence.

If I sustained the objection, it is important that you not speculate about what the answer to the objected-to question might have been. By sustaining the objection, the Court has determined that the evidence should not be considered by you.

CONDUCT OF THE COURT

At times during this trial I chose to ask witnesses questions. You should not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be. As I have said before, it is up to you to determine the facts in this case, and you should not interpret anything I have said or done during this trial as expressing an opinion on my part as to what the facts are.

BURDEN OF PROOF

As I explained in my preliminary instructions, In any legal action, facts must be proven by satisfying a standard of evidence known as a "burden of proof."

In this action, the law imposes on Alifax the responsibility or burden of proving its claim. It is not up to the Defendants to disprove Alifax's claims. Furthermore, Alifax must prove the truth of its allegations by what is called "a fair preponderance of the evidence," a burden of proof which I will now define in more detail.

PREPONDERANCE OF THE EVIDENCE

Here, Alifax must prove each and every element of its claims by what the law refers to as "a fair preponderance of the evidence" which is another way of saying that Alifax must prove its claims by "the greater weight of the evidence." To put it another way, you must be satisfied that the evidence shows that what Alifax is claiming is "more probably true than not."

Perhaps the best way to explain what is meant by a fair preponderance of the evidence is to ask you to visualize an old-fashioned scale with two counterbalancing arms and use it to mentally weigh the evidence with respect to each claim being made by Alifax. If, after you have heard all the evidence relevant to the claim, you determine that the scale tips in favor of Alifax, no matter how slightly it may tip, then Alifax has sustained its burden of proving that particular claim by a fair preponderance of the evidence because it has made the scale tip in its favor.



If, on the other hand, you determine that the scale tips in favor of the Defendants, or that the scale is so evenly balanced that you cannot say whether it tips one way or the other, then Alifax has failed to prove its claim by a fair preponderance of the evidence because it has not made the scale tip in its favor.

In this case, the burden of proof always remains with Alifax; it never shifts to the Defendants. Thus, as I said, the Defendants have no responsibility to "disprove" any element of Alifax's claims.

Do not confuse the burden of proving something by a fair preponderance of the evidence with the burden of proving something "beyond a reasonable doubt" or by "clear and convincing evidence." As most of you probably know or have heard, in a criminal case the prosecution must prove the Defendant is guilty beyond a reasonable doubt. That is a very stringent standard of proof. However, this is not a criminal case. Therefore, in order to prevail, the Plaintiff need not prove its claim beyond

a reasonable doubt; it need only prove it by a fair preponderance of the evidence.

Similarly, you may recall that in my preliminary instructions I referred to the standard of proof by "clear and convincing evidence." That standard no longer applies to any of the claims before you. Therefore, you should put it out of your mind.

SUMMARY OF CLAIMS

Now that you have a framework to guide your decision-making process, I will explain the legal claims you must decide. In rendering a verdict, you must decide the following principal issues:

- (1) Whether Alifax has proven by a preponderance of the evidence that particular information comprised one or more trade secrets, as that term is defined by law?
- (2) Whether Alifax has proven by a preponderance of the evidence Alcor and/or Mr. Frappa misappropriated one or more of Alifax's trade secrets as that act is defined by law?
- (3) Whether Alifax has proven by a preponderance of the evidence that any misappropriation by Alcor and/or Mr. Frappa was malicious or willful?
- (4) Whether Mr. Frappa breached his duty of confidentiality to Alifax, as that duty is defined under Italian law?

I will now describe the law that applies to each of these contentions in greater detail.

MISAPPROPRIATION OF TRADE SECRETS

Alifax alleges that Alcor and Mr. Frappa misappropriated the company's trade secrets in violation of Rhode Island General Laws § 6-41-1, the Rhode Island Uniform Trade Secrets Act. With respect to this claim, during this phase of your deliberations, Alifax has the burden of proving each of the following propositions by a preponderance of the evidence:

- (1) Alifax possessed information constituting a trade secret;
- (2) Alcor and/or Mr. Frappa misappropriated Alifax's trade secret.

If you find from your consideration of all the evidence that Alifax has proven each of these propositions by a preponderance of the evidence, then you should return a verdict for Alifax on this claim. On the other hand, if you find that either of these propositions has not been proven, your verdict should be for Alcor and/or Mr. Frappa on this claim.

TRADE SECRET DEFINED

A threshold issue for this claim is whether a trade secret existed that could be misappropriated. A "trade secret" is defined by statute as information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, 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
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Thus, you should conclude that information comprises a protectable trade secret if, and only if, Alifax has proven by a preponderance of the evidence that:

- (1) the information was proprietary;
- (2) the information had economic value for Alcor and Mr. Frappa; and

(3) Alifax took reasonable steps to protect the information.

COMPILATION/COMBINATION TRADE SECRET

As I just stated, Rhode Island law provides that a trade secret may be comprised of a "compilation" of information. Compiled information may comprise a trade secret even if the compilation contains elements that, by themselves, exist in the public domain.

To prove that any such information comprises a "compilation" trade secret under the statute, Alifax must prove by a preponderance of the evidence that the information comprises a unique combination of elements that, as a unified whole, affords a competitive advantage.

If, on the other hand, you find the information is in the public domain and the end-product is unoriginal, the compilation does not provide a competitive advantage and does not qualify as a trade secret.



INDEPENDENT ECONOMIC VALUE

Alleged trade secrets must also have "independent economic value" to be protectable. Information has "independent economic value" if it gives its owner a competitive advantage over others who do not know the information.

REASONABLE STEPS TO MAINTAIN SECRECY

The law requires that one who possesses a trade secret take reasonable steps to preserve its secrecy. The law requires reasonable measures, not heroic measures. In determining whether Alifax has taken reasonable precautions to protect the secrecy of its information, you should consider ~~to~~ the following factors:

- The existence or absence of an express agreement restricting disclosure and whether Alifax has enforced such agreements consistently;
- The nature and extent of security precautions taken by Alifax to prevent acquisition of the information by unauthorized third parties;
- The circumstances under which the information was disclosed to any employee to the extent that these circumstances give rise to a reasonable inference that further disclosure, without the consent of Alifax, was prohibited; and

- The degree to which the information has been placed in the public domain or rendered readily ascertainable by third parties (such as online) through issued patents or unrestricted product marketing.

You may consider, for example, whether Alifax took security precautions such as limiting access to the public and imposing requirements that visitors be logged in and out, escorted by Alifax personnel, and not permitted into areas where the trade secrets were available. You may also consider whether Alifax restricted the information to those employees with a need to know the information in order to perform their jobs.

MISAPPROPRIATION

If you find that Alifax's alleged confidential information is a protectable trade secret, then you must decide whether Alifax has established by a preponderance of the evidence that Alcor and Mr. Frappa misappropriated Alifax's trade secrets.

"Misappropriation" of a trade secret is defined as the acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means. Misappropriation may also include the disclosure or use, without express or implied consent, of a trade secret of another by a person who:

- (1) Used improper means to acquire knowledge of the trade secret; or
- (2) At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
  - a. Derived from or through a person who utilized improper means to acquire it;

- b. Was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
- c. Was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
- d. Before a material change of his position, knew or had reason to know, that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

As used in the context, "improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. If Alcor and/or Frappa had prior knowledge of the same information that Alifax contends is a trade secret, or learned of the same information through proper means, they cannot be liable for misappropriation.

You are hereby instructed that Mr. Frappa owed Alifax, the successor to his former employer Sire, a post-employment duty of loyalty prohibiting the disclosure or use of Alifax's confidential or proprietary information in a manner that was likely to injure Alifax's business. This duty does not encompass professional skills or technical know-how acquired or improved by Mr. Frappa during his work for Sire.

Furthermore, as used in the context of misappropriation, the term "person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

MISAPPROPRIATION OF TRADE SECRETS - IMPROPER USE

"Use" is not limited to a use in the manufacture or sale of a product.

Employing the trade secret information by itself, or in combination with other information, in manufacturing, production, research or development, marketing goods that embody the trade secret, or soliciting customers through the use of trade secret information acquired by improper means can constitute use.

It is not improper for a competitor to use information it acquired through independent development or invention, research of public or industry resources, or reverse engineering.

WILLFUL AND MALICIOUS MISAPPROPRIATION

If you find that Alifax's alleged confidential information is a protectable trade secret and that Alcor and/or Frappa misappropriated that trade secret, you must determine whether such misappropriation was willful and malicious. Willful and malicious conduct is conduct carried on with a conscious disregard for the rights of others. A person acts with conscious disregard of the rights of others when it or he is aware of the probable harmful consequences of its or his conduct and deliberately fails to avoid those consequences.



BREACH OF A CONFIDENTIAL RELATIONSHIP

Alifax's final claim is that Mr. Frappa breached a confidential relationship with Alfiar, the successor to his former employer Sire, by disclosing the company's confidential information.

As I mentioned in my preliminary instructions, Italian law applies to this claim. Under Italian law, an ex-employee owes his or her former employer a post-employment duty of loyalty. This duty prohibits the ex-employee from disclosing or using the former employer's confidential or proprietary information in a manner that is likely to injure the former employer's business. However, the ex-employee is not prohibited from using his or her experience, professional skills, or technical know-how developed or improved on the job in future employment.

If you find that Alifax has proven by a preponderance of the evidence that Mr. Frappa disclosed or used Alifax's confidential or proprietary information in a manner that was likely to injure Alifax's business, then

you should find Mr. Frappa liable. On the contrary, if you find that, in his employment with Alcor, Mr. Frappa used only his experience, professional skills or technical know-how, even if acquired or improved during his work for Alifax, you must find for Mr. Frappa on this claim.

SELECTION OF FOREPERSON & DUTY TO DELIBERATE

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court. After choosing a foreperson, you will then discuss the case with your fellow jurors to reach agreement if you can do so.

Your verdict must be unanimous. That is, all ten of you must agree as to what the verdict will be. Therefore, there are two things that you should keep in mind:

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the

other jurors may disagree as long as you have listened to their views with an open mind.

COMMUNICATIONS WITH THE COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

JURY RECOLLECTION CONTROLS - REHEARING TESTIMONY

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. If you feel that you need to rehear testimony, I will consider your request. However, keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

RETURN OF VERDICT

A verdict form has been prepared for you by the Court. This verdict form includes various questions you will have to answer as a jury, depending on the nature of your verdict. Be sure to read the verdict form very carefully and pay close attention to the directions and sequential order of the questions.

After you have reached unanimous agreement on a verdict, your foreperson 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.