

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

JAY CLASING AND DEANNA
CLASING, d/b/a JADE FARMS,

Plaintiff,

vs.

HORMEL FOODS CORPORATION,

Defendant.

No. C 12-3054-MWB

**INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

No. 1 — INTRODUCTION

Congratulations on your selection as a juror!

These Instructions are to help you better understand the trial and your role in it.

This is a civil case brought by plaintiffs Jay Clasing and Deanna Clasing, doing business as Jade Farms. I will call the plaintiffs “the Clasings.” The Clasings have brought this case against defendant Hormel Foods Corporation, which I will call “Hormel.” The Clasings are hog finishers, and Hormel is a meat packing company. The Clasings allege that Hormel breached the “base price” and “delivery” terms of the parties’ September 2008 oral contract for continued purchases of the Clasings’ Canadian-born (or Category B) hogs. Hormel denies the Clasings’ breach-of-contract claims and asserts certain specific defenses.

You have been chosen and sworn as jurors to try the issues of fact related to the Clasings’ claims and Hormel’s defenses. In making your decisions, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these Instructions. Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar

stations in life. Individuals, like the Clasings, and business entities, like the Jade Farms partnership and Hormel, stand equal before the law, and each is entitled to the same fair consideration.

Also, please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.

In these Instructions, I will explain how you are to determine whether or not the parties have proved their claims or defenses. First, however, I will explain some preliminary matters, including the burden of proof, what is evidence, and how you are to treat the testimony of witnesses.

No. 2 — BURDEN OF PROOF

Your verdict depends on what facts have been proved. Facts must be proved “by the greater weight of the evidence.” This burden of proof is sometimes called “the preponderance of the evidence.”

“Proof by the greater weight of the evidence” is proof that a fact is more likely true than not true.

- It does not depend on which side presented the greater number of witnesses or exhibits
- It requires you to consider all of the evidence and decide which evidence is more convincing or believable
 - For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness’s testimony
 - You are free to disbelieve any testimony or other evidence that you do not find convincing or believable
- If, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the issue has been proved

You may have heard that criminal charges require “proof beyond a reasonable doubt.” That is a stricter standard that does not apply in a civil case, such as this one.

No. 3 — DEFINITION OF EVIDENCE

Evidence is

- Testimony
 - Testimony may be either “live” or “by deposition”
 - A “deposition” is testimony taken under oath before the trial and preserved in writing or on video
 - Consider “deposition” testimony as if it had been given in court
- Answers to interrogatories
 - An interrogatory is a written question asked before trial by one party of another, who must answer it under oath in writing
 - Consider interrogatories and the answers to them as if the questions had been asked and answered here in court
- Exhibits admitted into evidence
 - Just because an exhibit may be shown to you does not mean that it is more important than any other evidence
- Stipulations
 - Stipulations are agreements between the parties
 - If the parties stipulate that certain facts are true, then you must treat those facts as having been proved
 - Either party may read all or part of their stipulations of facts at any time during the trial

Evidence is *not*

- Testimony that I tell you to disregard
- Exhibits that are not admitted into evidence
- Statements, arguments, questions, and comments by the lawyers
- Objections and rulings on objections
- Anything that you see or hear about this case outside the courtroom

Some exhibits consisting of charts and summaries may be shown to you in order to help explain the facts disclosed by books, records, or other underlying evidence in the case

- Such summary exhibits are not evidence or proof of any facts
- They are used for convenience
- In deciding how much weight to give summaries, you must
 - decide if they correctly reflect the facts shown by the evidence
 - consider testimony about the way in which the summaries were prepared

You may have heard of “direct” or “circumstantial” evidence.

- “Direct” evidence is direct proof of a fact
 - An example is testimony by a witness about what that witness personally saw or heard or did
- “Circumstantial” evidence is proof of one or more facts from which you could find another fact

- An example is testimony that a witness personally saw a broken window and a brick on the floor from which you could find that the brick broke the window
- You should consider both kinds of evidence, because the law makes no distinction between their weight

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens
- I will instruct you on the purposes for which the evidence can and cannot be used

The weight to be given any evidence—whether that evidence is “direct” or “circumstantial,” or in the form of testimony, an exhibit, or a stipulation—is for you to decide.

No. 4 — TESTIMONY OF WITNESSES

You may believe all of what any witness says, only part of it, or none of it.

In evaluating a witness's testimony, consider the following:

- the witness's
 - intelligence
 - memory
 - opportunity to have seen and heard what happened
 - motives for testifying
 - interest in the outcome of the case
 - manner while testifying
 - drug or alcohol use or addiction, if any
- the reasonableness of the witness's testimony
- any differences between what the witness says now and said earlier
- any inconsistencies between the witness's testimony and any other evidence that you believe
- whether any inconsistencies are the result of seeing or hearing things differently, actually forgetting things, or innocent mistakes, or are, instead, the result of lies or phony memory lapses, and
- any other factors that you find bear on believability or credibility

You should not give any more or less weight to a witness's testimony just because the witness is an expert

- An expert witness may be asked a “hypothetical question,” in which the expert is asked to assume certain facts are true and to give an opinion based on that assumption
- If a “hypothetical question” assumes a fact that is not proved by the evidence, you should decide if the fact not proved affects the weight that you should give to the expert’s answer

You may give any witness’s opinion whatever weight you think it deserves, but you should consider

- the reasons and perceptions on which the opinion is based
- any reason that the witness may be biased, and
- all of the other evidence in the case

It is your exclusive right to give any witness’s testimony whatever weight you think it deserves.

No. 5 — ACTIONS OF BUSINESS ENTITIES AND AUTHORITY OF AGENTS AND EMPLOYEES

In this case, both Jade Farms and Hormel are business entities. I will now explain how you are to determine the actions of business entities and the authority of their agents and employees to act for them.

Actions of business entities

- A business entity acts only through its agents or employees
- Any agent or employee of a business entity may bind the business entity by
 - acts and statements made while acting within the scope of the authority delegated to the agent by the business entity, or
 - acts and statements made while acting within the scope of his or her duties as an employee of the business entity
- An agent or employee of a business entity may also bind the business entity if
 - the business entity had notice that a third party believed that the agent or employee had the authority to act for the business entity, and
 - the business entity did not take steps to notify the third party of the lack of authority

- An agent or employee of a business entity may also bind the business entity if
 - the business entity knowingly accepted the benefits of a transaction entered into by the agent or employee

Authority of agents and employees

An agent or employee may have had either “actual” or “apparent” authority to act for the business entity. “Actual” and “apparent” authority are determined by what the business entity did, not by what the agent or employee did.

- A business entity gave an agent or employee “actual” authority if
 - the business entity intentionally gave the agent or employee authority, either in writing or through other conduct, and
 - the writing or conduct, reasonably interpreted, allowed the agent or employee to believe that he or she had the power to act
- A business entity gave an agent or employee “apparent” authority if
 - the business entity knowingly permitted or held the agent or employee out as possessing the authority to act for it in specific matters, and
 - the business entity did so in actions or communications to a third party, and
 - that third party reasonably relied upon the apparent authority of the agent or employee

No. 6 — THE CLASINGS' BREACH-OF- CONTRACT CLAIM

The Clasings contend that Hormel breached the “base price” and “delivery” terms of their September 2008 oral contract for the purchase of their Canadian-born hogs. A “breach of contract” claim consists of “elements,” which are the factual parts of the claim. The “elements” of the Clasings’ “breach of contract” claim are set out below in **bold**.

To win their “breach of contract” claim, the Clasings must prove all of the following elements by the greater weight of the evidence.

One, the parties had an oral contract.

A contract is an agreement between two or more parties to do or not to do something. The parties have stipulated, that is, they have agreed, that on September 29, 2008, the parties agreed that, from January 1, 2009, “until further notice,” Hormel would continue purchasing market hogs from the Clasings, under the same “base price” as under the parties’ prior written Hog Procurement Agreement. A true and correct copy of a handwritten note, prepared by Jill Andrews, a pork contract administrator with Hormel Foods, on September 29, 2008, about this September 2008 oral contract, is admitted into evidence and is marked as Exhibit 2009. Therefore, you must consider this element to be proved.

Two, the material terms of the contract.

“Material” terms of a contract are those that are significant to the contract. The Clasings contend that material terms of the parties’ September 2008 oral contract included the following:

- that, from January 1, 2009, the “base price” term for the Clasings’ Canadian-born (or Category B) hogs under the parties’ prior written agreement would continue until Hormel provided the required period of notice that it would no longer accept the Clasings’ Canadian-born hogs
- that, from January 1, 2009, the “delivery” terms for the Clasings’ Canadian-born (or Category B) hogs under the parties’ course of conduct after the passage of COOL legislation in 2008 would continue until Hormel provided the required period of notice that it would no longer accept the Clasings’ Canadian-born hogs

The Clasings contend that the required period of notice was one of the following:

- six months, the notice period that they contend Hormel agreed to as part of their September 2008 oral contract; or
- ninety days, the notice period required to terminate their prior written contract; or
- thirty days, the notice period that Hormel typically applied to oral contracts

Hormel contends that no specific period of notice was required, because the parties only agreed that the terms of the September 2008 oral contract would apply “until further notice.”

The Clasings contend that the “delivery” term of the September 2008 oral contract was established by the parties’ “course of conduct” after the passage of COOL

legislation in 2008. “Course of conduct” includes both of the following:

- “Course of dealing”
 - “Course of dealing” is a sequence of previous conduct, concerning previous transactions between the parties, that can fairly be understood to establish a common basis of understanding of a particular term of their contract
- “Course of performance”
 - “Course of performance” applies where a contract has repeated occasions for performance by one party, and the other party, with knowledge of and an opportunity to object to the first party’s performance, accepts the performance without objection

In deciding whether or not these terms were part of the parties’ September 2008 oral contract, you may consider evidence of the following:

- the situation and relationship of the parties
- the subject matter of the transaction
- preliminary negotiations and statements made during those preliminary negotiations
- usage of the trade, and
- the course of dealing between the parties

The most important evidence of the parties' intentions at the time that they entered into the contract, however, is the words of the agreement.

Thus, in deciding the meaning of terms of the parties' September 2008 oral contract, keep in mind the following:

- You should consider the intent of the parties along with a reasonable application of the surrounding circumstances
- The intent expressed in the language used prevails over any secret intention of either party
- You must attempt to give meaning to all language of a contract
 - Because an agreement is to be interpreted as a whole, assume that all of the language is necessary
 - An interpretation that gives a reasonable, effective meaning to all terms is preferred to an interpretation that leaves a part of the contract unreasonable or meaningless
- The meaning of a contract is the interpretation that a reasonable person would give it, if they were acquainted with the circumstances both before and at the time that the contract was made
- Where general and specific terms in the contract refer to the same subject, the specific terms control

Three, the Clasings did what the contract required or were excused from doing what the contract required.

Four, Hormel materially breached the contract.

A “material breach of the contract” occurred if Hormel failed to perform a material term of the contract. The Clasings allege that Hormel materially breached the parties’ September 2008 oral contract in the following ways:

- by changing the “base price” for the Clasings’ Canadian-born hogs on or about May 3, 2009, without providing the Clasings with the required period of notice that Hormel would no longer accept the Clasings’ hogs
- by imposing new restrictions on the manner of “delivery” of those hogs in 2009 without providing the Clasings with the required period of notice that Hormel would no longer accept the Clasings’ hogs

You must decide whether the Clasings have proved that Hormel breached the parties’ September 2008 oral contract in one, both, or neither of these ways.

If the Clasings do not prove all of these elements, by the greater weight of the evidence, as to their “breach of contract” claim, then your verdict must be for Hormel on that claim. On the other hand, if the Clasings have proved all of these elements as to one or more of the alleged breaches of the parties’ September 2008 oral contract, then the Clasings are entitled damages in some amount for each breach proved, *unless* Hormel proves, by the greater weight of the evidence, one

or more of its defenses of “modification,” as explained in Instruction No. 7, or “waiver,” as explained in Instruction No. 8.

No. 7 — HORMEL'S MODIFICATION DEFENSE

If you find that the parties' September 2008 oral contract

- required Hormel to comply with the "base price" term of the parties prior written contract, unless Hormel gave the Clasings the required period of notice that Hormel would no longer accept the Clasings' Canadian-born hogs, *or*
- required Hormel to comply with the "delivery" terms established by their prior course of conduct, unless Hormel gave the Clasings the required period of notice that Hormel would no longer accept the Clasings' Canadian-born hogs,

then you must consider Hormel's "modification" defense to any alleged breach of the parties' September 2008 oral contract. A contract may be modified by a subsequent oral agreement of the parties that meets the essential elements of a contract.

To prove its "modification" defense, Hormel must prove the following elements by the greater weight of the evidence:

One, the parties agreed to modify their September 2008 oral contract.

Agreement to modify a contract may be shown by either

- an express statement of agreement, *or*
- acts or conduct of the parties that reasonably suggested agreement to the modification

- but proof of a claimed oral modification must come from more than loose and random conversations

Consent to modification may be shown by a party continuing to perform a contract, even though the other party has unilaterally modified a term of the contract. Such conduct does not prove consent to the modification, however, *if*

- there was no express statement that the party was consenting to the modification, *and*
- the party openly and repeatedly objected to the modification

An agreement to modify an existing contract requires “consideration.” “Consideration” is either

- a benefit given or to be given to the person who makes the promise, or
- a detriment experienced or to be experienced by the person to whom the promise is made

Where the contract provides for promises by both parties, each promise is consideration for the other promise.

Two, the modification allowed Hormel to change a material term of the parties’ oral contract without the required period of notice that Hormel would no longer accept the Clasings’ Canadian-born hogs.

The modification must have changed a material term of the parties’ September 2008 oral contract that Hormel would otherwise have breached. Therefore,

- to avoid breach of the “base price” term, Hormel must prove that the parties’ modification allowed Hormel to change the “base price” for the Clasings’ Canadian-

born hogs without providing the required period of notice

- to avoid breach of the “delivery” term, Hormel must prove that the parties’ modification allowed Hormel to change the manner of “delivery” for the Clasings’ Canadian-born hogs without providing the required period of notice

If Hormel has proved by the greater weight of the evidence that the parties agreed to a modification of a term of the September 2008 oral contract that Hormel would otherwise have breached, even if Hormel did not give the required period of notice, *then*

- you must find for Hormel on its “modification” defense as to breach of that term of the September 2008 oral contract, *and*
- you cannot award any damages to the Clasings for breach of that term of the parties’ September 2008 oral contract.

No. 8 — HORMEL’S WAIVER DEFENSE

If you find that the parties’ September 2008 oral contract

- required Hormel to comply with the “base price” terms of the parties’ prior written contract, unless Hormel gave the Clasings the required period of notice that Hormel would no longer accept the Clasings’ Canadian-born hogs, *or*
- required Hormel to comply with the “delivery” terms established by their prior course of conduct, unless Hormel gave the Clasings the required period of notice that Hormel would no longer accept the Clasings’ Canadian-born hogs,

then you must also consider Hormel’s “waiver” defense to any alleged breach of the parties’ September 2008 oral contract. A “waiver” occurs when a party gives up a known right to performance of a specific term of a contract.

To prove its “waiver” defense, Hormel must prove the following elements by the greater weight of the evidence:

***One*, the Clasings knew that Hormel could not change a material term of the September 2008 oral contract, unless Hormel gave the required period of notice that Hormel would no longer accept their Canadian-born hogs.**

***Two*, the Clasings intended to give up their right to the required period of notice before Hormel could change a material term of the September 2008 oral contract.**

A party’s intent to give up or waive a right may be shown by either

- an express statement that the party was giving up the right, *or*
- acts or conduct of the party that reasonably suggested waiver of the right

Waiver may be shown by a party continuing to perform a contract, even though the other party has not complied with a term of the contract. Such conduct does not prove a waiver, however, *if*

- there was no express statement that the party was giving up the right, *and*
- the party openly and repeatedly objected to the other party's failure to comply with a term of the contract

The waiver must have applied to a material term of the parties' September 2008 oral contract that Hormel would otherwise have breached. Therefore,

- to avoid breach of the "base price" term, Hormel must prove that the Clasings waived the required period of notice for Hormel to change the "base price" for the Clasings' Canadian-born hogs
- to avoid breach of the "delivery" term, Hormel must prove that the Clasings waived the required period of notice for Hormel to change the manner of "delivery" for the Clasings' Canadian-born hogs

If Hormel has proved by the greater weight of the evidence that the Clasings waived the required period of notice for a change in a term of the September 2008 oral contract that Hormel would otherwise have breached, *then*

- you must find for Hormel on its “waiver” defense as to breach of that term of the September 2008 oral contract, *and*
- you cannot award any damages to the Clasings for breach of that term of the parties’ September 2008 oral contract.

No. 9 — DAMAGES IN GENERAL

It is my duty to instruct you about the measure of damages. By instructing you on damages, I do not mean to suggest what your verdict should be on any claim.

If you find for the Clasings on one or more of their allegations of breach of contract by Hormel, you must determine what damages to award for that breach of the parties' September 2008 oral contract. "Damages" are the amount of money that will reasonably and fairly compensate the Clasings for any injury that you find they suffered as a result of a particular breach of the September 2008 oral contract by Hormel

- It is for you to determine what damages, if any, have been proved
- Any damages award must be based upon evidence and not upon speculation, guesswork, or conjecture
- You cannot determine the amount for a particular item of damages by taking down each juror's estimate and agreeing in advance that the average of those estimates will be your award for that item of damages
- You must not award duplicate damages, so do not allow amounts awarded under one item of damages to be included in any amount awarded under another item of damages

No. 10 — COMPENSATORY DAMAGES

The measure of damages

Compensatory damages for “breach of contract” are the amount that would place the Clasing in as good a position as they would have enjoyed if Hormel had not breached the contract. The damages that you award must have been

- foreseeable at the time that the parties entered into the contract, or
- reasonably foreseen at the time that the parties entered into the contract

Specific items of damages

- **Damages for breach of the “base price” term by reducing the “base price” that Hormel paid for the Clasing’s Canadian-born hogs without giving the required period of notice**
 - These damages are
 - the amount that the Clasing would have received under the “base price” term of the parties’ September 2008 oral contract, *minus*
 - the amount that they actually received from Hormel
- **Damages for breach of the “delivery” term by imposing new restrictions on the “delivery” of the Clasing’s Canadian-born hogs without providing the required period of notice**
 - These damages are

- the additional costs incurred by the Clasings to comply with the new “delivery” restrictions, *plus*
- the lost “premium” or “incentive” payments because of the new “delivery” restrictions, *minus*
- the amount paid for increased carcass weight as a result of the new “delivery” restrictions

You must determine what, if any, damages to award for a breach of the September 2008 oral contract, before you consider whether or not the Clasings “mitigated” their damages for that breach, as explained in Instruction No. 11.

No. 11 — MITIGATION OF DAMAGES

A party asserting breach of contract, such as the Clasings, has a duty to “mitigate” its damages from the alleged breach of contract. This duty imposes on the Clasings the duty to use reasonable efforts to lessen the damages caused by Hormel’s alleged breaches.

To prove that the Clasings failed to mitigate damages, Hormel must prove the following elements by the greater weight of the evidence:

One, the Clasings could have reduced their damages from Hormel’s breach of contract through one or more substitute transactions.

Hormel must prove that a substitute transaction was similar in nature to the transaction with Hormel. Hormel does not have to prove

- that a substitute transaction was or would have been on identical terms, or
- that any one substitute transaction involved or would have involved all of the hogs that Hormel purchased from the Clasings after Hormel breached the parties’ September 2008 oral contract

Two, the Clasings acted unreasonably in failing to take action to lessen their damages.

The Clasings acted unreasonably, if

- they took no action to lessen their damages, or
- they failed to enter into one or more available, reasonable substitute transactions

The Clasings acted reasonably in taking action to lessen their damages, if

- they did all that was reasonable to find one or more substitute transactions,
- but they were unsuccessful

Three, the failure to take the action increased the Clasings' damages.

If Hormel proves that the Clasings failed to “mitigate” their damages, then

- You must determine the amount that the Clasings' damages could have been reduced by “mitigating” their damages, and
- Subtract that amount from the amount of damages that you would otherwise award the Clasings

No. 12 — OUTLINE OF THE TRIAL

I will now explain how the trial will proceed.

After I have read all but the last Instruction,

- The lawyers may make opening statements
 - An opening statement is not evidence
 - It is simply a summary of what the lawyer expects the evidence to be
- The Clasings will present evidence and call witnesses and the lawyer for Hormel may cross-examine them
- Hormel may present evidence and call witnesses, and the lawyer for the Clasings may cross-examine those witnesses
- The parties will make their closing arguments
 - Closing arguments summarize and interpret the evidence for you
 - Like opening statements, closing arguments are not evidence
- I will give you the last Instruction, on “deliberations”
- You will retire to deliberate on your verdict
- You will indicate your verdict on the Clasings’ claims in a Verdict Form, a copy of which is attached to these Instructions
 - A Verdict Form is simply a written notice of your decision

- When you have reached a unanimous verdict, your foreperson will complete one copy of the Verdict Form by marking the appropriate blank or blanks for each question
- You will all sign that copy to indicate that you agree with the verdict and that it is unanimous
- Your foreperson will then bring the signed Verdict Form to the courtroom when it is time to announce your verdict

No. 13 — OBJECTIONS

The lawyers may make objections and motions during the trial that I must rule upon.

- If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself
- Do not hold it against a lawyer or a party that a lawyer has made an objection, because lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible

No. 14 — BENCH CONFERENCES

During the trial, it may be necessary for me to talk with the lawyers out of your hearing.

- I may hold a bench conference while you are in the courtroom or call a recess
- Please be patient, because these conferences are
 - to decide how certain evidence is to be treated
 - to avoid confusion and error, and
 - to save your valuable time
- We will do our best to keep such conferences short and infrequent

No. 15 — NOTE-TAKING

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror's notes or memory
- Do not discuss your notes with anyone before you begin your deliberations
- Leave your notes on your chair during recesses and at the end of the day
- At the end of trial, you may take your notes with you or leave them to be destroyed
- No one else will ever be allowed to read your notes, unless you let them

If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations.

No. 16 — QUESTIONS BY JURORS

When the attorneys have finished questioning a witness, you may propose questions in order to clarify the testimony.

- Do not express any opinion about the testimony or argue with a witness in your questions
- Submit your questions in writing by passing them to the Court Security Officer (CSO)

I will review each question with the attorneys. You may not receive an answer to your question:

- I may decide that the question is not proper under the rules of evidence
- Even if the question is proper, you may not get an immediate answer, because a witness or an exhibit you will see later in the trial may answer your question

Do not feel slighted or disappointed if your question is not asked. Remember, you are not advocates for either side, you are impartial judges of the facts.

No. 17 — CONDUCT OF JURORS DURING TRIAL

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict.
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.

- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, a Blackberry, a PDA, a computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, any blog, or any website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.
- Do not do any research—on the Internet, in libraries, in the newspapers, in dictionaries or other reference books, or in any other way—or make any investigation about this case, the law, or the people involved on your own.
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you

will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on biases. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining Instruction at the end of the evidence.

No. 18 — DELIBERATIONS

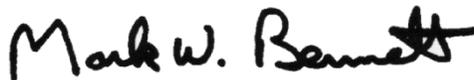
In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

- When you go to the jury room, select one of your members as your foreperson to preside over your discussions and to speak for you here in court
- Discuss this case with one another in the jury room to try to reach agreement on the verdict, if you can do so consistent with individual judgment
 - Nevertheless, each of you must make your own conscientious decision, after considering all the evidence, discussing it fully with your fellow jurors, and listening to the views of your fellow jurors
- Do not be afraid to change your opinions if the discussion with other jurors persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict
- Remember that you are not advocates, but judges—judges of the facts
 - Your sole interest is to seek the truth from the evidence in the case.

- If you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer (CSO), signed by one or more jurors
 - I will respond as soon as possible, either in writing or orally in open court
 - Remember that you should not tell anyone—including me—how your votes stand numerically
- Base your verdict solely on the evidence and on the law as I have given it to you in my Instructions
 - Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide
- Your verdict on each question submitted must be unanimous
- Complete and sign one copy of the Verdict Form
 - The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict
- When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 10th day of March, 2014.



MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

JAY CLASING AND DEANNA
CLASING, d/b/a JADE FARMS,

Plaintiff,

vs.

HORMEL FOODS CORPORATION,

Defendant.

No. C 12-3054-MWB

VERDICT FORM

On the Clasings' claims and Hormel's specific defenses, we, the Jury, find as follows:

I. THE CLASINGS' BREACH OF CONTRACT CLAIMS			
Step 1: Terms of the Contract	Have the Clasings proved that the September 2008 oral contract included the following terms, as terms of the contract are explained in element <i>two</i> of Instruction No. 6? <i>(If you answer "no" to both of the alleged terms, then do not answer any further questions in the Verdict Form. Instead, sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict. If you answer "yes" to one or more terms, please go on to Step 2 for each such term.)</i>		
(a)	That the "base price" terms for the Clasings' Canadian-born (or Category B) hogs under the parties' prior written agreement would continue until Hormel provided the required period of notice that it would no longer accept the Clasings' Canadian-born hogs	___ Yes	___ No
	<i>If you answered "yes," which one of the following was the required period of notice?</i>		
	___ 6 months	___ 90 days	___ 30 days
(b)	That the "delivery" terms for the Clasings' Canadian-born (or Category B) hogs under the parties' prior course of conduct would continue until Hormel provided the required period of notice that it would no longer accept the Clasings' Canadian-born hogs	___ Yes	___ No

	<i>If you answered “yes,” which one of the following was the required period of notice?</i>		
	<input type="checkbox"/> 6 months	<input type="checkbox"/> 90 days	<input type="checkbox"/> 30 days
Step 2: Breach of the Contract	<i>For each term for which you answered “yes” in Step 1, have the Clasings proved that Hormel breached that term, as breach of contract is explained in element <i>four</i> of Instruction No. 6? (If you answer “no” for both alleged breaches, sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict. If you answer “yes” for one or more alleged breaches, please go on to Part II.)</i>		
	Breach of the “base price” term		Breach of the “delivery” term
	by changing the “base price” for the Clasings’ Canadian-born hogs without providing the Clasings with the required period of notice that Hormel would no longer accept those hogs		by imposing new restrictions on the manner of “delivery” of the Clasings’ Canadian-born hogs without providing the Clasings with the required period of notice that Hormel would no longer accept those hogs
	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
II. HORMEL’S DEFENSES			
Step 1: Modification	<i>For any alleged breach that you found in Part I, Step 2, has Hormel proved that the Clasings agreed to modification of the pertinent term, as “modification” is explained in Instruction No. 7? (If you answer “yes” as to any term, you cannot award damages for breach of that term. Whether you answer “yes” or “no” as to any term in this Step, please also go on to consider Hormel’s “waiver” defense as to such term in Step 2.)</i>		
	Modification of the “base price” term		Modification of the “delivery” term
	to allow Hormel to change the “base price” for the Clasings’ Canadian-born hogs without providing the required period of notice		to allow Hormel to change the manner of “delivery” for the Clasings’ Canadian-born hogs without providing the required period of notice
	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No

Step 2: Waiver	<i>For any alleged breach that you found in Part I, Step 2, has Hormel proved that the Clasings waived the required period of notice, as “waiver” is explained in Instruction No. 8? (If you answer “yes” as to any term, you cannot award damages for breach of that term. If you found in this Part that “modification,” “waiver,” or both permitted a change to each term, then please sign the Verdict Form and inform the Court Security Officer (CSO) that you have reached a verdict. Otherwise, please go on to Part III.)</i>			
	Waiver of the “base price” term		Waiver of the “delivery” term	
	Waiver of the required period of notice for Hormel to change the “base price” for the Clasings’ Canadian-born hogs		Waiver of the required period of notice for Hormel to change the manner of “delivery” for the Clasings’ Canadian-born hogs	
	___ Yes	___ No	___ Yes	___ No
III. THE CLASINGS’ DAMAGES				
Step 1: Damages	<i>If you found a breach of a term in Part I, Step 2, and you did not find either “modification” or “waiver” permitted a change to that term in Part II, what amount, if any, do you award as damages for that breach of contract, as “damages” are explained in Instruction No. 9 and Instruction No. 10?</i>			
	Damages for breach of the “base price” term		Damages for breach of the “delivery” term	
	\$ _____		\$ _____	
Step 3: Mitigation of Damages	<i>For each kind of damages that you awarded in Step 1, what amount, if any, has Hormel proved that those damages must be reduced for the Clasings’ failure, if any, to mitigate damages, as “mitigation of damages” is explained in Instruction No. 11?</i>			
	Reduction for failure to mitigate damages for breach of the “base price” term		Reduction for failure to mitigate damages for breach of the “delivery” term	
	\$ _____		\$ _____	
TOTAL	\$ _____		\$ _____	

_____ Date

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

JAY CLASING AND DEANNA
CLASING, d/b/a JADE FARMS,

Plaintiff,

vs.

HORMEL FOODS CORPORATION,

Defendant.

No. C 12-3054-MWB

**COURT’S PROPOSED
INSTRUCTIONS
TO THE JURY**

(03/07/14 REVISED
“ANNOTATED” VERSION)

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VERDICT FORM

No. 19 — INTRODUCTION¹

Congratulations on your selection as a juror!

These Instructions are to help you better understand the trial and your role in it.

This is a civil case brought by plaintiffs Jay Clasing and Deanna Clasing, doing business as Jade Farms. I will call the plaintiffs “the Clasings.” The Clasings have brought this case against defendant Hormel Foods Corporation, which I will call “Hormel.” The Clasings are hog finishers, and Hormel is a meat packing company. The Clasings allege that Hormel breached the “base price” and “delivery” terms of the parties’ September 2008 oral contract for continued purchases of the Clasings’ Canadian-born (or Category B) hogs. Hormel denies the Clasings’ breach-of-contract claims and asserts certain specific defenses.²

¹ My current “plain language” stock Jury Instructions. *Compare* 8th Cir. Model 1.03 (2013); Joint Proposed Preliminary Jury Instruction No. 1.

² *See* my Proposed Statement Of The Case; *and compare* Joint Statement Of The Case; Joint Proposed Jury Instruction No. 1, ¶ 3. Excessive detail in the statement of the claims and defenses would be unhelpful at this point, but I believe that slightly more detail than the parties have provided in Joint Proposed Jury Instruction No. 1, ¶ 3, concerning what terms of the September 2008 oral contract Hormel allegedly breached, would be helpful to the jurors. I note, however, that there is a disturbing array of statements of the pertinent terms and Hormel’s alleged breaches in the Joint Proposed Jury Instructions and Joint Proposed Statement Of The Case. *See* Joint Proposed Jury Instruction No. 7, ¶ 1 (the Clasings’ disputed statement at note 8); *id.*, explanation to element *one* (but under “consideration”) (Hormel’s disputed statement of the terms of the September 2008 oral contract at note 14); *id.*, explanation to element *two* (the disputed statements of the breach at notes 15 and 16); Joint Proposed Statement Of The Case (the disputed statements of the terms and breaches at notes 1 and 2); Hormel’s Trial Brief

You have been chosen and sworn as jurors to try the issues of fact related to the Clasings' claims and Hormel's defenses. In making your decisions, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the

(docket no. 63). Consequently, it took considerable parsing of the Joint Proposed Jury Instructions, the Joint Proposed Statement Of The Case, and the record to determine precisely what the Clasing allege the pertinent "material" terms of the September 2008 oral contract were and how they were breached, including to what terms the alleged six months' notice requirement applied.

I ultimately relied on the Clasings' statement of the pertinent material terms and how they were breached in Joint Proposed Jury Instruction No. 7, explanation to element *two* (terms of the contract, including disputed language at note 15):

The Clasings contend that the material terms of their contract with Hormel included a term that Hormel Foods would purchase hogs from the Clasings at the same prices as Hormel Foods had previously paid for the Clasings' hogs, [and would continue to accept delivery of such hogs under the same practices as Hormel Foods had previously accepted the Clasings' hogs] unless and until Hormel Foods provided the Clasings with six-months' notice that it would no longer accept the Clasings' hogs.

This statement seems to identify most clearly the pertinent terms of the parties' September 2008 oral contract, including the relationship between a "six months' notice" requirement, the pertinent terms, and the alleged breaches of those terms.

As in the 03/07/14 Version of the Statement Of The Case, this paragraph refers to breach of the "base price" term rather than to breach of the "pricing" term, because I am persuaded that the contemporaneous reference to "777-74 pricing" in the written memorandum of the agreement by a Hormel employee (Exhibit 2009; Stipulation M) is a reference to a specific "base price" code.

evidence, your individual evaluation of that evidence, your reason and common sense, and these Instructions.³ Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.⁴

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Individuals, like the Clasings, and business entities, like the Jade Farms partnership and Hormel, stand equal before the law, and each is entitled to the same fair consideration.⁵

³ My stock first instruction on “implicit bias.” *Compare* 8th Cir. Model 1.03 (2013) (penultimate paragraph); 9th Cir. Model 1.1B, unnumbered ¶ 3.

⁴ *Compare* 8th Cir. Civil Model 1.03 (2013) (last paragraph); *see* Joint Proposed Jury Instruction No. 1.

⁵ *See* Iowa Civil Jury Instruction No. 100.20; *see* Joint Proposed Jury Instruction No. 1. Ordinarily, I also use the following short instruction concerning business entities acting through agents and employees:

A [business entity/corporation] can act only through its agents or employees, however. Any agent or employee of a [business entity/corporation] may bind it by acts and statements made while acting within the scope of the authority delegated to the agent by the [business entity/corporation] or within the scope of his or her duties as an employee of the [business entity/corporation].

See 8th Cir. Model 5.23 (2013). In this case, however, the parties have requested a stand-alone instruction on “actions of business entities and authority of agents and employees.” *See* Joint Proposed Jury Instruction No. 6. I have provided such a stand-alone instruction as my Instruction No. 5.

Also, please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.⁶

In these Instructions, I will explain how you are to determine whether or not the parties have proved their claims or defenses. First, however, I will explain some preliminary matters, including the burden of proof, what is evidence, and how you are to treat the testimony of witnesses.

⁶ In recent sets of jury instructions in civil cases, I have moved the explanation that the jurors will indicate their verdict in a verdict form to Instruction No. 12, which provides an outline of the trial, because I believe that is the more logical location for that explanation. *Compare* Joint Proposed Jury Instruction No. 1.

No. 20 — BURDEN OF PROOF⁷

Your verdict depends on what facts have been proved. Facts must be proved “by the greater weight of the evidence.”⁸ This burden of proof is sometimes called “the preponderance of the evidence.”

“Proof by the greater weight of the evidence” is proof that a fact is more likely true than not true.

- It does not depend on which side presented the greater number of witnesses or exhibits
- It requires you to consider all of the evidence and decide which evidence is more convincing or believable
 - For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness’s testimony
 - You are free to disbelieve any testimony or other evidence that you do not find convincing or believable
- If, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the issue has been proved

⁷ My “plain language” stock Jury Instructions. *Compare* 8th Cir. Model 3.04 (2013); Joint Proposed Jury Instruction No. 2.

⁸ Because punitive damages are not at issue in this case, and the parties have not identified any issue subject to another burden of proof, I have not indicated that “the greater weight of the evidence” standard applies “[u]nless I tell you otherwise.”

You may have heard that criminal charges require “proof beyond a reasonable doubt.” That is a stricter standard that does not apply in a civil case, such as this one.

No. 21 — DEFINITION OF EVIDENCE⁹

Evidence is

- Testimony
 - Testimony may be either “live” or “by deposition”
 - A “deposition” is testimony taken under oath before the trial and preserved in writing or on video
 - Consider “deposition” testimony as if it had been given in court¹⁰
- Answers to interrogatories
 - An interrogatory is a written question asked before trial by one party of another, who must answer it under oath in writing
 - Consider interrogatories and the answers to them as if the questions had been asked and answered here in court¹¹
- Exhibits admitted into evidence
 - Just because an exhibit may be shown to you does not mean that it is more important than any other evidence

⁹ My “plain language” Jury Instructions. *Compare* 8th Cir. Model 1.04 (2013); Joint Proposed Jury Instruction No. 3.

¹⁰ *Compare* 8th Cir. Model 2.14 (2013).

¹¹ *Compare* Iowa Civil Jury Instruction No. 100.6.

- Stipulations
 - Stipulations are agreements between the parties
 - If the parties stipulate that certain facts are true, then you must treat those facts as having been proved
 - Either party may read all or part of their stipulations of facts at any time during the trial¹²

Evidence is *not*

- Testimony that I tell you to disregard
- Exhibits that are not admitted into evidence
- Statements, arguments, questions, and comments by the lawyers
- Objections and rulings on objections
- Anything that you see or hear about this case outside the courtroom

Some exhibits consisting of charts and summaries may be shown to you in order to help explain the facts disclosed by books, records, or other underlying evidence in the case

- Such summary exhibits are not evidence or proof of any facts

¹² Compare 8th Cir. Model 2.03 (2013). *Unless stipulations are expressly identified with reference to particular elements of claims or defenses, the parties are responsible for entering stipulations into evidence. I will not include the parties' stipulations of facts in the instructions, as proposed in Joint Proposed Jury Instruction No. 5.*

- They are used for convenience
- In deciding how much weight to give summaries, you must
 - decide if they correctly reflect the facts shown by the evidence
 - consider testimony about the way in which the summaries were prepared¹³

You may have heard of “direct” or “circumstantial” evidence.

- “Direct” evidence is direct proof of a fact
 - An example is testimony by a witness about what that witness personally saw or heard or did
- “Circumstantial” evidence is proof of one or more facts from which you could find another fact
 - An example is testimony that a witness personally saw a broken window and a brick on the floor from which you could find that the brick broke the window
- You should consider both kinds of evidence, because the law makes no distinction between their weight¹⁴

¹³ See 8th Cir. Civil Models 2.11 and 2.12 (2013) and Joint Proposed Jury Instruction No. 3.

¹⁴ See 9th Cir. Criminal Model 1.9 (modified); *but see* 8th Cir. Criminal Model 1.04 (2013) (suggesting that definitions of direct and circumstantial evidence are ordinarily not required).

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens
- I will instruct you on the purposes for which the evidence can and cannot be used¹⁵

The weight to be given any evidence—whether that evidence is “direct” or “circumstantial,” or in the form of testimony, an exhibit, or a stipulation—is for you to decide.¹⁶

¹⁵ *Compare* 8th Cir. Model 2.09 (2013).

¹⁶ *See* 9th Cir. Model 1.9 (modified), *and compare* 8th Cir. Model 1.02 (2012) (last unnumbered paragraph).

No. 22 — TESTIMONY OF WITNESSES¹⁷

You may believe all of what any witness says, only part of it, or none of it.

In evaluating a witness's testimony, consider the following:

- the witness's
 - intelligence
 - memory
 - opportunity to have seen and heard what happened
 - motives for testifying
 - interest in the outcome of the case
 - manner while testifying
 - drug or alcohol use or addiction, if any
- the reasonableness of the witness's testimony
- any differences between what the witness says now and said earlier
- any inconsistencies between the witness's testimony and any other evidence that you believe

¹⁷ My "stock" Jury Instructions. *Compare* 8th Cir. Models 1.03 (2013) (unnumbered ¶¶ 5-6); *id.* 3.03; *and* Joint Proposed Jury Instruction No. 4. For some time, I have not given separate instructions on "testimony" and "credibility."

- whether any inconsistencies are the result of seeing or hearing things differently, actually forgetting things, or innocent mistakes, or are, instead, the result of lies or phony memory lapses,¹⁸ and
- any other factors that you find bear on believability or credibility

You should not give any more or less weight to a witness’s testimony just because the witness is an expert¹⁹

- An expert witness may be asked a “hypothetical question,” in which the expert is asked to assume certain facts are true and to give an opinion based on that assumption
- If a “hypothetical question” assumes a fact that is not proved by the evidence, you should decide if the fact not proved affects the weight that you should give to the expert’s answer²⁰

¹⁸ See 8th Cir. Civil Model 2.10 (2013). *Both parties have advised me that they do not believe that there are any witnesses to whom “conviction of a felony offense,” as a factor going to credibility, would apply. Therefore, I have removed that language from this version.*

¹⁹ Compare 9th Cir. Model 2.11 and Joint Proposed Jury Instruction No. 4 concerning expert and lay opinions. This language is applicable to both experts and law enforcement officials, but I am not aware that there will be any testimony from law enforcement officials in this case.

²⁰ Compare Iowa Civil Jury Instruction No. 100.11 (“hypothetical question”), which was *not* included in Joint Proposed Jury Instruction No. 4.

You may give any witness’s opinion whatever weight you think it deserves, but you should consider

- the reasons and perceptions on which the opinion is based
- any reason that the witness may be biased, and
- all of the other evidence in the case

It is your exclusive right to give any witness’s testimony whatever weight you think it deserves.²¹

²¹ See 8th Cir. Civil Model 3.07 (2013) (“*Allen*” charge, stating, “You are, instead, judges—judges of the facts; judges of the believability of the witnesses; and judges of the weight of the evidence.”)

No. 23 — ACTIONS OF BUSINESS ENTITIES AND AUTHORITY OF AGENTS AND EMPLOYEES²²

In this case, both Jade Farms and Hormel are business entities. I will now explain how you are to determine the actions of business entities and the authority of their agents and employees to act for them.

Actions of business entities

- A business entity acts only through its agents or employees
- Any agent or employee of a business entity may bind the business entity by
 - acts and statements made while acting within the scope of the authority delegated to the agent by the business entity, or
 - acts and statements made while acting within the scope of his or her duties as an employee of the business entity
- An agent or employee of a business entity may also bind the business entity if
 - the business entity had notice that a third party believed that the agent or employee had the authority to act for the business entity, and

²² See 8th Cir. Civil Models 5.23; Joint Proposed Jury Instruction No. 6; *Frontier Leasing Corp. v. Links Eng'g, L.L.C.*, 781 N.W.2d 772, 776-78 (Iowa 2010).

- the business entity did not take steps to notify the third party of the lack of authority
- An agent or employee of a business entity may also bind the business entity if
 - the business entity knowingly accepted the benefits of a transaction entered into by the agent or employee

Authority of agents and employees

An agent or employee may have had either “actual” or “apparent” authority to act for the business entity. “Actual” and “apparent” authority are determined by what the business entity did, not by what the agent or employee did.

- A business entity gave an agent or employee “actual” authority if
 - the business entity intentionally gave the agent or employee authority, either in writing or through other conduct, and
 - the writing or conduct, reasonably interpreted, allowed the agent or employee to believe that he or she had the power to act
- A business entity gave an agent or employee “apparent” authority if
 - the business entity knowingly permitted or held the agent or employee out as possessing the authority to act for it in specific matters, and
 - the business entity did so in actions or communications to a third party, and

- that third party reasonably relied upon the apparent authority of the agent or employee²³

²³ *Frontier Leasing Corp.*, 781 N.W.2d at 776-77; see also *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 79 (Iowa 2011) (“‘Apparent authority’ is authority the principal has knowingly permitted or held the agent out as possessing.” [*Frontier Leasing Corp.*, 781 N.W.2d at 776]. When determining if a principal vested an agent with apparent authority, the court must focus on the *principal’s actions and communications* to the third party. *Id.* Thus, we must determine whether apparent authority exists based on C & J’s conduct, rather than any conduct on the part of the Royal Links sales representative.” (emphasis added)).

No. 24 — THE CLASINGS' BREACH-OF- CONTRACT CLAIM²⁴

The Clasings contend that Hormel breached the “base price” and “delivery” terms of their September 2008 oral contract for the purchase of their Canadian-born hogs.²⁵ A “breach of contract” claim consists of “elements,” which are the factual parts of the claim. The “elements” of the Clasings’ “breach of contract” claim are set out below in **bold**.²⁶

To win their “breach of contract” claim, the Clasings must prove all of the following elements by the greater weight of the evidence.

²⁴ Like the parties’ Joint Proposed Jury Instructions No. 7, this instruction is based on Iowa Civil Jury Instructions Ch. 2400. I have departed from the statement of the elements in Iowa Civil Jury Instruction No. 2400.1, however, because I do not consider “the amount of damages” to be an element of a claim of “breach of contract,” but a separate requirement to obtain damages if a party proves its claim of “breach of contract.” *Compare* Iowa Civil Jury Instruction 2400.1 (element 7).

²⁵ Excessive factual specificity is undesirable, and no additional specificity is required here to distinguish dueling claims of breach of contract, where only one party alleges breach of the contract at issue. Thus, I find the Clasings’ opening paragraph, which describes the alleged breaches of the contract in some detail, unhelpful. Nevertheless, I find that identification of the “*base price*” and “delivery” terms of the September 2008 oral contract as the focus of the parties’ disputes is likely to be helpful to the jurors. A more specific statement of the ways in which the Clasings allege that Hormel breached the September 2008 oral contract is set out in the “breach” element.

²⁶ Although attorneys and judges are used to talking about “elements” of a claim, the concept may be foreign to jurors.

One, the parties had an oral contract.²⁷

A contract is an agreement between two or more parties to do or not to do something.²⁸ The parties have stipulated, that is, they have agreed, that on September 29, 2008, the parties agreed that, from January 1, 2009, “until further notice,” Hormel would continue purchasing market hogs from the Clasings, under the same “base price” as under the parties’ prior written Hog Procurement Agreement. A true and correct copy of a handwritten note, prepared by Jill Andrews, a pork contract administrator with Hormel Foods, on September 29, 2008, about this September 2008 oral contract, is admitted into evidence and is marked as Exhibit 2009.²⁹ Therefore, you must consider this element to be proved.

²⁷ The first element of a breach-of-contract claim in Iowa Civil Jury Instruction No. 2400.1 is cast in terms of the “existence” of a contract. I believe that a more jury-friendly way to state this element is that “the parties *had* an oral contract.”

²⁸ See BLACK’S LAW DICTIONARY (9th 3d. 2009) 366 (“contract,” definition 8, “loosely” defining the term); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1995) 251 (“contract,” definition 1); *Insurance Managers, Inc. v. Calvert Fire Ins. Co.*, 153 N.W.2d 480, 485 (Iowa 1967) (“Webster’s Third New International Dictionary, unabridged, defines a contract as ‘an agreement between two or more persons or parties to do or not to do something.’ Here there was an agreement in Iowa for the issuance of an insurance policy.”); compare Joint Proposed Jury Instruction No. 7 (explanation to element *one*). I find the parties’ proffered explanation of what is a contract is lengthy, complex, legalistic, and largely irrelevant, where, for the reasons stated in the next footnote, I find that the existence of the September 2008 oral contract is not genuinely in dispute. Here, I find the “loose” or “lay” definition of a contract as “an agreement between two or more parties to do or not to do something” is satisfactory.

²⁹ This explanation is taken from the parties’ stipulated facts set out in Joint Proposed Jury Instruction No. 5, ¶ M. In its Trial Brief (docket no. 63), Hormel argues that the Clasings must prove the “existence” of the contract, even though Hormel admits that it has consistently taken the position that an oral contract was, in fact, formed on September 29, 2008. Hormel now argues that the Clasings are asserting a *different*

contract, with *different* material terms, including six months' notice of changes or termination. Thus, Hormel contends that there is a jury question as to whether there was a "meeting of the minds," that is, whether the parties agreed to "the same things in the same sense," as required to form a contract. I believe that Hormel's argument conflates the "existence of the contract" and the "terms of the contract" elements of a breach-of-contract claim. As I stated in my summary judgment ruling (docket no. 43), 23, "Although there is no dispute about the existence of the contract at issue, which the parties agree was the September 2008 Oral Agreement, there is a dispute about the terms and conditions of the contract and whether or not Hormel breached those terms." I also concluded that "the Clasings have generated genuine issues of material fact, from the context of the parties' agreement, discussions, and practices, that the Oral Agreement required six months' notice of termination or alteration of its 'pricing' term." Whether the issue is cast as a "meeting of the minds" issue about the period of notice required, and, thus, as an issue about the "existence of a contract," or as an issue about the terms of the contract, that is, whether the contract required six months' notice of changes or termination, the factual issue *for the jurors* is exactly the same—whether six months' notice was required and whether that requirement was breached. Also, *for the jurors*, it is much clearer to treat the existence of the September 2008 oral contract as undisputed, and to focus the "fight" on proof of the existence and breach of a six months' "notice" term for changes to or termination of the September 2008 oral contract.

In Joint Proposed Jury Instruction No. 7, Hormel asserts that "consideration" is a requirement of a contract that is genuinely in dispute and that it should be stated as a separate element, not simply as part of the explanation of the "existence" of a contract. The Clasings counter that Hormel is arguing about "consideration" for a *separate* agreement to take some additional Canadian-born hogs, not about "consideration" for the parties' September 2008 oral contract, in both the language offered by Hormel in the explanation of "existence" of a contract and in the "consideration" element offered by Hormel in Joint Proposed Jury Instruction No. 7. I do not find any explanation of "consideration" to be necessary. I have treated the "existence" of the September 2008 oral contract as undisputed, which moots any need for an explanation of "consideration" as a requirement for the existence of that oral contract. Also, I find that Hormel's "consideration" argument does, in fact, go to a purported *separate* agreement to take some additional Canadian-born hogs (although the Clasings contend that Hormel was obligated to take those hogs, anyway, under the September 2008 oral contract), not to the September 2008 oral contract. Indeed, Hormel's rationale for the additional language that it proposes concerning the "existence" of the contract, explaining that the parties must agree to all material terms and conditions, is that "this additional language is

Two, the material terms of the contract.³⁰

necessary to inform the jury o[f] an alleged agreement by Hormel Foods to take delivery of additional quantities of hogs allegedly in connection with a purchase of weanling pigs [the] Clasings purchased in the fall of 2008.” Joint Proposed Jury Instruction No. 7, n.10. I do not see where the Clasings have asserted that Hormel breached such an allegedly separate agreement; rather, they contend that Hormel breached the September 2008 oral contract by not paying the promised price for these and other hogs.

Finally, I find references to the terms of the contract allegedly breached in the explanation to the “existence” (or the “consideration”) element, as the parties have done in Joint Proposed Jury Instruction No. 7, is improper or at least confusing. The proper place to identify the terms allegedly breached is in element *two*, concerning the terms of the contract. See Summary Judgment Ruling (docket no. 43) at 23.

The changes to the explanation of element one in this version are the substitution of “base price” for “pricing” and clarification that the September 2008 oral contract applied from January 1, 2009, not during the remainder of 2008, when the parties’ prior written contract continued to apply. The Clasings’ objection to my failure to include agreed language that “[t]erms of a contract can be written down or oral,” or language consistent with case law that a contract “may be partially written and partially oral” is overruled. I do not believe that the fact that the oral contract at issue here incorporated the “base price” term of the prior written contract is likely to cause jurors to be confused about the enforceability of the oral contract based on a term of the prior written contract, as the Clasings contend. I believe that jurors of reasonable intelligence can understand that this oral contract incorporated the “base price” term from the prior written contract. I also believe that further reference to a “partially written and partially oral” contract is much more likely to confuse the jurors about what was the contract at issue in this case. Moreover, Exhibit 2009 is not the contract at issue (because it is not signed by both parties and is only one party’s memorandum about the contract), and the Clasings’ proposed language might suggest that Exhibit 2009 is or is part of the contract.

³⁰ See Joint Proposed Jury Instruction No. 7; Iowa Civil Jury Instruction No. 2400.1.

“Material” terms of a contract are those that are significant to the contract.³¹ The Clasings contend that material terms of the parties’ September 2008 oral contract included the following:

- that, from January 1, 2009, the “base price” term for the Clasings’ Canadian-born (or Category B) hogs under the parties’ prior written agreement would continue until Hormel provided the required period of notice that it would no longer accept the Clasings’ Canadian-born hogs
- that, from January 1, 2009, the “delivery” terms for the Clasings’ Canadian-born (or Category B) hogs under the parties’ course of conduct after the passage of COOL legislation in 2008 would continue until Hormel provided the required period of notice that it would no longer accept the Clasings’ Canadian-born hogs³²

³¹ See *Pavone v. Kirke*, 801 N.W.2d 477, 488-89 (Iowa 2011) (noting that that the trial court’s instructions defined “material terms” in this way, and that the parties had failed to raise any error in the instructions on appeal, so that, “right or wrong,” the instructions became the law of the case); see also BLACK’S LAW DICTIONARY (9th ed.) 1608 (defining “material term” as “[a] contractual provision dealing with a significant issue such as subject matter, price, payment, quantity, quality, duration, or work to be done”). As explained, above, in note 2, I have ultimately relied on the Clasings’ statement of the material terms at issue and their breach in Joint Proposed Jury Instruction No. 7, explanation to element *two* (terms of the contract), including the disputed language at note 15).

³² I have accepted the parties’ assertions in their Joint Proposed Jury Instructions that the Clasings are alleging that the “six months’ notice” requirement applied to “delivery” terms, as well as to “pricing” terms. I note, however, that the Clasings conceded at the summary judgment stage of the proceedings that the “delivery” terms

The Clasings contend that the required period of notice was one of the following:

- six months, the notice period that they contend Hormel agreed to as part of their September 2008 oral contract; or
- ninety days, the notice period required to terminate their prior written contract; or
- thirty days, the notice period that Hormel typically applied to oral contracts

Hormel contends that no specific period of notice was required, because the parties only agreed that the terms of the September 2008 oral contract would apply “until further notice.”

The Clasings contend that the “delivery” term of the September 2008 oral contract was established by the

were established by a course of conduct, not by the prior written contract. *See* Summary Judgment Ruling (docket no. 43) at 28-29.

In their Response (docket no. 71), the Clasings assert that references to “six-months’ notice” should be amended to “the required notice,” because, although they assert that six-months’ notice was required, the evidence might establish a different required period of notice (90 days from the written contract; 30 days from Hormel’s usual practice for oral contracts), and they could still show that a shorter required notice period was not met in this case. I conclude that simply referring to “required notice” hardly addresses this contention. Moreover, the only alternative notice periods that the Clasings identified in their Response (or the summary judgment record) are 90-days’ notice (from the written contract) and 30-day’s notice (from testimony of Hormel employees about notice to terminate oral agreements). Therefore, I have indicated the possible “periods of notice” required to change or terminate the September 2008 oral contract, as in the 03/07/14 Version of the Statement Of The Case. I have also attempted to clarify that these alleged terms applied “from January 1, 2009,” as requested by Hormel, to clarify that the September 2008 oral contract did not apply to any period during 2008, when the parties’ written contract remained in full force.

parties' "course of conduct" after the passage of COOL legislation in 2008. "Course of conduct" includes both of the following:

- "Course of dealing"
 - "Course of dealing" is a sequence of previous conduct, concerning previous transactions between the parties, that can fairly be understood to establish a common basis of understanding of a particular term of their contract
- "Course of performance"
 - "Course of performance" applies where a contract has repeated occasions for performance by one party, and the other party, with knowledge of and an opportunity to object to the first party's performance, accepts the performance without objection³³

In deciding whether or not these terms were part of the parties' September 2008 oral contract, you may consider evidence of the following:

- the situation and relationship of the parties
- the subject matter of the transaction

³³ *The Clasings requested explanations of "course of dealing" and "course of performance" as relevant to the interpretation of terms of a contract in their Response (docket no. 71) at 6-7. I have included explanations drawn from Joint Proposed Jury Instruction No. 7, explanation to element two.*

- preliminary negotiations and statements made during those preliminary negotiations
- usage of the trade, and
- the course of dealing between the parties

The most important evidence of the parties' intentions at the time that they entered into the contract, however, is the words of the agreement.³⁴

Thus, in deciding the meaning of terms of the parties' September 2008 oral contract, keep in mind the following:³⁵

- You should consider the intent of the parties along with a reasonable application of the surrounding circumstances
- The intent expressed in the language used prevails over any secret intention of either party

³⁴ See Summary Judgment Ruling (docket no. 43) at 23-24 (quoting *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 107-108 (Iowa 2011), in turn quoting *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008)).

³⁵ See Iowa Civil Jury Instruction 2400.5; compare Joint Proposed Jury Instruction No. 7, explanation to element *two*. The parties have stated that the jurors "must" be guided by these factors, but the model instruction says "may." I have deleted proposed principle (f) in the Joint Proposed Jury Instruction (Iowa Civil Jury Instruction 2500.5(6)), that ambiguity of a written contract must be construed against the drafter, because that principle is irrelevant to this dispute concerning the terms of an oral contract.

The Clasings's objection that an instruction regarding "ambiguity of a written contract" is appropriate here, because of the "unique" fact that this oral contract incorporated the "base price" term of the prior written contract, is overruled. The Clasings have not identified any way in which the "base price" term of the prior written contract is ambiguous.

- You must attempt to give meaning to all language of a contract
 - Because an agreement is to be interpreted as a whole, assume that all of the language is necessary
 - An interpretation that gives a reasonable, effective meaning to all terms is preferred to an interpretation that leaves a part of the contract unreasonable or meaningless
- The meaning of a contract is the interpretation that a reasonable person would give it, if they were acquainted with the circumstances both before and at the time that the contract was made
- Where general and specific terms in the contract refer to the same subject, the specific terms control

Three, the Clasings did what the contract required or were excused from doing what the contract required.

Four, Hormel materially breached the contract.

A “material breach of the contract” occurred if Hormel failed to perform a material term of the contract. The Clasings allege that Hormel materially breached the parties’ September 2008 oral contract in the following ways:

- by changing the “base price” for the Clasings’ Canadian-born hogs on or about May 3, 2009, without providing the Clasings with the required period of notice that

Hormel would no longer accept the Clasings' hogs

- by imposing new restrictions on the manner of “delivery” of those hogs in 2009 without providing the Clasings with the required period of notice that Hormel would no longer accept the Clasings' hogs³⁶

You must decide whether the Clasings have proved that Hormel breached the parties' September 2008 oral contract in one, both, or neither of these ways.

If the Clasings do not prove all of these elements, by the greater weight of the evidence, as to their “breach of contract” claim, then your verdict must be for Hormel on that claim. On the other hand, if the Clasings have proved all of these elements as to one or more of the alleged breaches of the parties' September 2008 oral contract, then the Clasings are entitled damages in some amount for each breach proved, *unless* Hormel proves, by the greater weight of the evidence, one or more of its defenses of “modification,” as explained in Instruction No. 7, or “waiver,” as explained in Instruction No. 8.³⁷

³⁶ *See, supra*, note 2 (explaining the source of the statement of the alleged breaches of the contract). ***The statements of the alleged breaches have been amended by (1) replacing “pricing’ term” with “base price’ term,” (2) replacing “six-months’ notice” with “the required period of notice,” and (3) clarifying the alleged times of the alleged breaches.***

³⁷ Although failure to mitigate damages is an affirmative defense to a “breach of contract” claim, I will address it in a “damages” instruction, not in a “defenses” instruction.

No. 25 — HORMEL’S MODIFICATION DEFENSE³⁸

If you find that the parties’ September 2008 oral contract

- required Hormel to comply with the “base price” term of the parties prior written contract, unless Hormel gave the Clasings the required period of notice that Hormel would no longer accept the Clasings’ Canadian-born hogs, *or*
- required Hormel to comply with the “delivery” terms established by their prior course of conduct, unless Hormel gave the Clasings the required period of notice that Hormel would no longer accept the Clasings’ Canadian-born hogs,

then you must consider Hormel’s “modification” defense to any alleged breach of the parties’ September 2008 oral contract. A contract may be modified by a subsequent oral agreement of the parties that meets the essential elements of a contract.³⁹

³⁸ See Joint Proposed Jury Instruction No. 8 (agreed instruction). *I have amended the statement of the prerequisites to considering the “modification” defense to reflect the change from “six-months’ notice” to “the required period of notice.”*

³⁹ See *Seneca Waste Solutions, Inc. v. Sheaffer Mfg. Co., L.L.C.*, 791 N.W.2d 407, 412 (Iowa 2010) (citing *Passehl Estate v. Passehl*, 712 N.W.2d 408, 417 (Iowa 2006)). I do not believe that it is sufficient to refer the jurors to “the elements necessary to establish the existence of a contract” as the proof required to show a “modification,” as the parties have done. Rather, I have reiterated the “essential elements of a contract” that are necessary to establish an oral “modification” of a contract. The “essential elements of a contract” are the existence and terms of the contract. See, e.g., *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010).

To prove its “modification” defense, Hormel must prove the following elements by the greater weight of the evidence:

One, the parties agreed to modify their September 2008 oral contract.

Agreement to modify a contract may be shown by either

- an express statement of agreement, *or*
- acts or conduct of the parties that reasonably suggested agreement to the modification⁴⁰
 - but proof of a claimed oral modification must come from more than loose and random conversations⁴¹

Consent to modification may be shown by a party continuing to perform a contract, even though the other party has unilaterally modified a term of the contract. Such conduct does not prove consent to the modification, however, *if*

- there was no express statement that the party was consenting to the modification, *and*
- the party openly and repeatedly objected to the modification⁴²

⁴⁰ *Seneca Waste Solutions, Inc.*, 791 N.W.2d at 413 (“Consent to the modification may be either express or implied from acts or conduct.” (citing *Passehl Estate*, 712 N.W.2d at 417)).

⁴¹ *Passehl Estate*, 712 N.W.2d at 417 (quoting *Ehlinger v. Ehlinger*, 111 N.W.2d 656, 659 (Iowa 1961)).

⁴² I find that the principle that continued performance while voicing objections does not amount to consent is equally applicable to “modification” and “waiver,” even though the parties only asserted it in their instruction regarding “wavier.” *See* Summary

An agreement to modify an existing contract requires “consideration.”⁴³ “Consideration” is either

- a benefit given or to be given to the person who makes the promise, or
- a detriment experienced or to be experienced by the person to whom the promise is made

Where the contract provides for promises by both parties, each promise is consideration for the other promise.

Two, the modification allowed Hormel to change a material term of the parties’ oral contract without the required period of notice that Hormel would no longer accept the Clasings’ Canadian-born hogs.

The modification must have changed a material term of the parties’ September 2008 oral contract that Hormel would otherwise have breached. Therefore,

- to avoid breach of the “base price” term, Hormel must prove that the parties’ modification allowed Hormel to change the

Judgment Ruling (docket no. 26-27 (quoting *Davenport Osteopathic Hosp. Ass’n of Davenport, Iowa v. Hosp. Serv., Inc. of Iowa*, 154 N.W.2d 153, 157-58 (Iowa 1967)); and compare Joint Proposed Jury Instruction No. 9 (the Clasings’ disputed language at note 19). In fact, *Davenport Osteopathic Hospital* is a “modification” case, not a “waiver” case. See 154 N.W.2d at 157-58.

⁴³ *The Clasings contend that a requirement to prove the “existence” of the modification agreement is “consideration,” and they request insertion of a “consideration” requirement, because they contend that Hormel’s agreement to accept additional hogs was not consideration for the modification, where they contend that Hormel was required to accept those hogs under the existing oral agreement. Although I am not convinced that this dispute about “consideration” for the modification was reflected in Joint Proposed Jury Instruction No. 8, I have inserted an explanation of the “consideration” requirement drawn from Iowa Civil Jury Instruction No. 2400.4.*

“base price” for the Clasings’ Canadian-born hogs without providing the required period of notice

- to avoid breach of the “delivery” term, Hormel must prove that the parties’ modification allowed Hormel to change the manner of “delivery” for the Clasings’ Canadian-born hogs without providing the required period of notice⁴⁴

If Hormel has proved by the greater weight of the evidence that the parties agreed to a modification of a term of the September 2008 oral contract that Hormel would otherwise have breached, even if Hormel did not give the required period of notice, *then*

- you must find for Hormel on its “modification” defense as to breach of that term of the September 2008 oral contract, *and*
- you cannot award any damages to the Clasings for breach of that term of the parties’ September 2008 oral contract.

⁴⁴ *This explanation has been amended by substituting “without providing the required period of notice” for “without providing six-months’ notice.”*

No. 26 — HORMEL’S WAIVER DEFENSE⁴⁵

If you find that the parties’ September 2008 oral contract

- required Hormel to comply with the “base price” terms of the parties’ prior written contract, unless Hormel gave the Clasings the required period of notice that Hormel would no longer accept the Clasings’ Canadian-born hogs, *or*
- required Hormel to comply with the “delivery” terms established by their prior course of conduct, unless Hormel gave the Clasings the required period of notice that Hormel would no longer accept the Clasings’ Canadian-born hogs,

then you must also consider Hormel’s “waiver” defense to any alleged breach of the parties’ September 2008 oral contract. A “waiver” occurs when a party gives up a known right to performance of a specific term of a contract.⁴⁶

⁴⁵ See Joint Proposed Jury Instruction No. 9; see also Iowa Civil Jury Instruction No. 2400.11 (2012).

⁴⁶ See *Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 409 (Iowa 2005) (distinguishing “estoppel” from “waiver” by explaining that “waiver” is the voluntary relinquishment of a known right under a contract (quoting *Scheetz v. IMT Insurance Co.*, 324 N.W.2d 302, 305 (Iowa 1982)); *Benton v. Slater*, 605 N.W.2d 3, 5 (Iowa 2000) (“Waiver requires proof of voluntary and intentional relinquishment of a known right.”).

To prove its “waiver” defense, Hormel must prove the following elements by the greater weight of the evidence:⁴⁷

One, the Clasings knew that Hormel could not change a material term of the September 2008 oral contract, unless Hormel gave the required period of notice that Hormel would no longer accept their Canadian-born hogs.⁴⁸

Two, the Clasings intended to give up their right to the required period of notice before Hormel could change a material term of the September 2008 oral contract.

A party’s intent to give up or waive a right may be shown by either

- an express statement that the party was giving up the right, *or*

⁴⁷ See Iowa Civil Jury Instruction No. 2400.11 (stating the elements of waiver as “the existence of a right, knowledge of that right, and an intention to give it up”); *Talen*, 703 N.W.2d at 409; *Benton*, 605 N.W.2d at 5.

Hormel objected to the former first element (“the Clasings were entitled to six months’ notice that Hormel would no longer accept the Clasings’ Canadian-born hogs under the September 2008 oral contract”) on the ground that the burden to prove that a required period of notice was a term of the September 2008 oral contract rests with the Clasings, and if the jurors are considering the “waiver” defense, they must have found that there was such a term. I agree. Therefore, I have deleted the former first element. I have also amended the references to “six-months’ notice” to “required period of notice.” I have also amended elements and explanations to make clear that only the Clasings had to waive the right, both parties did not have to agree to the waiver.

⁴⁸ *I have recast this “knowledge” element to clarify the known right, after deleting the original first element.*

- acts or conduct of the party that reasonably suggested waiver of the right⁴⁹

Waiver may be shown by a party continuing to perform a contract, even though the other party has not complied with a term of the contract. Such conduct does not prove a waiver, however, *if*

- there was no express statement that the party was giving up the right, *and*
- the party openly and repeatedly objected to the other party's failure to comply with a term of the contract⁵⁰

The waiver must have applied to a material term of the parties' September 2008 oral contract that Hormel would otherwise have breached. Therefore,

- to avoid breach of the "base price" term, Hormel must prove that the Clasings waived the required period of notice for Hormel to change the "base price" for the Clasings' Canadian-born hogs
- to avoid breach of the "delivery" term, Hormel must prove that the Clasings waived the required period of notice for Hormel to

⁴⁹ *ARDI Exchange v. Valley Nat'l Bank*, 493 N.W.2d 862, 865 (Iowa 1992) ("A party to a contract who is entitled to the performance of a condition precedent may waive it either expressly or by conduct indicating waiver." (quoting *Mosebach v. Blythe*, 282 N.W.2d 755, 760 (Iowa Ct. App. 1979))).

⁵⁰ See Summary Judgment Ruling (docket no. 26-27 (quoting *Davenport Osteopathic Hosp. Ass'n of Davenport, Iowa v. Hosp. Serv., Inc. of Iowa*, 154 N.W.2d 153, 157-58 (Iowa 1967)); and compare Joint Proposed Jury Instruction No. 9 (the Clasings' disputed language at note 19).

change the manner of “delivery” for the
Clasings’ Canadian-born hogs

If Hormel has proved by the greater weight of the evidence that the Clasings waived the required period of notice for a change in a term of the September 2008 oral contract that Hormel would otherwise have breached, *then*

- you must find for Hormel on its “waiver” defense as to breach of that term of the September 2008 oral contract, *and*
- you cannot award any damages to the Clasings for breach of that term of the parties’ September 2008 oral contract.

No. 27 — DAMAGES IN GENERAL⁵¹

It is my duty to instruct you about the measure of damages. By instructing you on damages, I do not mean to suggest what your verdict should be on any claim.

If you find for the Clasings on one or more of their allegations of breach of contract by Hormel, you must determine what damages to award for that breach of the parties' September 2008 oral contract. "Damages" are the amount of money that will reasonably and fairly compensate the Clasings for any injury that you find they suffered as a result of a particular breach of the September 2008 oral contract by Hormel

- It is for you to determine what damages, if any, have been proved
- Any damages award must be based upon evidence and not upon speculation, guesswork, or conjecture
- You cannot determine the amount for a particular item of damages by taking down each juror's estimate and agreeing in advance that the average of those estimates will be your award for that item of damages

⁵¹ My stock instruction for damages. *Compare* Joint Proposed Jury Instruction No. 10.

- You must not award duplicate damages, so do not allow amounts awarded under one item of damages to be included in any amount awarded under another item of damages⁵²

⁵² I find Hormel’s requested insertion of an explanation that “[t]he damages allowed must be such as are traceable to the breach; if the proof offered does not lay the basis for recovery of damages traceable directly to a breach of contract, with reasonable certainty, then it is speculative, remote or conjectural,” to be redundant of the explanations that I already provide in this instruction.

No. 28 — COMPENSATORY DAMAGES⁵³

*The measure of damages*⁵⁴

Compensatory damages for “breach of contract” are the amount that would place the Clasings in as good a position as they would have enjoyed if Hormel had not breached the contract. The damages that you award must have been

- foreseeable at the time that the parties entered into the contract, or
- reasonably foreseen at the time that the parties entered into the contract⁵⁵

⁵³ Compare Joint Proposed Jury Instruction No. 11.

⁵⁴ I note that the Iowa Civil Jury Instructions distinguish between “expectation” damages and “reliance” damages for breach of contract, even though there is overlap between these measures of damages, but the parties’ Proposed Jury Instruction No. 11 does not do so. See Iowa Civil Jury Instructions 220.1 and 220.2 and comments (explaining that these instructions are alternatives); and compare Joint Proposed Jury Instruction No. 11. My understanding of the case, from my review of the pleadings, the briefing and evidence relating to Hormel’s motion for summary judgment, the briefing and evidence relating to Hormel’s motion in limine, and Hormel’s Trial Brief, is that the Clasings seek “reliance” damages—that is, the loss caused by Hormel’s breach, including the additional expenses and lost premiums that they incurred because of new restrictions on “delivery” of their hogs.

⁵⁵ These bullet points are the “overlapping” parts of Iowa Civil Jury Instructions 220.1 and 220.2.

*Specific items of damages*⁵⁶

- Damages for breach of the “base price” term by reducing the “base price” that Hormel paid for the Clasings’ Canadian-born hogs without giving the required period of notice⁵⁷
 - These damages are

⁵⁶ The Clasings’ statement of their specific items of damages is rather unclear about the relationship between the damages claimed and the specific breach of the contract from which those damages arise. I have attempted to state the damages that allegedly arise from each of the alleged breaches.

I have attempted to clarify further the specific breach to which the specific items apply, and I have cast those breaches in terms of failure to give “the required period of notice” rather than failure to give “six months’ notice.”

⁵⁷ I agree with Hormel that stating the Clasings’ claim for damages for breach of the “pricing” term as “[t]he full purchase price for sales of the Clasings’ hogs” is inaccurate or misleading. I also agree with Hormel that a clearer or more accurate statement of the damages that the Clasings seek for this alleged breach is the difference between what they were paid and what they claim that they were entitled to receive under the September 2008 oral contract.

In its Response (docket no. 70), Hormel contends that “the difference in payments for premiums based on carcass weights and/or back fat” was inadvertently included in the damages for breach of the “base price” term. For the same reasons that I have replaced “‘pricing’ term” with “‘base price’ term” throughout the 03/07/14 Versions of the Statement Of The Case and the Instructions, I agree that the only item of damages for breach of the “base price” term is “the difference between the amount that the Clasings would have received under the ‘base price’ term of the parties’ September 2008 oral contract and the amount that they actually received from Hormel.”

- the amount that the Clasings would have received under the “base price” term of the parties’ September 2008 oral contract, *minus*
 - the amount that they actually received from Hormel⁵⁸
- **Damages for breach of the “delivery” term by imposing new restrictions on the “delivery” of the Clasings’ Canadian-born hogs without providing the required period of notice⁵⁹**
 - These damages are
 - the additional costs incurred by the Clasings to comply with the new “delivery” restrictions, *plus*
 - the lost “premium” or “incentive” payments because of the new “delivery” restrictions, *minus*
 - the amount paid for increased carcass weight as a result of the new “delivery” restrictions

⁵⁸ *I have attempted to simply the explanation of this item of damages by changing it from “the difference” between the amounts they would have received under two prices to the amount they would have received at the contract price minus the amount they actually received.*

⁵⁹ I agree with Hormel’s complaint that the Clasings’ statement of their damages from “new” restrictions on delivery does not take into account any additional revenue that they received for the alleged increase in weights of their hogs at the time of delivery. Therefore, I have included that difference as a factor in the calculation of damages for breach of the “delivery” term.

You must determine what, if any, damages to award for a breach of the September 2008 oral contract, before you consider whether or not the Clasings “mitigated” their damages for that breach, as explained in Instruction No. 11.

No. 29 — MITIGATION OF DAMAGES⁶⁰

A party asserting breach of contract, such as the Clasings, has a duty to “mitigate” its damages from the alleged breach of contract. This duty imposes on

⁶⁰ Hormel has identified “failure to mitigate damages” as an affirmative defense and asks for a separate “mitigation of damages” instruction in Joint Proposed Jury Instruction No. 12. I find that failure to mitigate damages is an affirmative defense to the amount of damages for breach of contract under Iowa law. *See, e.g., Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 719 (Iowa 1994) (“A person asserting breach of contract has a duty to mitigate the damages [by] . . . exercis[ing] all reasonable diligence to lessen the damages caused by the other party’s breach.” (citations omitted)); *McHose v. Physician & Clinic Servs., Inc.*, 548 N.W.2d 158, 160 (Iowa Ct. App. 1996) (“The defense of mitigation or avoidable consequences [to a claim of breach of contract] must be pleaded and proven by the asserting party.”). Nevertheless, I do not find that it is necessary to identify “failure to mitigate damages” as a “defense.” Rather, I will simply treat “mitigation” as a “damages” issue.

I note that the Clasings object to giving any “mitigation of damages” instruction, because they argue that Hormel allegedly failed to respond to pertinent discovery requests, and that they also object to Hormel’s proposed “mitigation of damages” instruction, because it uses a “tort” standard rather than a “contract” standard. The Clasings do not offer an alternative “mitigation of damages” instruction that they believe states the correct standard for a “contract” case. In its Trial Brief, Hormel argues that it has adequately disclosed the factual basis for a “mitigation of damages” defense and that the “contract” cases on which the Clasings rely to not state a different standard.

I will leave to post-trial motions the question of whether or not Hormel is barred by discovery misconduct from asserting a “mitigation of damages” defense. I will consider now, however, the argument about a “contract” or “tort” standard for “mitigation of damages.” It is not clear to me that the “reasonably could have avoided” standard is a strictly “tort” standard inapplicable to “contract” claims. *See Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc.*, 540 N.W.2d 657, 649 (Iowa 1995) (recognizing that “a party to a contract must act to mitigate damages” and that “[t]h[is] doctrine applies to all types of contracts”); *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 291 (Iowa 1994) (explaining that the doctrine of avoidable consequences “is akin to

the Clasings the duty to use reasonable efforts to lessen the damages caused by Hormel's alleged breaches.⁶¹

To prove that the Clasings failed to mitigate damages, Hormel must prove the following elements by the greater weight of the evidence:

One, the Clasings could have reduced their damages from Hormel's breach of contract through one or more substitute transactions.⁶²

mitigation of damages in contract actions when plaintiffs must attempt to reduce damages after an injury occurs"); *Kuehl*, 521 N.W.2d at 719 (the duty to mitigate damages in a contract case "imposes on the complaining party the obligation to exercise all reasonable diligence to lessen the damages cause by the other party's breach"); *see also Clinton Physical Therapy Servs., P.C. v. John Dere Health Care, Inc.*, 714 N.W.2d 603, 606 n.1 (Iowa 2006) (noting, in passing, that a "failure-to-mitigate-damages" issue in a contract case is based on RESTATEMENT (SECOND) OF CONTRACTS § 350 and cmt. b, at 127 (1981)). Nevertheless, I have relied primarily on *Kuehl* and *Hunter v. Board of Trustees of Broadlawns Med. Ctr.*, 481 N.W.2d 510 (Iowa 1992), on which the Clasings specifically rely for their objection to Hormel's proposed instruction, for the elements of Hormel's "mitigation of damages" defense, because those cases specifically state standards for mitigation of damages in breach-of-contract cases.

⁶¹ *Kuehl*, 521 N.W.2d at 719. I have substituted the "jury friendly" term "use" for "exercise" and the "jury friendly" term "efforts" for "diligence."

⁶² *Hunter*, 481 N.W.2d at 517 (the "substitute transaction" requirement is a specifically "contract" requirement for mitigation).

Hormel contends in its Response (docket no. 70) that case law is not so restrictive as to require a specific "substitute transaction" in order for the Clasings to have mitigated their damages, because that particular requirement comes from an "employment contract" case, Hunter. Instead, Hormel contends that the correct standard is the "all reasonable diligence" standard from Kuehl, and that "a substitute transaction" is just one way to mitigate contract damages. Hormel then argues that an alternative form of "reasonably diligent" action to mitigate damages is "making selected additional sales to lessen the weights of problematic groups of market hogs, etc." I am not persuaded by Hormel's argument, because Hunter does not restrict the

Hormel must prove that a substitute transaction was similar in nature to the transaction with Hormel.⁶³ Hormel does not have to prove

- that a substitute transaction was or would have been on identical terms, or
- that any one substitute transaction involved or would have involved all of the hogs that Hormel purchased from the Clasings after Hormel breached the parties' September 2008 oral contract

“substitute transaction” standard to mitigation of damages in “employment contract” cases, it states, “In a breach-of-contract suit, the defendant has the burden of proving that plaintiff could have mitigated her loss through a substitute transaction.” 481 N.W.2d at 517 (emphasis added). Also, DeWaay, 160 N.W.2d at 457, on which Hunter relied for this standard, is not an “employment contract” case, but a case involving alleged breach of a contract to grow and deliver popcorn, so that it is analogous to this hog contract case. Similarly, RESTATEMENT (SECOND) OF CONTRACTS § 350 comment c (1981), on which Hunter also relies, is not restricted to “employment contracts.” RESTATEMENT (SECOND) OF CONTRACTS § 350 comment c (1981) (referring, inter alia, to the situation in which a buyer of goods repudiates, and the seller can often sell the goods elsewhere). Finally, I am not persuaded by Hormel’s argument, because “making selected additional sales” of problematic hogs—the only “other” form of mitigation that Hormel has identified—is also properly characterized as “substitute transactions.” Consequently, the only corrections that I conclude are necessary to address Hormel’s objection (and the only additional form of mitigation identified by Hormel) are to change references to “the substitute transaction” to “one or more substitute transactions” and to add that Hormel does not have to prove that a substitute transaction was or would have been on identical terms or that any one substitute transaction involved or would have involved all of the hogs that Hormel purchased from the Clasings after Hormel breached the parties’ September 2008 oral contract.”

⁶³ I have paraphrased the statement in *Hunter*, 481 N.W.2d at 517, that “the substitute transaction must be employment of a similar nature and caliber.”

Two, the Clasings acted unreasonably in failing to take action to lessen their damages.⁶⁴

The Clasings acted unreasonably, if

- they took no action to lessen their damages, or
- they failed to enter into one or more available, reasonable substitute transactions⁶⁵

The Clasings acted reasonably in taking action to lessen their damages, if

- they did all that was reasonable to find one or more substitute transactions,
- but they were unsuccessful⁶⁶

Three, the failure to take the action increased the Clasings' damages.⁶⁷

If Hormel proves that the Clasings failed to “mitigate” their damages, then

⁶⁴ *Kuehl*, 521 N.W.2d at 719 (stating the duty to mitigate as requiring “all reasonable diligence”); *Hunter*, 481 N.W.2d at 517 (also requiring only what was “reasonable”).

⁶⁵ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 350 and cmts. *b, c. I have altered this explanation to be consistent with the prior element.*

⁶⁶ *Hunter*, 481 N.W.2d at 517 (explaining that reasonable, but unsuccessful efforts satisfy the duty to mitigate damages). *I have altered this explanation to be consistent with the prior two elements.*

⁶⁷ This element follows logically from the duty to mitigate.

- You must determine the amount that the Clasings' damages could have been reduced by "mitigating" their damages, and
- Subtract that amount from the amount of damages that you would otherwise award the Clasings⁶⁸

⁶⁸ Hormel's Proposed Jury Instruction No. 12 does not explain how the effect of the failure to mitigate damages is to be calculated. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 350 and cmts. *b, c*.

No. 30 — OUTLINE OF THE TRIAL⁶⁹

I will now explain how the trial will proceed.

After I have read all but the last Instruction,

- The lawyers may make opening statements
 - An opening statement is not evidence
 - It is simply a summary of what the lawyer expects the evidence to be
- The Clasings will present evidence and call witnesses and the lawyer for Hormel may cross-examine them
- Hormel may present evidence and call witnesses, and the lawyer for the Clasings may cross-examine those witnesses
- The parties will make their closing arguments
 - Closing arguments summarize and interpret the evidence for you
 - Like opening statements, closing arguments are not evidence
- I will give you the last Instruction, on “deliberations”
- You will retire to deliberate on your verdict
- You will indicate your verdict on the Clasings’ claims in a Verdict Form, a copy of which is attached to these Instructions

⁶⁹ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.02, numbered ¶ 3; Joint Proposed Jury Instruction No. 13.

- A Verdict Form is simply a written notice of your decision
- When you have reached a unanimous verdict, your foreperson will complete one copy of the Verdict Form by marking the appropriate blank or blanks for each question
- You will all sign that copy to indicate that you agree with the verdict and that it is unanimous
- Your foreperson will then bring the signed Verdict Form to the courtroom when it is time to announce your verdict

No. 31 — OBJECTIONS⁷⁰

The lawyers may make objections and motions during the trial that I must rule upon.

- If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself
- Do not hold it against a lawyer or a party that a lawyer has made an objection, because lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible

⁷⁰ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.02, numbered ¶ 3; Joint Proposed Jury Instruction No. 14.

No. 32 — BENCH CONFERENCES⁷¹

During the trial, it may be necessary for me to talk with the lawyers out of your hearing.

- I may hold a bench conference while you are in the courtroom or call a recess
- Please be patient, because these conferences are
 - to decide how certain evidence is to be treated
 - to avoid confusion and error, and
 - to save your valuable time
- We will do our best to keep such conferences short and infrequent

⁷¹ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.03; Joint Proposed Jury Instruction No. 15.

No. 33 — NOTE-TAKING⁷²

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror's notes or memory
- Do not discuss your notes with anyone before you begin your deliberations
- Leave your notes on your chair during recesses and at the end of the day
- At the end of trial, you may take your notes with you or leave them to be destroyed
- No one else will ever be allowed to read your notes, unless you let them

If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations.

⁷² My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.05; Joint Proposed Jury Instruction No. 16.

No. 34 — QUESTIONS BY JURORS⁷³

When the attorneys have finished questioning a witness, you may propose questions in order to clarify the testimony.

- Do not express any opinion about the testimony or argue with a witness in your questions
- Submit your questions in writing by passing them to the Court Security Officer (CSO)

I will review each question with the attorneys. You may not receive an answer to your question:

- I may decide that the question is not proper under the rules of evidence
- Even if the question is proper, you may not get an immediate answer, because a witness or an exhibit you will see later in the trial may answer your question

Do not feel slighted or disappointed if your question is not asked. Remember, you are not advocates for either side, you are impartial judges of the facts.

⁷³ Compare 8th Cir. Model 1.04A (2012); Joint Proposed Jury Instruction No. 17.

No. 35 — CONDUCT OF JURORS DURING TRIAL⁷⁴

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict.
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to

⁷⁴ My “stock” Jury Instructions. Compare 8th Cir. Model 1.05; Joint Proposed Jury Instruction No. 18.

be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.

- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, a Blackberry, a PDA, a computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, any blog, or any website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.
- Do not do any research—on the Internet, in libraries, in the newspapers, in dictionaries or other reference books, or in any other way—or make any investigation about this case, the law, or the people involved on your own.
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone

involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on biases. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining Instruction at the end of the evidence.

No. 36 — DELIBERATIONS⁷⁵

In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

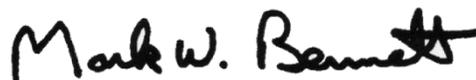
- When you go to the jury room, select one of your members as your foreperson to preside over your discussions and to speak for you here in court
- Discuss this case with one another in the jury room to try to reach agreement on the verdict, if you can do so consistent with individual judgment
 - Nevertheless, each of you must make your own conscientious decision, after considering all the evidence, discussing it fully with your fellow jurors, and listening to the views of your fellow jurors
- Do not be afraid to change your opinions if the discussion with other jurors persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict
- Remember that you are not advocates, but judges—judges of the facts
 - Your sole interest is to seek the truth from the evidence in the case.

⁷⁵ My “stock” Jury Instructions. *Compare* 8th Cir. Model 3.06 & 3.07; Joint Proposed Jury Instruction No. 19.

- If you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer (CSO), signed by one or more jurors
 - I will respond as soon as possible, either in writing or orally in open court
 - Remember that you should not tell anyone—including me—how your votes stand numerically
- Base your verdict solely on the evidence and on the law as I have given it to you in my Instructions
 - Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide
- Your verdict on each question submitted must be unanimous
- Complete and sign one copy of the Verdict Form
 - The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict
- When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 10th day of March, 2014.



MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

JAY CLASING AND DEANNA
CLASING, d/b/a JADE FARMS,

Plaintiff,

vs.

HORMEL FOODS CORPORATION,

Defendant.

No. C 12-3054-MWB

**COURT'S PROPOSED
VERDICT FORM**
(03/07/14 REVISED VERSION)

On the Clasings' claims and Hormel's specific defenses, we, the Jury, find as follows:

I. THE CLASINGS' BREACH OF CONTRACT CLAIMS			
Step 1: Terms of the Contract	Have the Clasings proved that the September 2008 oral contract included the following terms, as terms of the contract are explained in element <i>two</i> of Instruction No. 6? <i>(If you answer "no" to both of the alleged terms, then do not answer any further questions in the Verdict Form. Instead, sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict. If you answer "yes" to one or more terms, please go on to Step 2 for each such term.)</i>		
(a)	That the "base price" terms for the Clasings' Canadian-born (or Category B) hogs under the parties' prior written agreement would continue until Hormel provided the required period of notice that it would no longer accept the Clasings' Canadian-born hogs	___ Yes	___ No
	<i>If you answered "yes," which one of the following was the required period of notice?</i>		
	___ 6 months	___ 90 days	___ 30 days

(b)	That the “delivery” terms for the Clasings’ Canadian-born (or Category B) hogs under the parties’ prior course of conduct would continue until Hormel provided the required period of notice that it would no longer accept the Clasings’ Canadian-born hogs		___ Yes	___ No
<i>If you answered “yes,” which one of the following was the required period of notice?</i>				
___ 6 months		___ 90 days	___ 30 days	
Step 2: Breach of the Contract	<i>For each term for which you answered “yes” in Step 1, have the Clasings proved that Hormel breached that term, as breach of contract is explained in element <i>four</i> of Instruction No. 6? (If you answer “no” for both alleged breaches, sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict. If you answer “yes” for one or more alleged breaches, please go on to Part II.)</i>			
Breach of the “base price” term		Breach of the “delivery” term		
by changing the “base price” for the Clasings’ Canadian-born hogs without providing the Clasings with the required period of notice that Hormel would no longer accept those hogs		by imposing new restrictions on the manner of “delivery” of the Clasings’ Canadian-born hogs without providing the Clasings with the required period of notice that Hormel would no longer accept those hogs		
___ Yes		___ No	___ Yes	___ No
II. HORMEL’S DEFENSES				
Step 1: Modifi- cation	<i>For any alleged breach that you found in Part I, Step 2, has Hormel proved that the Clasings agreed to modification of the pertinent term, as “modification” is explained in Instruction No. 7? (If you answer “yes” as to any term, you cannot award damages for breach of that term. Whether you answer “yes” or “no” as to any term in this Step, please also go on to consider Hormel’s “waiver” defense as to such term in Step 2.)</i>			
Modification of the “base price” term		Modification of the “delivery” term		
to allow Hormel to change the “base price” for the Clasings’ Canadian-born hogs without providing the required period of notice		to allow Hormel to change the manner of “delivery” for the Clasings’ Canadian-born hogs without providing the required period of notice		
___ Yes		___ No	___ Yes	___ No

Step 2: Waiver	<i>For any alleged breach that you found in Part I, Step 2, has Hormel proved that the Clasing's waived the required period of notice, as "waiver" is explained in Instruction No. 8? (If you answer "yes" as to any term, you cannot award damages for breach of that term. If you found in this Part that "modification," "waiver," or both permitted a change to each term, then please sign the Verdict Form and inform the Court Security Officer (CSO) that you have reached a verdict. Otherwise, please go on to Part III.)</i>			
	Waiver of the "base price" term		Waiver of the "delivery" term	
	Waiver of the required period of notice for Hormel to change the "base price" for the Clasing's Canadian-born hogs		Waiver of the required period of notice for Hormel to change the manner of "delivery" for the Clasing's Canadian-born hogs	
	___ Yes	___ No	___ Yes	___ No
III. THE CLASINGS' DAMAGES				
Step 1: Damages	<i>If you found a breach of a term in Part I, Step 2, and you did not find either "modification" or "waiver" permitted a change to that term in Part II, what amount, if any, do you award as damages for that breach of contract, as "damages" are explained in Instruction No. 9 and Instruction No. 10?</i>			
	Damages for breach of the "base price" term		Damages for breach of the "delivery" term	
	\$ _____		\$ _____	
Step 3: Mitigation of Damages	<i>For each kind of damages that you awarded in Step 1, what amount, if any, has Hormel proved that those damages must be reduced for the Clasing's failure, if any, to mitigate damages, as "mitigation of damages" is explained in Instruction No. 11?</i>			
	Reduction for failure to mitigate damages for breach of the "base price" term		Reduction for failure to mitigate damages for breach of the "delivery" term	
	\$ _____		\$ _____	
TOTAL	\$ _____		\$ _____	

_____ Date

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror