

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

BRANIMIR CATIPOVIC,

Plaintiff,

vs.

MARK TURLEY,

Defendant.

No. C 11-3074-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 plaintiff Branimir Catipovic against defendant Mark Turley, arising from the failure of an alleged partnership to develop ethanol production facilities in Eastern Europe. Catipovic seeks damages from Turley for alleged “breach of contract” or, in the alternative, for alleged “unjust enrichment.” Turley denies Catipovic’s claims and asserts certain specific defenses.

You have been chosen and sworn as jurors to try the issues of fact related to Catipovic’s claims and Turley’s specific 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.

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. Unless I tell you otherwise, 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,
- whether the witness has been convicted of a felony offense, 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 — PRIOR STATEMENTS BY A PARTY

You may hear evidence that Catipovic or Turley made a statement before trial, either while under oath or while not under oath.

If you find

- that a party made such a statement

then you may

- consider the statement as evidence in this case

If you find

- that a party made such a statement, *and*
- that the statement was inconsistent with that party's testimony during the trial

then you may, but are not required to,

- use the prior inconsistent statement as a reason to disregard all or any part of that party's testimony during the trial, *but*
- you should not disregard a party's testimony during trial, if
 - other evidence that you believe supports that party's testimony,
 - or
 - you believe that party's testimony for any other reason

**No. 6 — “ELEMENTS” OF CLAIMS AND
SPECIFIC DEFENSES**

As I explained in Instruction No. 1, Catipovic seeks damages from Turley on a claim of “breach of contract” or, in the alternative, on a claim of “unjust enrichment.” Turley denies Catipovic’s claims and asserts certain specific defenses.

Each “claim” or “specific defense” consist of “elements,” which are the factual parts of the claim or specific defense. The “elements” of Catipovic’s claims and Turley’s specific defenses are set out in **bold** in the following instructions.

No. 7 — CATIPOVIC’S “BREACH OF CONTRACT” CLAIM

Catipovic’s first claim is for “breach of contract” by Turley. Turley denies this claim.

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

One, the parties had a contract to be partners in the development of ethanol production facilities anywhere in Eastern Europe.

A “contract”

- is an agreement between two or more parties to do or not to do something
- is the final and complete statement of the material terms of the parties’ agreement
- requires a “meeting of the minds” on the material terms, that is, that the parties agreed on the same things in the same sense

A contract may be partially written and partially oral. Where the parties

- did not intend a single written agreement or a series of written agreements to be the final and complete statement of the essential terms of their contract,

then

- evidence outside the language of the written agreement or agreements can be considered

- to supplement the terms of the parties' written agreement, and
- as evidence of the complete contract entered into by the parties

Where an oral agreement precedes a written agreement on a particular topic, the written agreement is controlling on that topic, if

- the terms of the written agreement are inconsistent with the earlier oral agreement, *and*
- the parties intended to substitute the written agreement for the earlier oral agreement

On the other hand, there was no "contract," if

- the parties agreed to enter into a written contract later, but did not do so, unless their preliminary agreement showed that they had agreed on all material terms and had left nothing for future negotiations, or
- the parties entered into a writing that clearly contemplated the signing of a formal written contract in the future before either party would be bound, or
- one party knew, or had reason to know, that the other party thought that the contract was incomplete and that the other party did not intend to be bound until other terms were agreed to or a formal written contract was signed

You must decide if the parties had a contract from their words and actions, together with all reasonable

inferences that you may draw from the surrounding circumstances.

Two, consideration from each party.

“Consideration” is

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

Three, the material terms of the contract.

“Material” terms of a contract are those that are significant to the contract. Catipovic contends that material terms of the parties’ contract included the following:

- agreement that the parties would not circumvent each other—that is, would not cut each other out—in pursuing the project to build ethanol plants anywhere in Eastern Europe, and
- agreement that Catipovic was to receive a 10% interest in any ethanol plant that any of the parties would ever build anywhere in Eastern Europe

In deciding the terms of the contract, keep in mind the following:

- You should consider the intent of the parties along with a reasonable consideration 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

Four, Catipovic did what the contract required and/or was excused from doing what the contract required.

Where

- the contract required Catipovic to fully perform his part of the contract, before he was entitled to any part of the promised consideration,

then

- Catipovic must have fully performed his part of the contract to receive any of the promised consideration,

unless

- his full performance was excused, *or*
- his failure to make full performance was not material

Catipovic's performance was "excused," if

- Turley or another party to the contract prevented it or made it impossible
- Turley clearly rejected the contract by giving notice to Catipovic that Turley would not perform

If Catipovic did not make full performance under the terms of the contract, he may still recover some amount, if his failure to make full performance at the time it was due was "not material." You should consider the following circumstances to help you decide whether any failure by Catipovic to make full performance was "material" or "not material":

- the extent to which Turley was deprived of the benefit that Turley reasonably expected
- the extent to which Turley can be adequately compensated for the part of the benefit that he expected, but did not receive
- the extent to which Catipovic will lose all benefit of the contract
- the likelihood that Catipovic would have cured the failure to perform fully, taking into account

- any reasonable assurances that Catipovic gave Turley, and
- all of the other circumstances
- the extent to which Catipovic’s behavior was in line with the standards of good faith and fair dealing

Five, Turley materially breached the contract.

A “material breach of the contract” occurred if Turley failed to perform a material term of the contract. Catipovic alleges that Turley materially breached the parties’ contract in the following ways:

- by terminating the agreement
- by circumventing Catipovic to build one or more ethanol plants in Eastern Europe without Catipovic

You must unanimously agree whether Turley breached the parties’ contract in one, both, or neither of these ways.

Six, Catipovic suffered damages as a result of Turley’s breach of the contract.

Catipovic must prove

- that he actually suffered some loss by reason of Turley’s breach of the contract, and
- that this loss was related to the nature and purpose of the contract

If Catipovic *does not* prove all of these elements, by the greater weight of the evidence, as to his “breach of contract” claim, then your verdict must be for Turley on that claim. On the other hand, if Catipovic *does* prove all of these

elements as to one or more of the alleged breaches of the parties' contract, then Catipovic is entitled to damages resulting from each breach proved, *unless* Turley proves one or more of his specific defenses, as explained in the next Instruction.

**No. 8 — TURLEY’S SPECIFIC DEFENSES TO
CATIPOVIC’S “BREACH OF CONTRACT”
CLAIM**

If you find that Catipovic has proved all of the elements of his “breach of contract” claim, then you must consider Turley’s specific defenses that he was excused from performing the parties’ contract by one or more of the following:

- Catipovic’s “prior material breach” of the contract;
- Catipovic’s “waiver” of performance by Turley; and/or
- Catipovic’s “misrepresentation or concealment” of material facts

I will explain each of these specific defenses in turn.

“Prior material breach” by Catipovic

A party’s performance of the contract as a whole is excused by the other party’s prior material breach of the contract. To prove that a “prior material breach” by Catipovic excused Turley’s performance of the parties’ contract, Turley must prove the following by the greater weight of the evidence:

One, material terms of the parties’ contract required Catipovic to do one or both of the things that Turley alleges.

“Material” terms of a contract are those that are significant to the contract. Turley alleges that material terms of the parties’ contract required Catipovic to do the following:

- secure the land and the necessary permits in Osijek, Croatia, and Titel, Serbia, to build ethanol plants; and

- sign a shareholders' agreement

You must unanimously agree whether one, both, or none of these things were material terms of the parties' contract.

***Two*, prior to any breach of the parties' contract by Turley, Catipovic materially breached the parties' contract by failing to perform one or more of these material terms.**

A "material breach of the contract" occurred if Catipovic failed to perform a material term of the contract. The breach of the contract by Catipovic must have been prior to any breach of the contract by Turley for Catipovic's breach to "excuse" Turley's breach.

"Waiver" by Catipovic

A party can give up or "waive" his right to insist on compliance with performance of the contract as a whole. To prove that a "waiver" by Catipovic excused Turley's performance of the parties' contract, Turley must prove the following by the greater weight of the evidence:

***One*, Catipovic had a right to performance of the contract as a whole.**

***Two*, Catipovic knew that he had a right to performance of the contract as a whole.**

***Three*, Catipovic indicated by his actions, in the surrounding circumstances, that he intended to give up his right to performance of the contract as a whole.**

Based on the circumstances of the waiver, you must determine whether Catipovic intended to waive

- only compliance with a specific term of the contract, or
- performance of the contract as a whole
 - A party can waive performance of the contract as a whole by conduct demonstrating that the party no longer expects or wants performance by the other party

“Misrepresentation or concealment” by Catipovic

A party’s performance of the contract as a whole is excused by the other party’s misrepresentations or concealments that induced the party to enter into the contract.

The specific defense of “misrepresentation or concealment” must be proved by clear, convincing, and satisfactory evidence.

- This is a higher burden of proof than “the greater weight of the evidence”
- Evidence is “clear, convincing, and satisfactory” if there is no serious or substantial uncertainty about the conclusion to be drawn from it

To prove that “misrepresentation or concealment” by Catipovic excused Turley’s performance of the parties’ contract, Turley must prove the following by clear, convincing, and satisfactory evidence:

One, Catipovic knowingly made a false representation to Turley or knowingly concealed information from Turley prior to the parties’ entry into the contract.

A “representation” includes

- any word or conduct asserting the existence of a fact
- an opinion as to quality, value, authenticity, or a similar matter
- a promise to perform a future act

A representation was “false” if it was not true at the time it was made.

A “concealment” is a failure to disclose a fact known to Catipovic that Turley had reason to believe would be disclosed.

Turley contends that, before the parties entered into any contract, Catipovic made false representations or concealments about one or more of the following:

- whether Catipovic had unique assets, relationships, insights, business awareness, ideas, or skills, and
- what the total cost of the project would be

You must unanimously agree whether Catipovic made one, both, or neither of these false representations or concealments.

Two, Catipovic’s false representation or concealment was material to the transaction.

A representation or concealment was “material,” if

- a reasonable person would have considered it important to making a decision, or

- Catipovic knew or had reason to know that Turley considered, or was likely to consider, it important to making a decision, or
- it influenced Turley to enter into a transaction that would not have occurred otherwise

Three, Catipovic knew that the representation was false, or knew that his concealment hid the true facts.

Catipovic knew that the representation was false or that the concealment hid the true facts, if:

- he actually knew or believed that it was false or hid the true facts, or
- he had no belief in its truth or recklessly disregarded its truth, or
- he falsely stated or implied that it was based on his personal knowledge or investigation, or
- he knew or believed that it was materially misleading, because it left out unfavorable information, or
- it indicated his intention to do or not to do something when he had the opposite intention, or
- he recklessly disregarded how it would be understood

Four, Catipovic made the representation or concealed the information with intent to deceive Turley.

Catipovic “intended to deceive Turley,” if

- he wanted to deceive Turley or believed that Turley would, in all likelihood, be deceived, or
- he had information from which a reasonable person would conclude that Turley would be deceived, or
- he made the representation or concealed the information without concern for the truth

Five, Turley justifiably relied on the representation or concealment to his detriment.

Turley “relied” on the representation or concealment, if he would not have entered into the transaction if he had known the true facts. The representation or concealment

- does not have to be the only reason that Turley entered into the transaction, *but*
- must have been a substantial factor in his decision to enter into the transaction

Reliance was “justified,” if

- Turley’s decision, based upon the representation or concealment, was what he could reasonably be expected to do in light of his own information and intelligence, and
- the representation or concealment involved an important fact and was not obviously false

The Effect Of Proof Of One Or More Specific Defenses

If Turley has proved one or more of his specific defenses, ***then***

- you must find for Turley on each such specific defense, *and*
- you cannot award any damages to Catipovic for breach of the parties' contract

No. 9 — CATIPOVIC’S CLAIM OF “UNJUST ENRICHMENT”

Catipovic’s second claim is a claim of “unjust enrichment,” in which Catipovic alleges that Turley was unjustly enriched by receiving the benefit of Catipovic’s services without compensating Catipovic. Turley denies that Catipovic provided anything of value to him or that he was unjustly enriched.

Where there is a contract between the parties on the same subject matter, a party cannot pursue a claim for “unjust enrichment.” Therefore,

- you can only consider this claim, if you find that there was no contract between the parties, as explained in element *one* in Instruction No. 7
- to put it another way, you cannot consider this claim if Catipovic proves element *one* in Instruction No. 7, even if he fails to prove that he is entitled to recover damages on his “breach of contract” claim

To win his “unjust enrichment” claim, Catipovic must prove all of the following elements by the greater weight of the evidence:

One, Turley was enriched by receiving a benefit.

To enrich a recipient, a “benefit”

- must have had some value to a reasonable person in the recipient’s circumstances

Such “benefits” may include receiving one or more of the following:

- property

- work or labor of another or that was paid for by another and the products of such work or labor
- services provided or paid for by another
- novel or original ideas that can be exploited to business or economic advantage

Two, Turley's enrichment was at Catipovic's expense.

The benefit must have been

- provided to Turley by Catipovic, or
- provided to Turley by a third party at Catipovic's expense

Three, it is unjust to allow Turley to retain the benefit under the circumstances.

For a party to be unjustly enriched,

- that party must retain a benefit from or provided by another person, and
- retaining that benefit must be to the other person's loss, harm, or disadvantage, and
- the circumstances must make it unjust for the recipient to enjoy the benefit without compensating the provider for the loss, harm, or disadvantage that he suffered

For example, it may be unjust for Turley to retain a benefit

- for which Catipovic expected compensation, but for which Catipovic did not receive compensation

On the other hand, it may not be unjust for Turley to retain a benefit

- that Catipovic voluntarily provided, or
- that Catipovic provided to advance Catipovic's own interests

You must decide, from your consideration of all of the circumstances, whether Turley unjustly retained a benefit to Catipovic's loss, harm, or disadvantage.

If Catipovic does not prove all of these elements, by the greater weight of the evidence, as to his "unjust enrichment" claim, then your verdict must be for Turley on that claim. On the other hand, if Catipovic does prove all of these elements, then Catipovic is entitled to damages in some amount on his "unjust enrichment" claim.

No. 10 — 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 Catipovic on his “breach of contract” claim, and against Turley on his specific defenses to that claim, or, in the alternative, if you find for Catipovic on his “unjust enrichment” claim, then you must determine what, if any, damages to award on that claim. “Damages” are the amount of money that will reasonably and fairly compensate Catipovic for the injury that you find he suffered as a result of Turley’s wrongful conduct.

- 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

Finally, you must determine what, if any, compensatory damages to award for any wrongful conduct by Turley, as explained in Instruction No. 11, before

you consider Turley's contention that Catipovic failed to "mitigate" his damages, as explained in Instruction No. 12.

No. 11 — COMPENSATORY DAMAGES

Damages For “Breach Of Contract”

Compensatory damages for “breach of contract” are the amount that would place Catipovic in as good a position as he would have enjoyed if Turley had not breached the contract and the parties had, instead, performed the contract according to its terms.

The damages, if any, that you award must have been

- established by the terms of the parties’ contract setting Catipovic’s compensation for or share in the project

and 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

Damages For “Unjust Enrichment”

Compensatory damages for “unjust enrichment” are the amount representing the value to a reasonable person in Turley’s circumstances of benefits provided or paid for by Catipovic.

Such damages may include the value to a reasonable person in Turley’s circumstances of

- Catipovic’s idea to build ethanol plants in Europe, and
- Catipovic’s services as a promoter of the ethanol project, and

- any ideas or services as a promoter provided by a third party for which Catipovic paid,

if Catipovic proves

- that he provided such ideas or services or that a third party provided such ideas or services at Catipovic's expense, and
- that the ideas or services had some value to a reasonable person in Turley's circumstances.

No. 12 — MITIGATION OF DAMAGES

A plaintiff seeking damages for “breach of contract” has a duty to “mitigate” his damages from the defendant’s breach of the parties’ contract. Thus, Catipovic is under the duty to use reasonable efforts to lessen his damages caused by Turley’s breach of the parties’ contract.

To prove that Catipovic failed to mitigate damages from Turley’s breach of contract, Turley must prove the following elements by the greater weight of the evidence:

***One*, Catipovic could have reduced his damages from Turley’s breach of contract by entering or timely attempting to enter into a substitute transaction to secure equity investment or debt financing of the ethanol project or some part of that project.**

A party seeking damages for a “breach of contract” may be required to mitigate damages through one or more substitute transactions. Turley must prove

- that a substitute transaction was similar in nature to the transaction with him

Turley 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 benefits or the same compensation or return to Catipovic as his transaction with Turley

Two, Catipovic acted unreasonably in failing to take action to lessen his damages.

Catipovic acted unreasonably, if

- he took no action to lessen his damages, or
- he failed to take advantage of one or more means of lessening his damages

On the other hand, Catipovic acted reasonably in taking action to lessen his damages, if

- he did all that was reasonable to lessen his damages, *but*
- was unsuccessful

Three, the failure to take the action increased Catipovic's damages.

If Turley proves that Catipovic failed to “mitigate” his damages, then

- You must determine the amount that Catipovic's damages on his “breach of contract” claim could have been reduced by “mitigating” his damages, and
- Subtract that amount from the amount of damages that you would otherwise award Catipovic as damages on that claim

No. 13 — 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
- Catipovic will present evidence and call witnesses and the lawyer for Turley may cross-examine them
- Turley may present evidence and call witnesses, and the lawyer for Catipovic 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 Catipovic’s claims and Turley’s specific defenses 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. 14 — 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. 15 — 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. 16 — 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. 17 — 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. 18 — 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 after closing arguments.

No. 19 — DELIBERATIONS

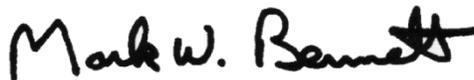
In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

- 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 12th day of November, 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**

BRANIMIR CATIPOVIC,

Plaintiff,

vs.

MARK TURLEY,

Defendant.

No. C 11-3074-MWB

VERDICT FORM

On Catipovic’s claims and Turley’s specific defenses, we, the Jury, find as follows:

I. CATIPOVIC’S BREACH OF CONTRACT CLAIM	
Step 1: Existence of the Contract	Has Catipovic proved that the parties had a contract to be partners in the development of ethanol production facilities anywhere in Eastern Europe, as explained in element <i>one</i> of Instruction No. 7? <i>(If you answer “yes” to this question, please go on to Step 2, but do not consider Catipovic’s alternative claim of “unjust enrichment” in Part II or “damages” for “unjust enrichment” in Part III.B. If you answer “no,” then do not consider any further questions concerning Catipovic’s “breach of contract” claim in Part I or damages for “breach of contract” in Part III.A. Instead, go on to consider Catipovic’s alternative claim of “unjust enrichment” in Part II of the Verdict Form.)</i>
	<input type="checkbox"/> Yes <input type="checkbox"/> No
Step 2: Breach	<i>If you found that the parties had a contract in Step 1, has Catipovic proved that Turley breached that contract, as explained in Instruction No. 7, in one or more of the following ways? (If you answer “yes” to one or more of the following alleged breaches, then go on to consider your verdict on Turley’s “specific defenses” in Step 3. If you answer “no” to both of the alleged breaches, do not answer any more questions in the Verdict Form. Instead, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict. Do not consider any further part of the Verdict Form.)</i>

	By terminating the contract?	
	_____ Yes	_____ No
	By circumventing Catipovic to build one or more ethanol plants in Europe without Catipovic?	
	_____ Yes	_____ No

Step 3: Turley's Specific Defenses	<i>If you answered "yes" as to breach of the contract in one or more of the ways set out in Step 2, has Turley proved one or more of the following "excuses" for his breach, as Turley's "specific defenses" are explained in Instruction No. 8? (If you answer "yes" as to one or more of Turley's "specific defenses," then you cannot award any damages to Catipovic for breach of the parties' contract. Instead, please do not answer any more questions, sign the Verdict Form, and notify the CSO that you have reached a verdict. On the other hand, if you answer "no" to all of Turley's "specific defenses," then Catipovic is entitled to damages, if any, resulting from each breach proved. In that case, skip Part II of the Verdict Form and go on to Part III.A.)</i>
--	--

	Catipovic's "prior material breach" of the contract?	
	_____ Yes	_____ No
	Catipovic's "waiver" of performance by Turley?	
	_____ Yes	_____ No
	Catipovic's "misrepresentation or concealment" of material facts?	
	_____ Yes	_____ No



II. CATIPOVIC'S UNJUST ENRICHMENT CLAIM	
--	--

Step 1: Proof of "Unjust Enrich- ment"	<i>If you answered "no" in Part I, Step 1, has Catipovic proved his alternative claim of "unjust enrichment," as explained in Instruction No. 9? (If you answer "yes," skip Part III.A. and go on to consider damages for "unjust enrichment" in Part III.B. On the other hand, if you answer "no," you cannot award damages on this claim. Instead, please do not answer any more questions, but sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>
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	_____ Yes	_____ No
--	-----------	----------

III. CATIPOVIC’S DAMAGES	
A. Damages For “Breach Of Contract”	
Step 1: Amount of Damages	<i>If you found that the parties had a contract in Part I, Step 1, that Turley breached the parties’ contract in one or more ways in Part I, Step 2, and that Turley did not prove any of his “specific defenses” in Part I, Step 3, what amount, if any, do you award to Catipovic as damages for Turley’s “breach of contract,” as compensatory damages for “breach of contract” are explained in Instruction No. 11? (If you enter “0,” you do not have to consider Step 2. Instead, please do not answer any more questions, but sign the Verdict Form and notify the CSO that you have reached a verdict. If you enter some amount, please go on to Step 2.)</i>
	\$ _____
Step 2: Mitigation of Damages	What amount, if any, has Turley proved that Catipovic’s damages for “breach of contract” in Step 1 must be reduced for Catipovic’s failure, if any, to mitigate damages, as “mitigation of damages” is explained in Instruction No. 12? (When you have answered this Step, do not consider Part III.A. Instead, please sign the Verdict Form and notify the CSO that you have reached a verdict.)
	Minus \$ _____
TOTAL	\$ _____
B. Damages For “Unjust Enrichment”	
Step 1: Amount of Damages	<i>If you found that the parties did not have a contract in Part I, Step 1, but you found that Catipovic has proved his alternative claim of “unjust enrichment” in Part II, what amount, if any, do you award to Catipovic as damages for Turley’s “unjust enrichment,” as compensatory damages for “unjust enrichment” are explained in Instruction No. 11? (When you have answered this question, please sign the Verdict Form and notify the CSO that you have reached a verdict.)</i>
	\$ _____

_____ Date

_____ Foreperson

_____ Juror

_____ Juror

_____ Juror

Juror

Juror

Juror

Juror

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

BRANIMIR CATIPOVIC,

Plaintiff,

vs.

MARK TURLEY,

Defendant.

No. C 11-3074-MWB

**COURT’S PROPOSED
INSTRUCTIONS
TO THE JURY
(11/10/14 REVISED
“ANNOTATED” VERSION)**

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VERDICT FORM

No. 20 — 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 plaintiff Branimir Catipovic against defendant Mark Turley, arising from the failure of an alleged partnership to develop ethanol production facilities in Eastern Europe. Catipovic seeks damages from Turley for alleged “breach of contract” or, in the alternative, for alleged “unjust enrichment.” Turley denies Catipovic’s claims and asserts certain specific defenses.²

¹ My current “plain language” stock Jury Instructions. *Compare* 8th Cir. Model 1.03 (2013); Joint Proposed Statement Of The Case; Joint Proposed Jury Instructions Nos. 1 and 2. *I do not give separate preliminary and final instructions.* See, e.g., Joint Proposed Jury Instruction No. 1 (referring to preliminary instructions). Instead, I give “front-end loaded” instructions, which means that, subject only to the rare instance when “supplemental” instructions are appropriate, *all* instructions, except for instructions on deliberations, are given to the jurors *before* opening statements.

² See my Proposed Statement Of The Case. Excessive detail in the statement of the claims and defenses would be unhelpful at this point. I note that there is a disturbing array of statements of the pertinent claims and, specifically, the allegations of breach of the contract. Consequently, it took considerable parsing of the Joint Proposed Jury Instructions, the Joint Proposed Statement Of The Case, the Joint Proposed Final Pretrial Order, and even the parties’ Statements Of Material Facts in the summary judgment record to determine precisely what claims and defenses are at issue. Also, I prefer to identify “affirmative defenses” as “specific defenses” in jury instructions, because the term “affirmative defense” probably has little meaning for and would likely be confusing to jurors.

Turley objects to inclusion of the phrase “in Eastern Europe,” because of the parties’ dispute relating to the scope of the alleged contract. In the alternative, he

You have been chosen and sworn as jurors to try the issues of fact related to Catipovic's claims and Turley's specific 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

suggests inserting "all of" before "Eastern Europe." He elsewhere explains that there is a difference, for example, between an agreement that an attorney be licensed "in the United States," which could be satisfied if the attorney were licensed only in Iowa, and an agreement that the attorney be licensed "in all of the United States, including all 50 states," which could only be satisfied if the attorney were licensed in each and every one of the 50 states. I am not persuaded that this phrase must be changed, because the challenged statement is not a statement of the *subject matter or any term of the parties' contract*, but a more general statement about the *relationship between the parties*. The nature or scope of the agreement and the precise terms at issue will be addressed in appropriate detail in the jury instructions. Also, removing any geographical limitation would not accurately reflect any agreement, or the relationship of the parties, where I am not aware of any allegation that the parties agreed to be partners in the development of ethanol production facilities anywhere other than in Eastern Europe, nor that they agreed to be partners in the development of one or more ethanol production facilities in each and every country in Eastern Europe.

Catipovic contends that identifying his claims as "alleged" and putting them in quotation marks, here and elsewhere, is not necessary and may be seen as diminishing his claims, which are known in law by these names. I have made no change. These are, in fact, the claims that Catipovic "alleges" and stating that they are "alleged" avoids any suggestion that there was, in fact or in my opinion, a breach of any contract or any unjust enrichment. Also, the quotation marks around the two claims, here and elsewhere, only signal that these are identifying terms for Catipovic's claims (which are, in fact, the "terms of art" for these specific legal claims). I think concerns that using "alleged" before and quotation marks around the names of claims will somehow diminish the claims in the jurors' eyes is farfetched.

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.

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.⁵

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.

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 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, which used to be here, to a later instruction, which provides an outline of the trial, because I believe that is the more logical location for that explanation.

No. 21 — BURDEN OF PROOF⁶

Your verdict depends on what facts have been proved. Unless I tell you otherwise, facts must be proved “by the greater weight of the evidence.”⁷ 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

⁶ My “plain language” stock Jury Instructions. *Compare* 8th Cir. Model 3.04 (2013); Joint Proposed Jury Instruction No. 3.

⁷ Because punitive damages are not at issue in this case, I have indicated that “the greater weight of the evidence” standard applies “[u]nless I tell you otherwise.” If “misrepresentation or concealment” is submitted as an “excuse” defense, however, I will instruct on the appropriate burden of proof for such a defense.

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. 22 — DEFINITION OF EVIDENCE⁸

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 court⁹
- 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 court¹⁰
- 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

⁸ My “plain language” Jury Instructions. *Compare* 8th Cir. Model 1.04 (2013).

⁹ *Compare* 8th Cir. Model 2.14 (2013).

¹⁰ *Compare* Iowa Civil Jury Instruction No. 100.6.

- 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 trial¹¹

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

¹¹ 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.

- decide if they correctly reflect the facts shown by the evidence
- consider testimony about the way in which the summaries were prepared¹²

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 weight¹³

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens

¹² See 8th Cir. Civil Models 2.11 and 2.12 (2013). Compare Defendant’s Proposed Jury Instruction Nos. 9 and 10. Plaintiff’s objection, based on uncertainty about whether or not there will be any charts or summaries, is overruled. I have used contingent language, stating that the jurors *may* be shown charts and summaries.

¹³ 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).

- I will instruct you on the purposes for which the evidence can and cannot be used¹⁴

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.¹⁵

¹⁴ Compare 8th Cir. Model 2.09 (2013).

¹⁵ See 9th Cir. Model 1.9 (modified), and compare 8th Cir. Model 1.02 (2012) (last unnumbered paragraph).

No. 23 — TESTIMONY OF WITNESSES¹⁶

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,
- whether the witness has been convicted of a felony offense, and

¹⁶ My "stock" Jury Instructions. Compare 8th Cir. Models 1.03 (2013) (unnumbered ¶¶ 5-6); id. 3.03; and Joint Proposed Jury Instruction Nos. 6 and 7. For some time, I have not given separate instructions on "testimony" and "credibility."

- any other factors that you find bear on believability or credibility¹⁷

You should not give any more or less weight to a witness's testimony just because the witness is an expert.¹⁸

- 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 answer¹⁹

¹⁷ See 8th Cir. Civil Model 2.10 (2013). *I have my doubts that there are any witnesses to whom “conviction of a felony offense,” as a factor going to credibility, would apply. Therefore, I will include such language only if it is requested by a party.*

In response to the part of my Order (docket no. 174) requiring responses from the parties about the applicability of a “conviction of a felony offense” factor in the determination of witness credibility in this case, Turley asserts that this factor is inapplicable, but Catipovic asserts that it might apply to Fergus Murphy's inability to gain entry to the United States and asks that I include this factor. Because the list of factors precedes any testimony, I believe that jurors will be able to decide that this factor is simply inapplicable, if they do not hear any evidence about any witness's felony conviction. I will include this factor to avoid any possibility that a supplemental instruction will be required, if there ultimately is evidence that a witness has a felony conviction.

¹⁸ Compare 9th Cir. Model 2.11 and Joint Proposed Jury Instructions (requesting Iowa Civil Jury Instruction 100.12). 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.

¹⁹ Compare Iowa Civil Jury Instruction No. 100.11 (“hypothetical question”).

You may give any witness's opinion²⁰ 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

²⁰ The factors relevant to determination of the weight to give a witness's opinions are essentially the same, whether the witness is a "lay" witness or an "expert" witness. Compare 8th Cir. Civil Model 3.03 (credibility of witnesses) with Iowa Civil Jury Instruction No. 100.12 (expert witness); see also FED. R. EVID. 701 (basis for lay opinions); FED. R. EVID. 702 (basis for expert opinions). I do not give separate "credibility" instructions for expert witnesses.

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. 24 — PRIOR STATEMENTS BY A PARTY²²

You may hear evidence that Catipovic or Turley²³ made a statement before trial, either while under oath or while not under oath.

If you find

- that a party made such a statement

then you may

- consider the statement as evidence in this case

If you find

- that a party made such a statement, *and*
- that the statement was inconsistent with that party's testimony during the trial

then you may, but are not required to,

- use the prior inconsistent statement as a reason to disregard all or any part of that party's testimony during the trial, *but*
- you should not disregard a party's testimony during trial, if

²² See Joint Proposed Jury Instruction No. 8 (based on Iowa Civil Jury Instruction No. 100.15). The Iowa model instruction is flawed, because evidence does not “claim” anything; parties claim that evidence shows something.

²³ I found it appropriate to identify specifically the “parties” to whom this instruction applies.

- other evidence that you believe supports that party's testimony,
or
- you believe that party's testimony for any other reason

No. 25 — “ELEMENTS” OF CLAIMS AND SPECIFIC DEFENSES

As I explained in Instruction No. 1, Catipovic seeks damages from Turley on a claim of “breach of contract” or, in the alternative, on a claim of “unjust enrichment.” Turley denies Catipovic’s claims and asserts certain specific defenses.

Each “claim” or “specific defense” consist of “elements,” which are the factual parts of the claim or specific defense. The “elements” of Catipovic’s claims and Turley’s specific defenses are set out in **bold** in the following instructions.²⁴

²⁴ Although attorneys and judges are used to talking about “elements” of a claim or an affirmative defense, the concept may be foreign to jurors. **Catipovic has indicated, in his Objections to the 10/31/14 Version of the Jury Instructions, that he intends to move to submit his claim of fraud to the jury, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, with an attendant instruction seeking punitive damages, at the appropriate time. I have no intention of including any instruction on Catipovic’s fraud claim at this time, where Catipovic has twice been denied leave to add such a claim to his Complaint.**

No. 26 — CATIPOVIC’S “BREACH OF CONTRACT” CLAIM²⁵

Catipovic’s first claim is for “breach of contract” by Turley. Turley denies this claim.

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

One, the parties had a contract to be partners in the development of ethanol production facilities anywhere in Eastern Europe.²⁶

²⁵ As I explained, *supra*, in note 1, ***I do not give separate preliminary and final instructions.*** See, e.g., Joint Proposed Jury Instruction Nos. 4 (preliminary instruction on breach of contract); 11 (final instruction on breach of contract). Instead, I give “front-end loaded” instructions, which means that, subject only to the rare instance when “supplemental” instructions are appropriate, *all* instructions concerning a claim are given to the jurors in a single “elements” instruction *before* opening statements.

Like the parties’ Joint Proposed Jury Instruction No. 11, 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).

²⁶ 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* a contract.”

It is not enough in this case, however, to refer simply to a “contract,” where, for example, Turley contends that there was only an “agreement to agree,” not an agreement giving Catipovic any interest in anything in exchange for his efforts, and elsewhere takes the position that Catipovic is relying on a series of oral agreements, not a single contract.

A “contract”

The “contract” at issue is, in my view, best distinguished from other possible contracts by its subject matter or general purpose. I also believe that it is appropriate to distinguish the general purpose of the alleged “contract” from the specific terms of that contract that Catipovic alleges that Turley breached. Terms and breach are subsequent elements of the claim, analytically distinct from the existence of the contract. Here, Catipovic contends (and must prove) that the contract was to develop ethanol production facilities *in Eastern Europe*, while Turley contends (and could defeat Catipovic’s allegation that the pertinent contract “existed” by proving) that the parties agreed to develop only *an* ethanol production facility in Osijek, Croatia, if they reached any agreement at all.

The prior statement of element *one* was, “the parties had a contract to develop ethanol production facilities in Eastern Europe.” Here, as with the second paragraph of the Statement Of The Case, Turley objects to the phrase “in Eastern Europe” as potentially confusing, and proposes “the parties had a contract to develop ethanol production facilities in all of Eastern Europe, including Hungary.” Focusing now on the *subject matter* of the *contract*, not merely on the *relationship of the parties*, I believe that a more accurate characterization of that subject matter is, “the parties had a contract *to be partners in the development of* ethanol production facilities *anywhere* in Eastern Europe.” (Emphasis showing changes). The existence of this contract would not be proved by evidence of a contract that limited the parties’ partnership to the development of an ethanol plant or ethanol plants in Osijek, Croatia, and/or Titel, Serbia.

Catipovic suggests that “a contract” should be replaced with “agreed” (presumably meaning that I should replace “had a contract” with “agreed”), which he contends will give the instruction clarity and less redundancy. I disagree. Catipovic must prove the existence of a “contract.” Using the word “contract” also distinguishes the contract as a whole from any agreement on any particular terms or any separate agreements that, together, constitute the “contract.” Moreover, Catipovic does not explain what clarity or less redundancy will be achieved by his proposed change.

- is an agreement between two or more parties to do or not to do something²⁷
- is the final and complete statement of the material terms of the parties' agreement²⁸

²⁷ 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*). Here, I find the parties' agreed explanation of the "existence" of a contract, drawn from Iowa Civil Jury Instruction No. 2400.3, more helpful if I first provide the jurors with the "loose" or "lay" definition of a contract as "an agreement between two or more parties to do or not to do something."

²⁸ This second part of the definition of a "contract" follows from the following: (1) the definition of a "fully integrated" contract as "the final and complete expression of the agreement," *Whalen v. Connelly*, 545 N.W.2d 284, 290 (Iowa 1996); (2) the principle that "[a]n agreement to enter into a contract is of no effect unless the terms and conditions of the contract are agreed on and nothing is left to future negotiations," which Turley requests in his Proposed Jury Instruction No. 14, see *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002) ("An 'agreement to agree to enter into a contract is of no effect unless all of the terms and conditions of the contract are agreed on and nothing is left to future negotiations.'" (quoting *Crowe-Thomas Consulting Group, Inc. v. Fresh Pak Candy Co.*, 494 N.W.2d 442, 444-45 (Iowa Ct. App. 1992)); (3) the principle that "[a] contract may be partially written and partially oral," see *Federal Land Bank of Omaha v. Emberton*, 460 N.W.2d 488, 491 (Iowa Ct. App. 1990) (citing *Cargill, Inc. v. Fickbohn*, 252 N.W.2d 739, 741 (Iowa 1977)); and (4) the principle that "only essential [*i.e.*, material] terms need to be sufficiently definite" to create an enforceable agreement, see *Hinshaw v. Ligon Indus., L.L.C.*, 551 F. Supp. 2d 798, 811 (N.D. Iowa 2008). Moreover, here, Catipovic contends that no single written contract is "fully integrated," so that evidence of oral terms is admissible to show the full scope of the parties' contract, see Plaintiff's Proposed Jury Instruction No. 13, and Turley "does not dispute that no integrated written contract exists in this matter." *Id.* Thus, a "contract,"

- requires a “meeting of the minds” on the material terms, that is, that the parties agreed on the same things in the same sense²⁹

A contract may be partially written and partially oral.³⁰ Where the parties

- did not intend a single written agreement or a series of written agreements to be the final and complete statement of the essential terms of their contract,

then

- evidence outside the language of the written agreement or agreements can be considered
 - to supplement the terms of the parties’ written agreement, and
 - as evidence of the complete contract entered into by the parties³¹

whether written, oral, or partially written and partially oral, is properly defined as the final and complete expression of the material terms of the parties’ agreement.

²⁹ Iowa Civil Jury Instruction No. 2400.3 (existence of a contract).

³⁰ See *Federal Land Bank of Omaha*, 460 N.W.2d at 491 (citing *Cargill, Inc.*, 252 N.W.2d at 741). Catipovic’s contention is that the contract was partially written and partially oral. It is not, as Turley contends, that “even if [Catipovic] and Turley did not have a written contract, they had an oral contract or that there were separate oral contracts.” See Turley’s Proposed Jury Instruction No. 19 and Catipovic’s objection.

³¹ See Plaintiff’s Proposed Jury Instruction No. 13 (explaining that evidence outside of the language of the written agreement can be considered to supplement the terms of the parties’ contract and as evidence of the total agreement entered into by the parties, when a contract is not completely integrated). I believe that use of the term “integrated contract” would mislead and confuse the jurors. I also reject Turley’s

Where an oral agreement precedes a written agreement on a particular topic, the written agreement is controlling on that topic, if

- the terms of the written agreement are inconsistent with the earlier oral agreement, *and*
- the parties intended to substitute the written agreement for the earlier oral agreement³²

On the other hand, there was no “contract,” if

- the parties agreed to enter into a written contract later, but did not do so, unless their preliminary agreement showed that they had agreed on all material terms and had left nothing for future negotiations,³³ or
- the parties entered into a writing that clearly contemplated the signing of a formal written contract in the future before either party would be bound,³⁴ or

contention that an explanation of the parol evidence rule is inapplicable here. These are precisely the circumstances in which parol evidence can be relied upon to determine the terms and full agreement of the parties, because Turley concedes that no integrated written contract exists in this matter.

³² See Defendant’s Proposed Jury Instruction No. 20. I believe that I have addressed Catipovic’s objections to Turley’s instruction by relying primarily on *Commercial Trust and Sav. Bank of Storm Lake v. Toy Nat’l Bank of Sioux City*, 373 N.W.2d 521, 523 (Iowa Ct. App. 1985); see also *Wagner Enters., Inc. v. John Deere Shared Servs., Inc.*, 397 F. Supp. 2d 1097, 1108 (N.D. Iowa 2005) (Reade, J.).

³³ *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002).

³⁴ See *Kopple v. Schick Farms, Ltd.*, 447 F. Supp. 2d 965, 977 (N.D. Iowa 2006); *Faught v. Budlong*, 540 N.W.2d 33, 40 (Iowa 1995).

- one party knew, or had reason to know, that the other party thought that the contract was incomplete and that the other party did not intend to be bound until other terms were agreed to or a formal written contract was signed³⁵

You must decide if the parties had a contract from their words and actions, together with all reasonable inferences that you may draw from the surrounding circumstances.³⁶

Two, consideration from each party.³⁷

“Consideration” is

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

³⁵ See *Kopple*, 447 F. Supp. 2d at 979 (citing *Restatement (Second) of Contracts*, § 27, cmt. b.).

³⁶ Iowa Civil Jury Instruction No. 2400.3. The parties request lists of various factors relevant to the existence of a contract. See Parties’ Proposed Jury Instructions Nos. 13 (by plaintiff: last sentence); 14 (by defendant: last paragraph). I conclude that all of the specific factors that the parties identify are adequately encompassed by language directing the jurors to consider the parties’ words and actions and all reasonable inferences from the surrounding circumstances. This statement will allow the parties to argue the import of specific facts present in this case.

³⁷ Evidently, the parties consider this element to be genuinely in dispute. See Proposed Jury Instructions Nos. 11 (agreed “elements” instruction); 15 (plaintiff’s instruction: failure of consideration and partial performance). Like the parties, I have drawn the explanation for this element from Iowa Civil Jury Instruction No. 2400.4.

- mutual promises

Three, the material terms of the contract.³⁸

“Material” terms of a contract are those that are significant to the contract.³⁹ Catipovic contends that material terms of the parties’ contract included the following:

- agreement that the parties would not circumvent each other—that is, would not cut each other out—in pursuing the project to build ethanol plants anywhere in Eastern Europe, and
- agreement that Catipovic was to receive a 10% interest in any ethanol plant that any of the parties would ever build anywhere in Eastern Europe⁴⁰

³⁸ See Joint Proposed Jury Instruction No. 11; Iowa Civil Jury Instruction No. 2400.1. A party asserting a “breach of contract” claim does not have to prove *all* of the terms of the contract, only the “material” terms of the contract. As explained in Iowa Civil Jury Instruction No. 2400.3, the existence of a contract requires a meeting of the minds on the *material* terms of the contract. See also *Hinshaw*, 551 F. Supp. 2d at 811 (explaining that “only essential [*i.e.*, material] terms need to be sufficiently definite” to create an enforceable agreement).

³⁹ See *Pavone v. Kirke*, 801 N.W.2d 477, 488-89 (Iowa 2011) (noting 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”).

⁴⁰ These are what I understand to be the material terms of the alleged contract, based, for example, on the parties’ various submissions and (1) their specific disputes about whether there was an agreement to be partners in any and all ethanol production facilities in Eastern Europe, or only in such facilities in Osijek, Croatia, or only in Croatia

In deciding the terms of the contract, keep in mind the following:

- You should consider the intent of the parties along with a reasonable consideration 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

and Serbia, but not Hungary; (2) their disputes about whether Catipovic's share was 10% of all ethanol facilities in Europe, or only in Croatia or Croatia and Serbia, which were never built; and (3) their disputes about whether there was a non-circumvention agreement that Turley breached. *See, e.g.*, Plaintiff's Legal Issue 2 in the Parties Proposed Final Pretrial Order (identifying a "legal issue" as whether Turley breached his agreement with Catipovic by circumventing Catipovic to build ethanol plant(s) in Europe without Catipovic); Turley's Statement Of Undisputed Material Facts In Support Of Summary Judgment (docket no. 68-1), ¶ 24, and Catipovic's Response (docket no. 101-1), ¶ 24 (stating that Catipovic contends that Turley said he would never built any ethanol facilities anywhere in Europe without Catipovic and that the contract allegedly gave Catipovic a 10% share in any ethanol plant that the parties might build in Europe).

I have now reframed the alleged second term of the contract at issue as "agreement that Catipovic was to receive a 10% interest in any ethanol plant that *any of the parties would ever build anywhere in Eastern Europe*" (emphasis indicating changes), consistent with my conclusions about the subject matter of the alleged contract and the precise terms at issue in note 26, above (in bold).

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 control⁴¹

Four, Catipovic did what the contract required and/or was excused from doing what the contract required.⁴²

Where

- the contract required Catipovic to fully perform his part of the contract, before he was entitled to any part of the promised consideration,

⁴¹ See Iowa Civil Jury Instruction 2400.5; compare Joint Proposed Jury Instruction No. 12. I have deleted proposed principle 6 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 or misleading in this dispute concerning the terms of a written contract, if any, that the parties agree was not fully integrated or a contract that was partially written and partially oral.

⁴² Like the parties, I have used “and/or was excused.” Joint Proposed Jury Instruction No. 11. The parties also apparently agree that the pertinent “excuses” are set out in Proposed Jury Instructions Nos. 15-17, although Turley disputes the applicability of a “non-material breach” instruction, as set out by Catipovic in Proposed Jury Instruction No. 15, because Turley contends that there were no “non-material” breaches by Catipovic. I conclude that there is a fact question on whether any breach by Catipovic was “material” or “non-material” and, hence, whether or not he is still entitled to some recovery.

then

- Catipovic must have fully performed his part of the contract to receive any of the promised consideration,

unless

- his full performance was excused, *or*
- his failure to make full performance was not material⁴³

Catipovic's performance was "excused,"⁴⁴ if

- Turley or another party to the contract prevented it or made it impossible
- Turley clearly rejected the contract by giving notice to Catipovic that Turley would not perform

If Catipovic did not make full performance under the terms of the contract, he may still recover some

⁴³ See Proposed Jury Instruction No. 15 (based on Iowa Civil Jury Instruction No. 2400.7), first unnumbered ¶. The first paragraph of the model states "unless full performance has been (excused) (waived) (prevented) (delayed) by the act of the other party." The problem is that the remainder of Iowa Civil Jury Instruction No. 2400.7 appears to state yet *another* circumstance in which full performance is not required, that is, when the plaintiff's non-performance was not "material." I believe that both "excuse" (which both parties recognize is relevant in this case) and "non-performance not material" should be alternatives after "unless." The remainder of the explanation then addresses these two circumstances.

⁴⁴ As to "excuse," the parties have agreed to two "excuse" instructions, Joint Proposed Jury Instruction Nos. 16 ("the other party prevents [performance] or makes it impossible," based on Iowa Civil Jury Instruction No. 2400.10) and 17 ("one party clearly rejects the contract by giving notice to the other that they will not perform," based on Iowa Civil Jury Instruction No. 2400.12). I have included both.

amount, if his failure to make full performance at the time it was due was “not material.”⁴⁵ You should consider the following circumstances to help you decide whether any failure by Catipovic to make full performance was “material” or “not material”:

- the extent to which Turley was deprived of the benefit that Turley reasonably expected
- the extent to which Turley can be adequately compensated for the part of the benefit that he expected, but did not receive
- the extent to which Catipovic will lose all benefit of the contract⁴⁶
- the likelihood that Catipovic would have cured the failure to perform fully, taking into account
 - any reasonable assurances that Catipovic gave Turley, and
 - all of the other circumstances

⁴⁵ This explanation of “not material” is drawn from Catipovic’s Proposed Jury Instruction No. 15, based on Iowa Civil Jury Instruction No. 2400.7. Turley objects to Catipovic’s Proposed Jury Instruction No. 15 on the ground that there will be no evidence to support a non-material breach by Catipovic. It seems to me that a jury can decide whether or not any non-performance by Catipovic was “not material,” in light of the factors stated in Iowa Civil Jury Instruction No. 2400.7.

⁴⁶ This circumstance is stated in Iowa Civil Jury Instruction No. 2400.7 as “the extent to which plaintiff will suffer forfeiture.” I have recast this circumstance in more juror-friendly terms as “the extent to which Catipovic will lose all benefit of the contract.”

- the extent to which Catipovic’s behavior was in line with the standards of good faith and fair dealing

Five, Turley materially breached the contract.

A “material breach of the contract” occurred if Turley failed to perform a material term of the contract.⁴⁷ Catipovic alleges that Turley materially breached the parties’ contract in the following ways:

- by terminating the agreement
- by circumventing Catipovic to build one or more ethanol plants in Eastern Europe without Catipovic⁴⁸

You must unanimously agree whether Turley breached the parties’ contract in one, both, or neither of these ways.

Six, Catipovic suffered damages as a result of Turley’s breach of the contract.⁴⁹

Catipovic must prove

⁴⁷ Iowa Civil Jury Instruction No. 2400.6.

⁴⁸ Again, the parties’ statements of the alleged breaches in their Proposed Jury Instructions are very vague. These allegations of breach of the contract are drawn from Plaintiff’s Legal Issues 1 and 2 in the parties’ Proposed Final Pretrial Order. **In light of Turley’s objection, I have inserted “Eastern” before “Europe” in the statement of the second alleged breach.**

⁴⁹ **I accept Turley’s contention that, even if the *amount of damages* is not an essential element of a “breach of contract” claim, proof of *damage resulting from the breach* is an essential element of such a claim. See, e.g., *Iowa Mortgage Ctr., L.L.C. v. Baccam*, 841 N.W.2d 107, 111 (Iowa 2013).**

- that he actually suffered some loss by reason of Turley’s breach of the contract, and
- that this loss was related to the nature and purpose of the contract⁵⁰

If Catipovic *does not* prove all of these elements, by the greater weight of the evidence, as to his “breach of contract” claim, then your verdict must be for Turley on that claim. On the other hand, if Catipovic *does* prove all of these elements as to one or more of the alleged breaches of the parties’ contract, then Catipovic is entitled to damages resulting from each breach proved, *unless* Turley proves one or more of his specific defenses, as explained in the next Instruction.⁵¹

⁵⁰ **The conclusion that proof of damage resulting from the breach is an essential element of a “breach of contract” claim begs the question of the appropriate standard of “causation.” As the Iowa Supreme Court has explained,**

We also require that the damages have some nexus with the breach, i.e., the damages recoverable for a breach of contract are limited to losses actually suffered by reason of the breach and must relate to the nature and purpose of the contract. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998).

***Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d at 839, 847 (Iowa 2010) (also discussing “foreseeability” of damages from breach of contract, but that is addressed in an appropriate “damages” instruction). I have instructed accordingly.**

⁵¹ 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 “specific defenses” instruction. **Neither party objects to treating “failure to mitigate” as a “damages” issue, but Turley objects to the former language of the “then” clause of this sentence (“then Catipovic is entitled to damages in some amount for each breach proved”). Turley contends that Catipovic is only entitled to damages in some amount if such damages resulting from the breach are proved, i.e., that existence of a breach is not enough to prove entitlement to damages. I agree. I believe that the problem is**

remedied by stating the “then” clause as follows: “then Catipovic is entitled to damages *resulting from* each breach proved.” (Emphasis added to show changes).

**No. 27 — TURLEY’S SPECIFIC DEFENSES TO
CATIPOVIC’S “BREACH OF CONTRACT”
CLAIM⁵²**

If you find that Catipovic has proved all of the elements of his “breach of contract” claim, then you must consider Turley’s specific defenses that he was excused from performing the parties’ contract by one or more of the following:

- Catipovic’s “prior material breach” of the contract;
- Catipovic’s “waiver” of performance by Turley; and/or
- Catipovic’s “misrepresentation or concealment” of material facts⁵³

I will explain each of these specific defenses in turn.

⁵² See Defendant’s Proposed Jury Instruction No. 18 (Turley’s specific “excuse” defenses, consisting of “prior breach,” “waiver,” and “misrepresentation or concealment”). Catipovic objects to this instruction, first, on the ground that Turley did not plead the affirmative defense of “excuse.” Catipovic is wrong. Turley expressly pleaded affirmative defenses of “waiver,” see Answer (docket no. 28), affirmative defense 4; Catipovic’s prior material breach of the contract, see *id.* at affirmative defense 7; and “fraudulent inducement,” see *id.* at affirmative defense 8. The failure to plead a specific defense expressly designated or described as “excuse” is not fatal, and the affirmative defenses that Turley pleaded are not legally insufficient. See, e.g., *FDIC v. Dosland*, 298 F.R.D. 388, 393-94 (N.D. Iowa 2013) (stating the standards for adequate pleading of an affirmative defense).

⁵³ See Defendant’s Proposed Statement Of The Case; Defendant’s Proposed Jury Instruction No. 18. **Catipovic objects to submitting the “misrepresentation or concealment” specific defense to the jury, because he asserts it was not pleaded with the particularity imposed upon his pleading of fraud in his rejected amendments to his Complaint. As I noted, above, Catipovic had ample opportunity to challenge the sufficiency of the pleading of Turley’s affirmative defenses, but did not timely do so. This objection is overruled. I will not strike this defense nor instruct on Catipovic’s purported “fraud” claim at this time.**

“Prior material breach” by Catipovic⁵⁴

A party’s performance of the contract as a whole is excused by the other party’s prior material breach of the contract. To prove that a “prior material breach” by Catipovic excused Turley’s performance of the parties’ contract, Turley must prove the following by the greater weight of the evidence:

One, material terms of the parties’ contract required Catipovic to do one or both of the things that Turley alleges.

“Material” terms of a contract are those that are significant to the contract.⁵⁵ Turley alleges that material terms of the parties’ contract required Catipovic to do the following:

⁵⁴ Turley does not cast this specific defense in “elements.” The elements of breach of contract, set out in Iowa Civil Jury Instruction No. 2400.1, that are at issue when the plaintiff’s prior breach of the contract is raised as an affirmative defense are whether the contract contained the material terms alleged by the defendant (element *three* in the preceding “breach of contract” instruction), whether the plaintiff breached those terms (element *five* of the preceding “breach of contract” instruction), and whether the plaintiff’s breach was prior to any breach by the defendant (element *four* of the preceding “breach of contract” instruction). I believe that these last two elements can be combined into a single element, stated as whether “prior to any breach of the parties’ contract by Turley, Catipovic materially breached the parties’ contract by failing to perform one or more of these material terms.”

⁵⁵ See *Pavone v. Kirke*, 801 N.W.2d 477, 488-89 (Iowa 2011) (noting 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”).

- secure the land and the necessary permits in Osijek, Croatia, and Titel, Serbia, to build ethanol plants;⁵⁶ and
- sign a shareholders' agreement

You must unanimously agree whether one, both, or none of these things were material terms of the parties' contract.

Two, prior to any breach of the parties' contract by Turley, Catipovic materially breached the parties' contract by failing to perform one or more of these material terms.

A "material breach of the contract" occurred if Catipovic failed to perform a material term of the contract.⁵⁷ The breach of the contract by Catipovic must have been prior to any breach of the contract by Turley for Catipovic's breach to "excuse" Turley's breach.

"Waiver" by Catipovic⁵⁸

A party can give up or "waive" his right to insist on compliance with performance of the contract as a whole.⁵⁹ To prove that a "waiver" by Catipovic

⁵⁶ **I have amended this statement of a material term of the contract, which Catipovic allegedly breached, in the more specific terms proffered by Turley in his Objections to the 10/31/14 Version.**

⁵⁷ Iowa Civil Jury Instruction No. 2400.6.

⁵⁸ *See* Iowa Civil Jury Instruction No. 2400.11; *see also* Defendant's Proposed Jury Instruction No. 18.

⁵⁹ A party can waive performance of a single term or of the entire contract. Turley asserts that Catipovic waived performance of the entire contract.

excused Turley's performance of the parties' contract, Turley must prove the following by the greater weight of the evidence:

One, Catipovic had a right to performance of the contract as a whole.

Two, Catipovic knew that he had a right to performance of the contract as a whole.

Three, Catipovic indicated by his actions, in the surrounding circumstances, that he intended to give up his right to performance of the contract as a whole.⁶⁰

Based on the circumstances of the waiver, you must determine whether Catipovic intended to waive

- only compliance with a specific term of the contract, or
- performance of the contract as a whole
 - A party can waive performance of the contract as a whole by conduct demonstrating that the party no longer expects or wants performance by the other party⁶¹

⁶⁰ See Iowa Model Civil Jury Instruction 2400.11.

⁶¹ See, e.g., *Pearce v. ELIC Corp.*, 329 N.W.2d 74, 78-79 (Neb. 1982) (“The following well-established rules of law are applicable to the facts of the instant case. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.”).

“Misrepresentation or concealment” by Catipovic⁶²

⁶² The parties dispute the elements of this defense. Turley relies on my statement of a “misrepresentation or concealment” defense in *EAD Control Sys., L.L.C. v. Besser Co. USA*, No. C 11-4029-MWB (N.D. Iowa) (Jury Instructions (docket no. 61)). Catipovic contends, however, that the applicable defense, if any, is “fraud in the inducement,” and cites the elements of “fraudulent inducement” from *Whalen v. Connelly*, 545 N.W.2d 284, 294 (Iowa 1996) (stating the elements of a *claim for damages* for “fraudulent inducement,” not the elements of a *defense* of “fraudulent inducement” to a “breach of contract” claim).

The determination of the proper elements, I find, depends upon the *timing* of the alleged misrepresentations. Specifically, the “misrepresentation or concealment” defense in *EAD* was, more specifically, an affirmative defense of “equitable estoppel,” based on “misrepresentation or concealment.” My statement of the elements of the defense in *EAD* was based on these authorities: *Humiston Grain Co. v. Rowley Interstate Transp. Co., Inc.*, 483 N.W.2d 832, 834-35 (Iowa 1992) (estoppel by misrepresentation); *International Harvester Credit Corp. v. Leaders*, 818 F.2d 655, 658-59 (8th Cir. 1987) (explaining “estoppel” as an “affirmative defense that may be raised in both legal and equitable actions,” under Iowa law, such as the “breach of contract” action before it, and defining the defense in terms of both misrepresentation and concealment). The alleged misrepresentations and concealments at issue in *EAD* were primarily, if not exclusively, *alleged misrepresentations by the party asserting breach of contract allegedly made by that party during the performance of the contract*. See *EAD*, Joint Proposed Jury Instructions (docket no. 42) (defendant’s Proposed Jury Instruction No. 22).

Here, in contrast, I believe that the alleged misrepresentations at issue allegedly occurred *before* Turley allegedly entered into the contract. The Joint Proposed Jury Instructions and the parties’ Joint Proposed Final Pretrial Order do not reveal this fact, as they are entirely silent on the specific misrepresentations or concealments at issue. Nevertheless, I have found guidance in the parties’ Statements Of Fact in the summary judgment record. There, I find that Turley stated (and Catipovic denied) that Turley had discovered that, contrary to Catipovic’s representations before Turley entered into the contract, Catipovic had “no unique assets, relationships, insights, business awareness, ideas or skills, and had grossly misrepresented his skills and value [and] what the total cost of the project would be.” Turley’s Statement Of Undisputed Material Facts In Support Of Summary Judgment (docket no. 68-1), ¶ 55, and Catipovic’s Response (docket no. 101-1), ¶ 55. Thus, the alleged misrepresentations were made “in the

inducement” to Turley to enter into the contract, *not* “during the performance” of the contract.

A further problem is that, as I have observed, “Under Iowa law, fraudulent misrepresentation in the inducement to contract gives rise to three distinct actions: (1) a cause of action at law for money damages; (2) *a defense to a breach-of-contract claim*; and (3) a ground for rescission of a contract in an action in equity.” *Schmidt v. Fortis Ins. Co.*, 349 F. Supp. 2d 1171, 1191 (N.D. Iowa 2005) (emphasis added) (citing, *inter alia*, *Utica Mut. Ins. Co. v. Stockdale Agency*, 892 F. Supp. 1179, 1191 (N.D. Iowa 1995)). In *Utica Mutual Insurance Company*, I cited *Higgins v. Blue Cross of Western Iowa and South Dakota*, 319 N.W.2d 232, 236 (Iowa 1982), as explaining the use of “fraudulent misrepresentation in the inducement to contract” as a *defense* to a breach of contract claim. 892 F. Supp. at 1191. *Higgins* explains that the elements of a “fraudulent inducement” *defense* to a “breach of contract” claim, which must be proved “by clear, convincing, and satisfactory evidence,” are the following: (1) the party asserting a breach of contract claim made a false representation or failed to make a disclosure to the other party; (2) the representation or the non-disclosure was material to the transaction; (3) the representation was made with actual knowledge of falsity or with reckless disregard of whether it was true or false or the non-disclosure was made with knowledge that it concealed the true circumstances or with reckless disregard of whether it did so; (4) the party making the representation or non-disclosure did so with intent to deceive the other party; and (5) the other party relied on the representation or non-disclosure to its detriment, *i.e.*, the other party would not have entered into the transaction if the true facts had been known. 391 N.W.2d at 237 (clarifying that fraudulent non-disclosure, as well as a false representation, will establish the defense); *cf.* Iowa Civil Jury Instruction No. 810.1 (statement the elements of a *claim for damages* for “fraudulent misrepresentation”); Iowa Civil Jury Instruction No. 810.2 (statement of the elements of a *claim for damages* for “fraudulent non-disclosure”).

Again, Catipovic objects to submitting the “misrepresentation or concealment” specific defense to the jury, because he asserts it was not pleaded with the particularity imposed upon his pleading of fraud in his rejected amendments to his Complaint. Catipovic had ample opportunity to challenge the sufficiency of the pleading of Turley’s affirmative defenses, but did not timely do so. This objection is overruled. I will not strike the “misrepresentation” defense or instruct on Catipovic’s purported “fraud” claim at this time.

A party's performance of the contract as a whole is excused by the other party's misrepresentations or concealments that induced the party to enter into the contract.

The specific defense of "misrepresentation or concealment" must be proved by clear, convincing, and satisfactory evidence.⁶³

- This is a higher burden of proof than "the greater weight of the evidence"
- Evidence is "clear, convincing, and satisfactory" if there is no serious or substantial uncertainty about the conclusion to be drawn from it⁶⁴

To prove that "misrepresentation or concealment" by Catipovic excused Turley's performance of the parties' contract, Turley must prove the following by clear, convincing, and satisfactory evidence:

One, Catipovic knowingly made a false representation to Turley or knowingly concealed information from Turley prior to the parties' entry into the contract.

A "representation" includes

- any word or conduct asserting the existence of a fact
- an opinion as to quality, value, authenticity, or a similar matter
- a promise to perform a future act

⁶³ *Higgins*, 391 N.W.2d at 237.

⁶⁴ Iowa Civil Jury Instruction No. 100.19.

A representation was “false” if it was not true at the time it was made.

A “concealment” is a failure to disclose a fact known to Catipovic that Turley had reason to believe would be disclosed.⁶⁵

Turley contends that, before the parties entered into any contract, Catipovic made false representations or concealments about one or more of the following:

- whether Catipovic had unique assets, relationships, insights, business awareness, ideas, or skills, and
- what the total cost of the project would be⁶⁶

You must unanimously agree whether Catipovic made one, both, or neither of these false representations or concealments.

Two, Catipovic’s false representation or concealment was material to the transaction.

A representation or concealment was “material,”
if

⁶⁵ Iowa Civil Jury Instruction No. 810.3.

⁶⁶ **Catipovic contends that Turley has never adequately identified the alleged misrepresentations or concealments at issue. I believe that it is appropriate to identify more specifically the alleged misrepresentations or concealments at issue than I did in the prior version of the jury instructions. I explained, above, that I found the allegations of misrepresentations and concealments at issue in Turley’s Statement Of Undisputed Material Facts In Support Of Summary Judgment (docket no. 68-1), ¶ 55, and Catipovic’s Response (docket no. 101-1), ¶ 55. I have used those allegations here.**

- a reasonable person would have considered it important to making a decision, or
- Catipovic knew or had reason to know that Turley considered, or was likely to consider, it important to making a decision, or
- it influenced Turley to enter into a transaction that would not have occurred otherwise⁶⁷

Three, Catipovic knew that the representation was false, or knew that his concealment hid the true facts.

Catipovic knew that the representation was false or that the concealment hid the true facts, if:

- he actually knew or believed that it was false or hid the true facts, or
- he had no belief in its truth or recklessly disregarded its truth, or
- he falsely stated or implied that it was based on his personal knowledge or investigation, or
- he knew or believed that it was materially misleading, because it left out unfavorable information, or
- it indicated his intention to do or not to do something when he had the opposite intention, or

⁶⁷ Iowa Civil Jury Instruction No. 810.4.

- he recklessly disregarded how it would be understood⁶⁸

Four, Catipovic made the representation or concealed the information with intent to deceive Turley.

Catipovic “intended to deceive Turley,” if

- he wanted to deceive Turley or believed that Turley would, in all likelihood, be deceived, or
- he had information from which a reasonable person would conclude that Turley would be deceived, or
- he made the representation or concealed the information without concern for the truth⁶⁹

Five, Turley justifiably relied on the representation or concealment to his detriment.

Turley “relied” on the representation or concealment, if he would not have entered into the transaction if he had known the true facts.⁷⁰ The representation or concealment

- does not have to be the only reason that Turley entered into the transaction, *but*

⁶⁸ Iowa Civil Jury Instruction No. 810.5.

⁶⁹ Iowa Civil Jury Instruction No. 810.6.

⁷⁰ *Higgins*, 391 N.W.2d at 237.

- must have been a substantial factor in his decision to enter into the transaction⁷¹

Reliance was “justified,” if

- Turley’s decision, based upon the representation or concealment, was what he could reasonably be expected to do in light of his own information and intelligence, and
- the representation or concealment involved an important fact and was not obviously false⁷²

The Effect Of Proof Of One Or More Specific Defenses

If Turley has proved one or more of his specific defenses, ***then***

- you must find for Turley on each such specific defense, ***and***
- you cannot award any damages to Catipovic for breach of the parties’ contract⁷³

⁷¹ Iowa Civil Jury Instruction No. 810.8 (second unnumbered paragraph).

⁷² Iowa Civil Jury Instruction No. 810.8 (last paragraph).

⁷³ *Cf.* Iowa Civil Jury Instruction No. 2400.8 (last paragraph on the effect of an affirmative defense).

**No. 28 — CATIPOVIC’S CLAIM OF “UNJUST
ENRICHMENT”⁷⁴**

Catipovic’s second claim is a claim of “unjust enrichment,” in which Catipovic alleges that Turley was unjustly enriched by receiving the benefit of Catipovic’s services without compensating Catipovic.⁷⁵ Turley denies that Catipovic provided anything of value to him or that he was unjustly enriched.⁷⁶

Where there is a contract between the parties on the same subject matter, a party cannot pursue a claim for “unjust enrichment.”⁷⁷ Therefore,

- you can only consider this claim, if you find that there was no contract between the parties, as explained in element *one* in Instruction No. 7
- to put it another way, you cannot consider this claim if Catipovic proves element *one* in Instruction No. 7, even if he fails to prove that he is entitled to recover damages on his “breach of contract” claim⁷⁸

⁷⁴ See Joint Proposed Jury Instruction Nos. 24 and 25; see also Iowa Civil Jury Instruction No. 2400.11 (2012).

⁷⁵ See Plaintiff’s Proposed Statement Of The Case (docket no. 171).

⁷⁶ See Defendant’s Proposed Statement Of The Case.

⁷⁷ See *Community Voiceline, L.L.C. v. Great Lakes Commc’ns Corp.*, No. C 12–4048–MWB, 2014 WL 357782, *4 (N.D. Iowa Jan. 31, 2014) (citing Iowa cases so holding).

⁷⁸ Compare Defendant’s Proposed Jury Instruction No. 25. Contrary to Catipovic’s objection, I find that it is not only appropriate, but necessary to inform the jurors that they *cannot* consider this claim if they find that there was an express contract between the parties on the same subject matter. I have not been able to determine a

To win his “unjust enrichment” claim, Catipovic must prove all of the following elements by the greater weight of the evidence:⁷⁹

One, Turley was enriched by receiving a benefit.⁸⁰

way—at least, a way that would not be unduly confusing to a jury—to permit independent verdicts on both a “breach of contract” claim and an “unjust enrichment” claim, to avoid any possibility of a retrial, if a court concludes on post-trial review or appeal that one or the other claim was improperly submitted or a verdict must be set aside.

⁷⁹ Compare Proposed Jury Instruction No. 24 (plaintiff’s and defendant’s versions). Turley objects to Catipovic’s Proposed Jury Instruction on the ground that it appears to relate to a claim for *quantum meruit*, which has not been pleaded, rather than to a claim for unjust enrichment. Contrary to Turley’s objection, however, Catipovic’s statement of the *elements* of the claim is exactly the same as the statement of the elements in *Helm Fin. Corp. v. Iowa N. Ry. Co.*, 214 F. Supp. 2d 934, 992 (N.D. Iowa 2002), on which Turley relies. It seems to me that Turley’s objection actually goes to the appropriate measure of *damages* on an “unjust enrichment” claim. See Catipovic’s Proposed Jury Instruction No. 24; see also Turley’s objection to Catipovic’s Proposed Jury Instruction No. 26 (“The proper measure of damages on an unjust enrichment claim under Iowa law is not the ‘reasonable value of the services or benefit the plaintiff provided,’ but is ‘the value of what was inequitably retained.’ *Iowa Waste Sys.*, 617 N.W.2d at 31.”). In short, I have relied on the statement of the elements of an “unjust enrichment” claim stated in my June 11, 2012, Memorandum Opinion And Order Regarding Defendants’ Motions To Dismiss (docket no. 25), 34-35, 42-44, and the cases cited therein.

⁸⁰ The parties both state this element in terms of “receipt of a benefit from Catipovic,” but Catipovic adds “or other third parties.” Both *Lakeside Feeders, Inc. v. Producers Livestock Mktg. Ass’n*, 666 F.3d 1099, 1112 (8th Cir. 2012), and *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001), state this element simply as “defendant was enriched by the receipt of a benefit”; they do not state that the benefit was received from the plaintiff or anyone else. Also, *Palmer* notes that “benefits can be direct or indirect, and can involve benefits conferred by third parties” and that “[t]he critical inquiry is that the benefit received is at the expense of the plaintiff.” 637 N.W.2d at 155. Thus, I will address the issue of a benefit conferred by a third party in the explanation to the *second* element.

To enrich a recipient, a “benefit”

- must have had some value to a reasonable person in the recipient’s circumstances⁸¹

Such “benefits” may include receiving one or more of the following:

- property⁸²
- work or labor of another or that was paid for by another and the products of such work or labor⁸³
- services provided or paid for by another⁸⁴

⁸¹ Turley asserts that Catipovic provided nothing of value to him and, indeed, states the “damages” question (Defendant’s Proposed Verdict Form, Question 11) as, “What is the value to Mark Turley of the benefit provided by Branimir Catipovic?” This suggests that Turley believes that the benefit conferred must have some subjective value *to him*. I disagree. “Unjust enrichment” under Iowa law is based on principles of justice and equity and has the goal of providing a claimant with compensation for the reasonable value of a benefit conferred on another. *Lakeside Feeders, Inc.*, 666 F.3d at 1112; *Waldner*, 618 F.3d at 848. Consequently, I believe that whether or not a “benefit” has “enriched” another is based on whether the “benefit” has some *objective* value, that is, whether it would have some value to a reasonable person in the recipient’s circumstances. I have then stated such “benefits” identified in case law.

⁸² *Palmer*, 637 N.W.2d at 154.

⁸³ *Criterion 508 Solutions, Inc. v. Lockheed Martin Servs., Inc.*, 806 F. Supp. 2d 1078, 1102 (S.D. Iowa 2009).

⁸⁴ *Waldner v. Carr*, 618 F.3d at 838, 848 (8th Cir. 2010) (quoting *State Public Defender v. Iowa Dist. Court for Woodbury Cnty.*, 731 N.W.2d 680, 684 (Iowa 2007)).

- novel or original ideas that can be exploited to business or economic advantage⁸⁵

Two, Turley’s enrichment was at Catipovic’s expense.

The benefit must have been

- provided to Turley by Catipovic, or
- provided to Turley by a third party at Catipovic’s expense⁸⁶

Three, it is unjust to allow Turley to retain the benefit under the circumstances.

For a party to be unjustly enriched,

- that party must retain a benefit from or provided by another person, and
- retaining that benefit must be to the other person’s loss, harm, or disadvantage, and

⁸⁵ Turley cites in support of this instruction on “ideas” as “benefits” for purposes of an “unjust enrichment” claim the district court’s decision in *Khreativity Unlimited v. Mattel, Inc.*, 101 F. Supp. 2d 177, 184-85 (S.D.N.Y. 2000), *aff’d*, 242 F.3d 366 (2d Cir. 2000). I agree that any “property interest” in an idea sufficient to constitute a “benefit” within the meaning of an “unjust enrichment” claim would require that the “idea” be novel or original. *See also Hurst v. Dezer/Reyes Corp.*, 82 F.3d 232, 236 (8th Cir. 1996) (discussing an out-of-circuit case, *Murray v. National Broadcasting Co.*, 844 F.2d 988 (2d Cir.), *cert. denied*, 488 U.S. 955 (1988), in which an unjust enrichment claim premised on providing an idea for a new television program was rejected, because the idea was not novel, but finding the case inapplicable to the facts before it); *see also Cobb v. Southern Plaswood Corp.*, 171 F. Supp. 691, 698 (W.D. Ark. 1959) (recognizing that a claim for unjust enrichment might lie for disclosure of a novel idea, but only if the disclosure was under contractual non-disclosure protection).

⁸⁶ As the Iowa Supreme Court explained in *Palmer*, “benefits can be direct or indirect, and can involve benefits conferred by third parties” and “[t]he critical inquiry is that the benefit received is at the expense of the plaintiff.” 637 N.W.2d at 155.

- the circumstances must make it unjust for the recipient to enjoy the benefit without compensating the provider for the loss, harm, or disadvantage that he suffered⁸⁷

For example, it may be unjust for Turley to retain a benefit

- for which Catipovic expected compensation, but for which Catipovic did not receive compensation⁸⁸

On the other hand, it may not be unjust for Turley to retain a benefit

- that Catipovic voluntarily provided, or
- that Catipovic provided to advance Catipovic's own interests⁸⁹

⁸⁷ The first two “bullets” of this explanation of unjust retention of a benefit are from *Brown v. Kerkhoff*, 279 F.R.D. 479, 497 (S.D. Iowa 2012) (Gritzner, J.) (citing *Walsh Chiropractic, Ltd. v. StrataCare, Inc.*, No. 09-cv1061-MJR, 2011 WL 4336727, *10 (S.D. Ill. Sept. 14, 2011)). I have substituted “loss, harm, or disadvantage” where *Brown* uses “detriment.” I believe it is necessary, however, to add a third “bullet,” drawn from *Restatement (Second) of Restitution* § 1, cmt. c, which makes clear that “even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, *as between the two persons*, it is unjust for him to retain it.” (Emphasis added).

⁸⁸ *Lakeside Feeders, Inc.*, 666 F.3d at 1112 (quoting *Palmer*, 637 N.W.2d at 154); *Waldner*, 618 F.3d at 848 (quoting *State Public Defender*, 731 N.W.2d at 684).

⁸⁹ *See, e.g., Waldner*, 618 F.3d at 848 (holding it was not unjust for the plaintiff to suffer the detriment, where he had willingly placed himself in that position); *Westchester Fire Ins. Co. v. Wallerich*, 563 F.3d 707, 716 (8th Cir. 2009) (noting that the Illinois Supreme Court had recognized that there was no unjust enrichment where a party conferred a benefit on another to advance or protect its own interests); *West Branch State Bank v. Gates*, 477 N.W.2d 848, 852 (Iowa 1991) (there was no unjust enrichment

You must decide, from your consideration of all of the circumstances, whether Turley unjustly retained a benefit to Catipovic's loss, harm, or disadvantage.

If Catipovic does not prove all of these elements, by the greater weight of the evidence, as to his "unjust enrichment" claim, then your verdict must be for Turley on that claim. On the other hand, if Catipovic does prove all of these elements, then Catipovic is entitled to damages in some amount on his "unjust enrichment" claim.

where the claimant transferred an asset, voluntarily and without coercion, for his own interests); *In re Petersen*, 273 B.R. 586, 592 (Bankr. N.D. Iowa 2002) (observing, "Iowa courts seem especially reluctant to find 'unjust enrichment' when parties have voluntarily placed themselves in a situation or have failed to take action to put themselves in a better situation," and holding after trial that the party claiming unjust enrichment had considered, but decided not to insist on, a mortgage to secure her interest, and that "[t]his court should not now improve her bargain by providing security that she herself knowingly elected not to take").

No. 29 — DAMAGES IN GENERAL⁹⁰

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 Catipovic on his “breach of contract” claim, and against Turley on his specific defenses to that claim, or, in the alternative, if you find for Catipovic on his “unjust enrichment” claim, then you must determine what, if any, damages to award on that claim. “Damages” are the amount of money that will reasonably and fairly compensate Catipovic for the injury that you find he suffered as a result of Turley’s wrongful conduct.

- 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

⁹⁰ My stock instruction for damages. *Compare* Defendant’s Proposed Jury Instruction No. 27. Contrary to Catipovic’s objection, I find that this instruction on general principles applicable to *any* damages award is appropriate, notwithstanding that I will also give separate instructions on the damages available on each claim.

Finally, you must determine what, if any, compensatory damages to award for any wrongful conduct by Turley, as explained in Instruction No. 11, before you consider Turley's contention that Catipovic failed to "mitigate" his damages, as explained in Instruction No. 12.

No. 30 — COMPENSATORY DAMAGES⁹¹

Damages For “Breach Of Contract”⁹²

Compensatory damages for “breach of contract” are the amount that would place Catipovic in as good a position as he would have enjoyed if Turley had not breached the contract and the parties had, instead, performed the contract according to its terms.⁹³

The damages, if any,⁹⁴ that you award must have been

⁹¹ Compare Joint Proposed Jury Instruction Nos. 21-23 (damages for breach of contract); 26 (damages for unjust enrichment).

⁹² 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). From Plaintiff’s Proposed Jury Instruction No. 21, it appears that Catipovic seeks “expectation” damages on his “breach of contract” claim. Turley’s objections to Catipovic’s proposed instruction, on the ground that it improperly states the “expectation” as Catipovic’s subjective expectation, is well founded. Compare Turley’s Proposed Jury Instruction No. 23. I do not believe that it is appropriate to instruct the jurors on what factors may go into the calculation of “expectation” damages, and the parties have not offered statements of specific items of damages. Although Turley offered a “nominal damages” instruction, it does not appear that Catipovic seeks “nominal damages,” even in the alternative.

⁹³ This is the definition of “expectation” damages in Iowa Civil Jury Instruction No. 220.1.

⁹⁴ I believe that Turley is correct that “if any” should be inserted here.

- established by the terms of the parties' contract setting Catipovic's compensation for or share in the project⁹⁵

and 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 contract⁹⁶

Damages For "Unjust Enrichment"

Compensatory damages for "unjust enrichment" are the amount representing the value to a reasonable person in Turley's circumstances of benefits provided or paid for by Catipovic.⁹⁷

⁹⁵ Turley is also correct that Catipovic's proffered instruction improperly assumes that a term of the contract provided Catipovic with a 10% share in any ethanol facility in Europe. Rather, I believe it is appropriate to instruct the jurors that Catipovic's expectation damages are the compensation for or share in the project set by the terms of the parties' contract.

⁹⁶ These to "bullet points" are the "overlapping" parts of Iowa Civil Jury Instructions 220.1 and 220.2. Contrary to Catipovic's objection to Turley's Proposed Jury Instruction No. 21, I do not think that this language unduly emphasizes "foreseeability."

⁹⁷ The parties dispute the proper measure of damages for "unjust enrichment." In Plaintiff's Proposed Jury Instruction No. 26, Catipovic asserts that "the proper measure of plaintiff's damages for unjust enrichment would be the value of plaintiff's services in acting as a promoter of the European ethanol venture including, but not limited to, providing the idea to build ethanol plants in Europe," and he proposes that the jurors be asked to consider both his efforts and services and Wendland's efforts and services. In Defendant's Proposed Jury Instruction No. 26, Turley asserts that the "[c]ompensation for unjust enrichment is limited to the value of what was inequitably retained by Turley.

Such damages may include the value to a reasonable person in Turley's circumstances of

- Catipovic's idea to build ethanol plants in Europe, and
- Catipovic's services as a promoter of the ethanol project, and

In other words, the amount of unjust enrichment is the value to Turley of the services provided by Catipovic to Turley." As I explained, *supra*, in note 81, I believe that whether or not a "benefit" has "enriched" another is based on whether the "benefit" has some *objective* value, that is, whether it would have some value to a reasonable person in the recipient's circumstances, not the subjective value, if any, perceived by the recipient. I believe that the measure of damages is also an *objective* one, not the value *to the recipient* of the services or other benefits received.

More specifically still, Iowa courts have repeatedly stated that the purpose of an unjust enrichment claim is to prevent unjust enrichment of a recipient of property, services, or other benefits without making just compensation for the benefits received. *Lakeside Feeders, Inc.*, 666 F.3d at 1112; *Ahrendsen ex. rel. Ahrendsen v. Iowa Dep't of Human Servs.*, 613 N.W.2d 675, 679 (Iowa 2000). "Unjust enrichment" is a "restitution" theory. *Smith v. Harrison*, 325 N.W.2d 92, 94 (Iowa 1982); *Palmer*, 637 N.W.2d at 154 (citing *Smith*); *Irons v. Community State Bank*, 461 N.W.2d 849, 855 (Iowa Ct. App. 1990). The Iowa Supreme Court has explained, "Restitution measures the remedy by the gain obtained by the defendant, and seeks disgorgement of that gain." *Palmer*, 637 N.W.2d at 153. Similarly, the Iowa Court of Appeals has stated, "Damages under a claim of unjust enrichment are limited to the value of what was inequitably retained." *Iowa Waste Sys., Inc. v. Buchanan Cnty.*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000).

Here, what was allegedly inequitably gained and retained, using Turley's measure of damages, is precisely the reasonable value of the services that Catipovic provided or paid for, essentially as Catipovic contends.

- any ideas or services as a promoter provided by a third party for which Catipovic paid,⁹⁸

if Catipovic proves

- that he provided such ideas or services or that a third party provided such ideas or services at Catipovic's expense, and
- that the ideas or services had some value to a reasonable person in Turley's circumstances.⁹⁹

⁹⁸ Contrary to Catipovic's contentions or the inferences from his list of "considerations" in the determination of damages for "unjust enrichment" in Plaintiff's Proposed Jury Instruction No. 26, such damages do *not* include any ideas, services, or efforts of Wendland or any other third party, *unless* Catipovic paid for Wendland's or the other third party's services to Turley. This is true, for the same reasons that the benefit at issue must have been provided by the plaintiff, or if provided indirectly by a third-party, at the plaintiff's expense, as explained, *supra*, in note 86.

⁹⁹ **I agree with Turley's contention that the prior language, which did not include the "if" clause and accompanying "bullets," could have improperly suggested that there was proof that Catipovic had provided such ideas or services. Contrary to Turley's request, however, I will not strike these allegations of items of damages for "unjust enrichment." Instead, I believe that the problem is cured by adding the "if" clause making clear that Catipovic must prove that he provided such ideas or services and that they had value to a reasonable person in Turley's circumstances.**

No. 31 — MITIGATION OF DAMAGES¹⁰⁰

A plaintiff seeking damages for “breach of contract” has a duty to “mitigate” his damages from the defendant’s breach of the parties’ contract. Thus, Catipovic is under the duty to use reasonable efforts to lessen his damages caused by Turley’s breach of the parties’ contract.¹⁰¹

¹⁰⁰ Turley offered a “failure to mitigate damages” instruction, as an affirmative defense to Catipovic’s “breach of contract” claim. See Defendant’s Proposed Jury Instruction No. 22. Catipovic objects to this instruction on the ground that the evidence will not support it. Because I prefer to instruct jurors *before* any evidence is presented, so that they are better able to assess the importance of evidence as they hear it, I would also prefer to strike a “mitigation of damages” instruction, if the evidence ultimately does not support it, than not to give it in the first place.

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.”). I have not found any decision, however, expressly allowing such a defense to an “unjust enrichment” claim. Nevertheless, I do not see why such a defense would not be applicable to such a claim.

I do not find that it is necessary to identify “failure to mitigate damages” as a “defense.” Rather, as I have previously indicated, *supra*, note 51, I will simply treat “mitigation” as a “damages” issue.

¹⁰¹ *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.” **The parties agree that “mitigation of damages” is only applicable to Catipovic’s “breach of contract” claim.**

To prove that Catipovic failed to mitigate damages from Turley's breach of contract, Turley must prove the following elements by the greater weight of the evidence:

One, Catipovic could have reduced his damages from Turley's breach of contract by entering or timely attempting to enter into a substitute transaction to secure equity investment or debt financing of the ethanol project or some part of that project.¹⁰²

¹⁰² Iowa Civil Jury Instruction No. 400.7, the only available Iowa model on mitigation of damages (albeit for purposes of comparative fault), and Defendant's Proposed Jury Instruction No. 22 both talk about "something that [the plaintiff] could do," and Turley also states that his contention is that Catipovic "failed to mitigate his damages by not exercising ordinary care in a specific manner in which Catipovic had a duty to reduce damages." "Something" Catipovic could have done or some "specific," but unidentified thing that he could have done simply isn't good enough. *If Turley does not identify pretrial adequate allegations of Catipovic's failure to mitigate damages, I will not submit this instruction.*

In response to that part of my Order (docket no. 174) requiring Turley to identify specifically the way or ways in which he alleges that Catipovic failed to mitigate damages, Turley alleges that Catipovic failed to mitigate damages from breach of contract in four different ways: (1) failing to enter or timely attempt to enter into a substitute transaction to secure equity investment or debt financing for the Osijek project; (2) failing to timely apply for or attempt to obtain permits which were necessary to move forward with the Osijek project until several years after Turley left the Osijek project; (3) failing to timely revise and update business plans and financial models for the Osijek project which were necessary to obtain or attempt to obtain equity investment or debt financing for the Osijek project until several years after Turley left the Osijek project; and (4) abandoning development of the Titel, Serbia, project entirely. As explained in note 103, a "substitute transaction" is a "contract" requirement for "mitigation." Only the first "way" alleged by Turley is a "substitute transaction." Turley has not identified any legal authority for any other kind of "mitigation" for a "breach of contract."

A party seeking damages for a “breach of contract” may be required to mitigate damages through one or more substitute transactions.¹⁰³ Turley must prove

I simply do not find that “ways” (2) through (4) are “mitigation of damages,” in the sense of things that Catipovic could have done to reduce his damages *from Turley’s breach of contract*—that is, *in the absence of a “substitute transaction” or an attempt to enter into a “substitute transaction,”* none of them would have reduced Catipovic’s damages. They are, *at most*, evidence indicating the lack of a reasonable effort by Catipovic to obtain a “substitute transaction,” as set out in element *two*, where Turley does not assert, and I am not aware of any evidence, that Catipovic could “go it alone” to complete any project to build ethanol plants. I also note that “way” (2) overlaps one of Turley’s allegations of Catipovic’s “prior material breach” of the contract excusing his own breach, but Turley cites no authority that a “prior material breach” can also be a “failure to mitigate damages,” and I don’t see how it can be.

I have limited the allegation of what Catipovic could have done to “mitigate” his damages to “entering or timely attempting to enter into a substitute transaction to secure equity investment or debt financing of the ethanol project or some part of that project,” because only such a “substitute transaction,” as a means of mitigating damages from a breach of contract, is adequately supported by authority, such as the authority identified in the next note.

¹⁰³ In *Hunter v. Board of Trustees of Broadlawns Medical Center*, 481 N.W.2d 510, 517 (Iowa 1992), the Iowa Supreme Court explained that the “substitute transaction” requirement is a specifically “contract” requirement for mitigation. *Hunter* is an “employment contract” case, but it does not restrict the “substitute transaction” standard to mitigation of damages in “employment contract” cases. Rather, 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 v. Muhr*, 160 N.W.2d 454, 457 (Iowa 1968), 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. 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).

- that a substitute transaction was similar in nature to the transaction with him¹⁰⁴

Turley 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 benefits or the same compensation or return to Catipovic as his transaction with Turley¹⁰⁵

Two, Catipovic acted unreasonably in failing to take action to lessen his damages.¹⁰⁶

Catipovic acted unreasonably, if

- he took no action to lessen his damages, or

¹⁰⁴ 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.”

¹⁰⁵ *Again, Turley must identify the “specific manner” in which he alleges that Catipovic could reasonably have mitigated his damages from “unjust enrichment.”*

Again, in response to that part of my Order (docket no. 174) requiring Turley to identify specifically the way or ways in which he alleges that Catipovic failed to mitigate damages, Turley concedes that mitigation of damages is not applicable to Catipovic’s “unjust enrichment” claim. Therefore, I have specifically restricted this instruction to mitigation of damages from “breach of contract.”

¹⁰⁶ *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”).

- he failed to take advantage of one or more means of lessening his damages¹⁰⁷

On the other hand, Catipovic acted reasonably in taking action to lessen his damages, if

- he did all that was reasonable to lessen his damages, *but*
- was unsuccessful¹⁰⁸

Three, the failure to take the action increased Catipovic’s damages.¹⁰⁹

If Turley proves that Catipovic failed to “mitigate” his damages, then

- You must determine the amount that Catipovic’s damages on his “breach of contract” claim could have been reduced by “mitigating”

¹⁰⁷ See, e.g., *Restatement (Second) of Contracts* § 350 and cmts. *b, c. I have altered this explanation to be consistent with the prior element.*

While they do not stand as “ways” that Catipovic allegedly failed to mitigate damages, the following are *evidence that might suggest* that Catipovic acted unreasonably: Catipovic’s failure to apply for or to attempt to obtain permits that were necessary to move forward with the Osijek ethanol project until years after Turley left the Osijek project; Catipovic’s failure to revise and update business plans and financial models for the Osijek project that were necessary to obtain or to attempt to obtain equity investment or debt financing for the Osijek project until years after Turley left the Osijek project; and abandoning development of the Titel, Serbia, project entirely.

¹⁰⁸ *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.*

¹⁰⁹ This element follows logically from the duty to mitigate.

his damages, and

- Subtract that amount from the amount of damages that you would otherwise award Catipovic as damages on that claim¹¹⁰

¹¹⁰ See Defendant's Proposed Jury Instruction No. 22, last paragraph. See also *Restatement (Second) of Contracts* § 350 and cmts. *b, c*.

No. 32 — OUTLINE OF THE TRIAL¹¹¹

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
- Catipovic will present evidence and call witnesses and the lawyer for Turley may cross-examine them
- Turley may present evidence and call witnesses, and the lawyer for Catipovic 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

¹¹¹ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.02, numbered ¶ 3.

- You will indicate your verdict on Catipovic's claims and Turley's specific defenses 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. 33 — OBJECTIONS¹¹²

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

¹¹² My “stock” Jury Instructions. Compare 8th Cir. Model 1.02, numbered ¶ 3.

No. 34 — BENCH CONFERENCES¹¹³

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

¹¹³ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.03.

No. 35 — NOTE-TAKING¹¹⁴

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.

¹¹⁴ My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.05.

No. 36 — QUESTIONS BY JURORS¹¹⁵

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.

¹¹⁵ Compare 8th Cir. Model 1.04A (2012); Joint Proposed Jury Instruction No. 6.

No. 37 — CONDUCT OF JURORS DURING TRIAL¹¹⁶

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.

¹¹⁶ My “stock” Jury Instructions. Compare 8th Cir. Model 1.05.

- 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 after closing arguments.

No. 38 — DELIBERATIONS¹¹⁷

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

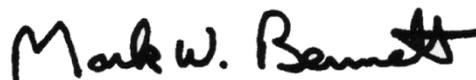
- When you go to the jury room, select one of your members as your foreperson to preside over your discussions and to speak for you here in court
- Discuss this case with one another in the jury room to try to reach agreement on the verdict, if you can do so consistent with individual judgment
 - Nevertheless, 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.

¹¹⁷ My “stock” Jury Instructions. *Compare* 8th Cir. Model 3.06 & 3.07.

- 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 12th day of November, 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**

BRANIMIR CATIPOVIC,

Plaintiff,

vs.

MARK TURLEY,

Defendant.

No. C 11-3074-MWB

**COURT'S PROPOSED
VERDICT FORM
(11/10/14 VERSION)**

On Catipovic's claims and Turley's specific defenses, we, the Jury, find as follows:

I. CATIPOVIC'S BREACH OF CONTRACT CLAIM	
Step 1: Existence of the Contract	Has Catipovic proved that the parties had a contract to be partners in the development of ethanol production facilities anywhere in Eastern Europe, ¹¹⁸ as explained in element <i>one</i> of Instruction No. 7? <i>(If you answer "yes" to this question, please go on to Step 2, but do not consider Catipovic's alternative claim of "unjust enrichment" in Part II or "damages" for "unjust enrichment" in Part III.B. If you answer "no," then do not consider any further questions concerning Catipovic's "breach of contract" claim in Part I or damages for "breach of contract" in Part III.A. Instead, go on to consider Catipovic's alternative claim of "unjust enrichment" in Part II of the Verdict Form.)</i>
	<input type="checkbox"/> Yes <input type="checkbox"/> No
Step 2: Breach	<div style="border: 1px solid black; padding: 5px;"> <i>If you found that the parties had a contract in Step 1, has Catipovic proved that Turley breached that contract, as explained in Instruction No. 7, in one or more of the following ways? (If you answer "yes" to one or more of the following alleged breaches, then go on to consider your verdict on Turley's "specific defenses")</i> </div>

¹¹⁸ Although I have not used the precise formulation requested by Turley, I have made the statement of the contract consistent with element *one* of Instruction No. 7.

	<i>in Step 3. If you answer “no” to both of the alleged breaches, do not answer any more questions in the Verdict Form. Instead, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict. Do not consider any further part of the Verdict Form.)</i>	
	By terminating the contract?	
	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	By circumventing Catipovic to build one or more ethanol plants in Europe without Catipovic?	
	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Step 3: Turley’s Specific Defenses	<i>If you answered “yes” as to breach of the contract in one or more of the ways set out in Step 2, has Turley proved one or more of the following “excuses” for his breach, as Turley’s “specific defenses” are explained in Instruction No. 8? (If you answer “yes” as to one or more of Turley’s “specific defenses,” then you cannot award any damages to Catipovic for breach of the parties’ contract. Instead, please do not answer any more questions, sign the Verdict Form, and notify the CSO that you have reached a verdict. On the other hand, if you answer “no” to all of Turley’s “specific defenses,” then Catipovic is entitled to damages, if any, resulting from each breach proved.¹¹⁹ In that case, skip Part II of the Verdict Form and go on to Part III.A.)</i>	
	Catipovic’s “prior material breach” of the contract?	
	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	Catipovic’s “waiver” of performance by Turley?	
	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	Catipovic’s “misrepresentation or concealment” of material facts?	
	<input type="checkbox"/> Yes	<input type="checkbox"/> No
II. CATIPOVIC’S UNJUST ENRICHMENT CLAIM		
Step 1: Proof of “Unjust	<i>If you answered “no” in Part I, Step 1, has Catipovic proved his alternative claim of “unjust enrichment,” as explained in Instruction No. 9? (If you answer “yes,” skip Part III.A. and go on to consider damages for “unjust</i>	



¹¹⁹ Turley objected to the prior language as suggesting that damage resulting from the breach was not an element that had to be proved before damages could be awarded. I have made the language here consistent with the changes in this regard to Instruction No. 7.

Enrichment”	<i>enrichment” in Part III.B. On the other hand, if you answer “no,” you cannot award damages on this claim. Instead, please do not answer any more questions, but sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>	
	_____ Yes	_____ No
III. CATIPOVIC’S DAMAGES		
A. Damages For “Breach Of Contract”		
Step 1: Amount of Damages	<i>If you found that the parties had a contract in Part I, Step 1, that Turley breached the parties’ contract in one or more ways in Part I, Step 2, and that Turley did not prove any of his “specific defenses” in Part I, Step 3, what amount, if any, do you award to Catipovic as damages for Turley’s “breach of contract,” as compensatory damages for “breach of contract” are explained in Instruction No. 11? (If you enter “0,” you do not have to consider Step 2. Instead, please do not answer any more questions, but sign the Verdict Form and notify the CSO that you have reached a verdict. If you enter some amount, please go on to Step 2.)</i>	
	\$ _____	
Step 2: Mitigation of Damages	<i>What amount, if any, has Turley proved that Catipovic’s damages for “breach of contract” in Step 1 must be reduced for Catipovic’s failure, if any, to mitigate damages, as “mitigation of damages” is explained in Instruction No. 12? (When you have answered this Step, do not consider Part III.A. Instead, please sign the Verdict Form and notify the CSO that you have reached a verdict.)</i>	
	Minus	\$ _____
TOTAL	\$ _____	
B. Damages For “Unjust Enrichment”		
Step 1: Amount of Damages	<i>If you found that the parties did not have a contract in Part I, Step 1, but you found that Catipovic has proved his alternative claim of “unjust enrichment” in Part II, what amount, if any, do you award to Catipovic as damages for Turley’s “unjust enrichment,” as compensatory damages for “unjust enrichment” are explained in Instruction No. 11? (When you have answered this question, please sign the Verdict Form and notify the CSO that you have reached a verdict.)</i>	
	\$ _____	

¹²⁰ The parties agree that I should remove “mitigation of damages” from the “unjust enrichment” portion of Part III (former Part III.B.), because they agree that “mitigation of damages” does not apply to “unjust enrichment.”

Date

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror