

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

DAVID and BARBARA STULTS,

Plaintiffs,

vs.

INTERNATIONAL FLAVORS AND  
FRAGRANCES, INC., and BUSH  
BOAKE ALLEN, INC.,

Defendants.

No. C 11-4077-MWB

**INSTRUCTIONS  
TO THE JURY**

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**VERDICT FORM**

## **No. 1 — INTRODUCTION**

Congratulations on your selection as a juror!

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

This is a civil case brought by plaintiffs David and Barbara Stults, alleging that the Defendants breached the implied warranty of fitness of their butter flavorings containing diacetyl for a foreseeable use in microwave popcorn. They seek damages for David's lung injury and for the injury to Barbara's relationship with her husband. The Defendants deny the Stultses' claims and assert certain specific defenses.

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

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Individuals and corporations, such as the Defendants, stand equal before the law, and each is entitled to the same fair consideration.

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

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

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

### *Charts and summaries*

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

### *“Direct” and “circumstantial” evidence*

You may have heard of “direct” and “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

### *Evidence admitted for a limited purpose*

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

### *Weight of evidence*

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.

### *~~“Missing” evidence~~*

~~—The Defendants contend that David Stults destroyed or failed to preserve notes that he had made in June 2012 to identify the microwave popcorn brands that he allegedly consumed over the years. You may, but are not required to, find that the missing notes would have been unfavorable to the Stultses if you find all of the following:~~

- ~~● The notes were within the Stultses' control~~
- ~~● The Stultses could have produced the notes~~
- ~~● The Stultses have given no reasonable excuse for failure to produce the notes, and~~
- ~~● The notes would have been significant to an issue in the case, and not merely additional evidence on that issue~~

~~Any finding that you may make about whether the missing notes would have been unfavorable to the Stultses should be based on all of the facts and circumstances in this case.~~

## 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, but only to help you decide whether to believe that witness and how much weight to give his or her testimony, 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

- Persons may become qualified as experts in some field by knowledge, skill, training, education, or experience
- Although witnesses ordinarily may only testify to factual matters within their personal knowledge, experts may state their opinions on matters in their field and may also state the reasons for their opinions
- 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 — THE PARTIES' CLAIMS AND DEFENSES

The Stultses assert the following claims:

- a *“breach of implied warranty” claim*, based on their allegation that the Defendants’ butter flavorings containing diacetyl were not reasonably fit for a reasonably foreseeable use in microwave popcorn; and
- a *“loss of consortium” claim*, based on their allegation that the injuries to David Stults from the Defendants’ wrongful conduct caused damage to his relationship with his wife, Barbara

You must decide your verdict on the Stultses’ claims without regard to either of the Defendants’ specific defenses, described below. I will determine the effect of any specific defense, described below, that you find the Defendants have proved.

In addition to the Defendants’ arguments that the Stultses cannot prove their claims, the Defendants assert two specific defenses to the Stultses’ claims:

- a *“sole proximate cause” defense*, based on their allegation that David Stults has a medical condition unrelated to his inhalation of butter flavorings containing diacetyl that is the sole proximate cause of his injuries; and
- a *“fault of others” defense*, based on their allegation that others were at fault for David’s injuries

Again, unless I tell you otherwise, you must consider each specific defense separately

- you must decide whether or not the Defendants have proved each specific defense without regard to any other claim or specific defense
- I will determine the effect of any specific defense that you find the Defendants have proved

Each claim or specific defense consists of “elements,” which are the parts of the claim or specific defense

- The “elements” of each claim and specific defense are set out below in **bold**
- The party asserting the claim or specific defense must prove all of the elements of that claim or specific defense by the greater weight of the evidence
- I will explain the elements of the claims and specific defenses in the following instructions

## No. 6 — “PROXIMATE CAUSE”

The Stultses’ claims and some of the Defendants’ specific defenses have as an element whether or not certain conduct was a “proximate cause” of injury.

“Proximate cause” means *both* of the following

- that the conduct was a substantial factor in producing the plaintiff’s injury
  - “‘Substantial’ means that the conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause

*and*

- that the plaintiff’s injury was of a type that is a natural and probable result of the conduct

There may be more than one proximate cause.

- The conduct of a defendant need not be the only cause or the last cause of injury to be a proximate cause of that injury
- Conduct of a defendant may be a proximate cause of injury, even if that conduct and the conduct of another, or another force, or another circumstance acted at the same time or in combination to produce the injury

## **No. 7 — THE STULTSES’ “BREACH OF IMPLIED WARRANTY” CLAIM**

The Stultses’ first claim is that the Defendants breached the implied warranty of fitness of their butter flavorings containing diacetyl for a foreseeable use in microwave popcorn. The Defendants deny this “breach of implied warranty” claim.

An “implied warranty” is a duty imposed by law on a manufacturer that its product be reasonably fit for a use or purpose anticipated or reasonably foreseeable by the manufacturer. A manufacturer “breaches” an implied warranty when its product is not reasonably fit for a use or purpose anticipated or reasonably foreseeable by the manufacturer.

Thus, to win on their “breach of implied warranty” claim, the Stultses must prove all of the following elements by the greater weight of the evidence:

***One*, the use of the Defendants’ butter flavorings containing diacetyl in microwave popcorn was a use or purpose anticipated or reasonably foreseeable by the Defendants.**

***Two*, the Defendants’ butter flavorings containing diacetyl were not reasonably fit for use in microwave popcorn.**

The Stultses contend that the Defendants’ butter flavorings containing diacetyl were not reasonably fit for use in microwave popcorn in the following way:

- The diacetyl fumes emitted from the heated butter flavoring were potentially hazardous to breathe

The Stultses also contend that:

- Diacetyl-free butter flavorings, which did not emit fumes that were potentially hazardous to breathe, were available for use in microwave popcorn

The Stultes are not required to prove that the Defendants breached the implied warranty in *both* of these ways. Rather, this element is proved if you find that the Defendants breached the implied warranty in one or both of these ways.

***Three, the Defendants’ butter flavorings containing diacetyl were not reasonably fit for use in microwave popcorn at the time that they left the Defendants’ control.***

***Four, David Stults suffered injury after consuming Orville Redenbacher Butter® microwave popcorn produced by ConAgra with the Defendants’ butter flavorings containing diacetyl.***

***Five, the unfitness of the Defendants’ butter flavorings containing diacetyl for use in microwave popcorn was a proximate cause of David Stults’s injury.***

“Proximate cause” was defined for you in Instruction No. 6. As to the “substantial factor” requirement of “proximate cause,” the unfitness of the Defendants’ butter flavorings containing diacetyl for use in microwave popcorn was not a substantial factor in producing David Stults’s injury, unless

- the butter flavorings were in Orville Redenbacher Butter® microwave popcorn produced by ConAgra at the time that David Stults was injured

- David Stults consumed that microwave popcorn, and
- the butter flavorings had such an effect in producing damage as to lead a reasonable person to regard them as a cause of the damage

Remember that, to establish “proximate cause,” the Stultses must also prove the second requirement, that David’s injury was of a type that is a natural and probable result of the unfitness of the Defendants’ butter flavorings containing diacetyl for use in microwave popcorn.

If the Stultses do *not* prove *all* of these elements by the greater weight of the evidence, then you must find in favor of the Defendants on the Stultses’ “breach of implied warranty” claim. On the other hand, if the Stultses *do* prove *all* of these elements by the greater weight of the evidence, then you must consider their claims for “damages” for a “breach of implied warranty.”

**No. 8 — PERMANENT LOSS OF A VITAL BODILY  
FUNCTION AND RECKLESSNESS**

The Stultses contend that the wrongful conduct of the Defendants at issue in their “breach of implied warranty” claim (1) caused David a permanent loss of a vital bodily function and (2) was reckless. If the Stultses win on their “breach of implied warranty” claim, you must also consider whether the Stultses have proved these contentions.

***Permanent loss of a vital bodily function***

To win on their contention that the Defendants’ wrongful conduct caused David a permanent loss of a vital bodily function, the Stultses must prove the following element by the greater weight of the evidence:

**As a result of the Defendants’ breach of the implied warranty of fitness of their butter flavorings containing diacetyl for use in microwave popcorn, David sustained a permanent loss of a vital bodily function.**

A “vital bodily function” is a bodily function that has a high degree of importance.

If the Stultses do *not* prove this element by the greater weight of the evidence, then you must indicate in the Verdict Form that the Defendants’ wrongful conduct at issue in the Stultses’ “breach of implied warranty” claim did not cause a “permanent loss of a vital bodily function.” On the other hand, if the Stultses *do* prove this element by the greater weight of the evidence, then you must indicate in the Verdict Form that the Defendants’ wrongful conduct at issue in the Stultses’

“breach of implied warranty” claim did cause a “permanent loss of a vital bodily function.”

***Recklessness***

If you find that the Defendants’ wrongful conduct caused a permanent loss of a vital bodily function, then you must also decide whether the Defendants’ wrongful conduct was reckless.

To win on their contention that the Defendants’ wrongful conduct was reckless, the Stultses must prove the following element by the greater weight of the evidence:

**The Defendants’ breach of the implied warranty of fitness of their butter flavorings containing diacetyl for use in microwave popcorn was so reckless as to demonstrate a substantial lack of concern for whether an injury would result.**

If the Stultses do *not* prove this element by the greater weight of the evidence, then you must indicate in the Verdict Form that the Defendants’ wrongful conduct at issue in the Stultses’ “breach of implied warranty” claim was not “reckless.” On the other hand, if the Stultses *do* prove this element by the greater weight of the evidence, then you must indicate in the Verdict Form that the Defendants’ wrongful conduct at issue in the Stultses’ “breach of implied warranty” claim was “reckless.”

You need not be concerned with the effect of your determinations on these two contentions. The effect of your determinations on these contentions is for me to decide.

**No. 9 — THE STULTSES’ “LOSS OF CONSORTIUM”  
CLAIM**

The Stultses’ second claim is that the injuries to David Stults from the Defendants’ breach of implied warranty caused damage to his relationship with his wife, Barbara. A claim of damage to the spousal relationship is called a “loss of consortium” claim. The Defendants deny this “loss of consortium” claim.

To win on their “loss of consortium” claim, the Stultses must prove both of the following elements by the greater weight of the evidence:

***One*, the Stultses have proved their “breach of implied warranty” claim.**

***Two*, the injuries to David resulting from the Defendants’ breach of implied warranty proximately caused damage to Barbara’s relationship with David.**

“Proximate cause” was defined for you in Instruction No. 6. Damage to the marital relationship includes

- Barbara’s loss of the services of her injured husband
- Barbara’s loss of the society, companionship, and sexual relationship with her injured husband

If the Stultses do *not* prove *both* of these elements by the greater weight of the evidence, then you must find in favor of the Defendants on the Stultses’ “loss of consortium” claim. On the other hand, if the Stultses *do* prove *both* of these

elements by the greater weight of the evidence, then you must consider their claims for “damages” for “loss of consortium.”

## 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 the Stultses on their “breach of implied warranty” claim, you must determine what damages to award. “Damages” are the amount of money that will reasonably and fairly compensate the Stultses for any injury that you find they suffered as a result of the Defendants’ 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
- Your verdict must be solely to compensate the Stultses damages, and not to punish the Defendants
- The amount of money to be awarded for certain items of damages cannot be proved in a precise dollar amount
  - The law leaves such amount to your sound judgment
  - You must base your determination of the amount of such damages on the evidence presented
- 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

You may award future damages, if you find that the damages are of a continuing nature. Future damages

- must be limited to the length of time that the injury may continue
- must be limited to David's life expectancy, if the injury is permanent
  - a Standard Mortality Table indicates that the normal life expectancy of people who are the same age as David is an additional 26.3 years, or until he is 80.3 years of age, but those statistics are not conclusive
- must not be reduced to "present cash value"
- may be adjusted to consider the effect of inflation

## No. 11 — ITEMS OF DAMAGES

The Stultses seek certain items of past and future “economic” and “non-economic” damages. “Economic” damages consist of such things as medical expenses, lost wages or lost earning potential, and miscellaneous expenses. “Non-economic” damages consist of such things as damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, mental anguish, embarrassment, humiliation, mortification, and denial of social pleasures and enjoyments.

“Past” damages are to compensate the Stultses from the date of injury to the time of your verdict. “Future” damages are to compensate the Stultses for continuing damage from the date of your verdict into the future.

You must consider each item of damages separately and award only those amounts of damages, if any, that will compensate the Stultses for injuries that they suffered as a result of the Defendants’ breach of implied warranty.

### *Damages For David’s Injuries*

If you find that the Stultses have proved their “breach of implied warranty” claim, you may award the following items of damages, as proved by the evidence.

#### *Economic Damages*

- “Past economic damages” include, but are not limited to, the following
  - ~~reasonable expenses of necessary medical care, treatment, and services~~
  - lost wages

- ~~reasonable expenses that have been required as a result of David's injury~~
- **“Future economic damages”** include, but are not limited to, the following:
  - reasonable expenses of necessary medical care, treatment, and services that David Stults is reasonably certain to require in the future
  - loss of future earning capacity
  - reasonable expenses that are reasonably certain to be required in the future as a result of David's injury

### *Non-Economic Damages*

- **“Past non-economic damages”** include, but are not limited to, the following:
  - mental pain and suffering, including mental anguish, denial of social pleasure and enjoyments, and embarrassment, humiliation, or mortification
  - physical pain and suffering, and
  - disability, including the loss or impairment of lung function
- **“Future non-economic damages”** include, but are not limited to, the following:
  - mental pain and suffering that is reasonably certain to continue in the future

- physical pain and suffering that is reasonably certain to continue in the future, and
- disability, including the loss or impairment of lung function, that is reasonably certain to continue in the future

### ***Damages For Loss Of Consortium***

If you find that the Stultses have proved their “loss of consortium” claim, you may award the following items of damages, as proved by the evidence.

#### ***Economic Damages***

- **“Past economic damages”** for loss of consortium consist of Barbara’s loss of the services of her injured husband
- **“Future economic damages”** for loss of consortium consist of Barbara’s loss of the services of her injured husband that are reasonably certain to continue in the future

#### ***Non-Economic Damages***

- **“Past non-economic damages”** for loss of consortium consist of Barbara’s loss of the society, companionship, and sexual relationship with her injured husband
- **“Future non-economic damages”** for loss of consortium consist of Barbara’s loss of the society, companionship, and sexual relationship with her injured husband that is reasonably certain to continue in the future

**No. 12 — THE DEFENDANTS’ “SOLE PROXIMATE  
CAUSE” SPECIFIC DEFENSE**

The Defendants’ first specific defense is a “sole proximate cause” defense, based on their allegation that David Stults has a medical condition unrelated to his inhalation of butter flavorings containing diacetyl that is the sole proximate cause of his injuries.

To prove their “sole proximate cause” specific defense, the Defendants must prove both of the following elements by the greater weight of the evidence:

***One*, David Stults has a medical condition unrelated to his inhalation of butter flavoring containing diacetyl.**

***Two*, that medical condition was the sole proximate cause of David Stults’s damages.**

“Proximate cause” was defined for you in Instruction No. 6. To be the “sole proximate cause,” the medical condition in question

- must be the *only* cause of David’s injury
- must not have acted at the same time or in combination with the Defendants’ breach of implied warranty to produce David’s injury

If the Defendants do *not* prove *both* of these elements by the greater weight of the evidence, then you must find in favor of the Stultses on the Defendants’ “sole proximate cause” defense. On the other hand, if the Defendants *do* prove *both* of these elements by the greater weight of the evidence, then you must find in favor of the Defendants on their “sole proximate cause” defense. You must not

be concerned with the effect of your finding on this specific defense. The effect of your finding on this specific defense is for me to determine.

**No. 13 — THE DEFENDANTS’ “FAULT OF OTHERS”  
SPECIFIC DEFENSE**

The Defendants’ second specific defense is a “fault of others” defense, based on their allegation that others were at fault for David’s injuries. The fault of a non-party does not bar recovery by the Stultses against the Defendants. Rather, if you find that the Defendants and one or more identified non-parties are at fault, then you must allocate the total fault among the Defendants and the identified non-parties who are at fault. The Stultses deny that anyone other than the Defendants was at fault for their injuries.

To prove its “fault of others” specific defense, the Defendants must prove both of the following elements by the greater weight of the evidence:

***One, one or more microwave popcorn manufacturers or suppliers of butter flavorings containing diacetyl were at fault for the Stultses’ injuries.***

“Fault” includes an act or an omission, including a design defect, a warning defect, or a breach of warranty, sufficient to impose liability, that is a proximate cause of damage sustained by a party.

A manufacturer or supplier has a duty to use “reasonable care” in designing or providing warnings with its product to eliminate any unreasonable risk of foreseeable injury. “Reasonable care” means the degree of care that a reasonably prudent manufacturer would exercise under the circumstances that you find existed in this case.

To prove that a non-party was at fault for a design defect, the Defendants must prove the following elements:

- the non-party designed butter flavorings containing diacetyl for microwave popcorn
- the non-party failed to use reasonable care at the time of designing butter flavorings containing diacetyl
- the butter flavorings containing diacetyl were not reasonably safe for consumers as an ingredient of microwave popcorn at the time that they left the non-party's control
- a reasonable alternative safer design existed at the time of sale or distribution of the non-party's butter flavorings containing diacetyl
  - This element requires proof that
    - a practical and technically feasible alternative design was available, *and*
    - that alternative design would have prevented the harm that David Stults suffered
- the design defect in the non-party's butter flavorings containing diacetyl was a proximate cause of David Stults's injury

To prove that a non-party was at fault for a warning defect, the Defendants must prove the following elements:

- the non-party labeled and distributed butter flavorings containing diacetyl for microwave popcorn
- the non-party was in a position to warn consumers of the dangers of butter

flavorings containing diacetyl in microwave popcorn

- the non-party failed to use reasonable care in providing warnings on its butter flavorings containing diacetyl
- the omission of one or more instructions or warnings rendered the non-party's butter flavorings containing diacetyl not reasonably safe for consumers of microwave popcorn
- the omission of one or more instructions or warnings on the non-party's butter flavoring containing diacetyl was a proximate cause of David Stults's injury

To prove that a non-party was at fault for breach of an implied warranty, the Defendants must prove the elements explained in Instruction No. 7.

The Defendants contend that one or more of the following non-parties were at fault for the Stultses' injuries:

- manufacturers of microwave popcorn consumed by David Stults:
  - American Pop Corn Company
  - ConAgra Foods, Inc., and
  - General Mills, Inc.
- other suppliers of microwave popcorn butter flavorings containing diacetyl:
  - Givaudan Flavors Corporation
  - Chr. Hansen, Inc.
  - Firmenich Inc.

- Sensient Flavors, Inc., and
- Symrise, Inc.

You must decide whether the Defendants have proved that one or more of these non-parties were at fault, in one or more of the ways alleged, for the Stultses' injuries.

***Two, the fault of such a non-party was a proximate cause of the Stultses' injuries.***

“Proximate cause” was defined for you in Instruction No. 6. The fault of a non-party was not a substantial factor in producing David Stults's injury, unless

- that non-party made butter flavoring containing diacetyl for microwave popcorn or made microwave popcorn with butter flavoring containing diacetyl at the time that David Stults was injured
- David Stults consumed that butter flavoring in microwave popcorn or consumed that microwave popcorn, and
- the butter flavoring had such an effect in producing damage as to lead a reasonable person to regard it as a cause of the damage

Remember that, to be a “proximate cause” of David's injury, David's injury must also have been of a type that is a natural and probable result of consuming the non-party's butter flavoring containing diacetyl or the non-party's microwave popcorn with butter flavoring containing diacetyl.

If the Defendants prove that a particular non-party was at fault, by proving both of these elements as to that non-party, then you must allocate a percentage of

fault to that non-party. In determining the percentage of fault of the Defendants and any non-parties found to be at fault, you must consider the nature of the conduct of each entity and the extent to which each entity's conduct caused or contributed to the Stultses' injury. The total must add up to 100 percent.

## No. 14 — OUTLINE OF THE TRIAL

I will now explain how the trial will proceed.

After I have read all but the last Instruction,

- The lawyers may make opening statements
  - An opening statement is not evidence
  - It is simply a summary of what the lawyer expects the evidence to be
- The Stultses will present evidence and call witnesses and the lawyer for the Defendants may cross-examine them
- The Defendants may present evidence and call witnesses, and the lawyer for the Stultses may cross-examine those witnesses
- The parties will make their closing arguments
  - Closing arguments summarize and interpret the evidence for you
  - Like opening statements, closing arguments are not evidence
- I will give you the last Instruction, on “deliberations”
- You will retire to deliberate on your verdict
- You will indicate your verdict on the Stultses’ claims and the Defendants’ 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. 15 — 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. 16 — 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. 17 — 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. 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 at the end of the evidence.

## No. 19 — DELIBERATIONS

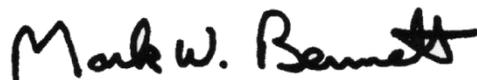
In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

- 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 11th day of August, 2014.



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

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

DAVID and BARBARA STULTS,

Plaintiffs,

vs.

INTERNATIONAL FLAVORS AND  
FRAGRANCES, INC., and BUSH  
BOAKE ALLEN, INC.,

Defendants.

No. C 11-4077-MWB

**VERDICT FORM**

On the Stultses' claims and the Defendants' specific defenses, we, the Jury,  
find as follows:

<b>I. THE STULTSES' CLAIMS</b>			
<b>Step 1: Verdicts</b>	<i>On each of the Stultses' claims, in whose favor do you find? (If you find in favor of the Stultses on their "breach of implied warranty" claim, go on to consider your verdict on Barbara Stults's "loss of consortium" claim in Step 1(b) and the remaining questions in the verdict form. On the other hand, if you find in favor of the Defendants on the Stultses' "breach of implied warranty" claim in Step 1(a), then do not answer any further questions in the Verdict Form. Instead, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>		
<b>(a)</b>	On the "breach of implied warranty" claim, as explained in Instruction No. 7?	___ The Stultses	___ The Defendants
<b>(i)</b>	<i>If you found in favor of the Stultses on the "breach of implied warranty" claim in Step 1(a), in which one or both of the following ways was the implied warranty breached?</i>		
	___ The diacetyl fumes emitted from the heated butter flavoring were potentially hazardous to breathe		
	___ Diacetyl-free butter flavorings, which did not emit fumes that were potentially hazardous to breathe, were available for use in microwave popcorn		

<b>(ii)</b>	<i>If you found in favor of the Stultses on the “breach of implied warranty” claim in Step 1(a), did the wrongful conduct of the Defendants at issue in the “breach of implied warranty” claim cause David a permanent loss of a vital bodily function, as explained in Instruction No. 8? (I will determine the effect of your determination on this question.)</i>		
	___ Yes	___ No	
<b>(iii)</b>	<i>If you found in favor of the Stultses on the “breach of implied warranty” claim in Step 1(a), and you found that David Stults sustained a permanent loss of a vital bodily function in Step(1)(a)(ii), do you find that the Defendants’ conduct in causing the permanent loss of a vital bodily function was so reckless as to demonstrate a substantial lack of concern for whether an injury would result, as explained in Instruction No. 8?</i>		
	___ Yes	___ No	
<b>(b)</b>	On the “loss of consortium” claim, as explained in Instruction No. 9?	___ The Stultses	___ The Defendants
<b>Step 2: Damages</b>	What amounts, if any, do you award for each of the following items of compensatory damages, on each claim on which you found that the Stultses won in <b>Step 1(a)</b> , as items of damages are explained in Instruction No. 11?		
<b>(a)</b>	<b>Damages For David’s Injuries</b>		
<b>(i)</b>	<b>Economic damages</b>		
	<del>Past reasonable expenses of necessary medical care, treatment, and services:</del>	\$ _____	
	Future reasonable expenses of necessary medical care, treatment, and services:	\$ _____	
	Past lost wages:	\$ _____	
	Future lost earning capacity:	\$ _____	
	<del>Past reasonable expenses that have been required as a result of David’s injury:</del>	\$ _____	
	Future reasonable expenses that are reasonably certain to be required in the future as a result of David’s injury:	\$ _____	
	<b>Total of economic damages:</b>	\$ _____	
<b>(ii)</b>	<b>Non-economic damages</b>		
	Past mental pain and suffering	\$ _____	

	Future mental pain and suffering:	\$ _____
	Past physical pain and suffering:	\$ _____
	Future physical pain and suffering:	\$ _____
	Past disability, including the loss or impairment of lung function:	\$ _____
	Future disability, including the loss or impairment of lung function	\$ _____
	<b>Total of non-economic damages:</b>	\$ _____
<b>(b)</b>	<b>Damages For Loss Of Consortium</b>	
<b>(i)</b>	<b>Economic damages</b>	
	Past loss of the services:	\$ _____
	Future loss of services:	\$ _____
	<b>Total of economic damages:</b>	\$ _____
<b>(ii)</b>	<b>Non-economic damages</b>	
	Past loss of the society, companionship, and sexual relationship:	\$ _____
	Future loss of the society, companionship, and sexual relationship:	\$ _____
	<b>Total of non-economic damages:</b>	\$ _____

<b>II. THE DEFENDANTS' SPECIFIC DEFENSES</b>		
<b>Step 1:</b> Sole Proximate Cause	On the Defendants' "sole proximate cause" specific defense, as explained in Instruction No. 12, in whose favor do you find? <i>(You must not be concerned with the effect of your finding on this specific defense. The effect of your finding on this specific defense is for me to determine.)</i>	
	___ The Defendants	___ The Stultses
<b>Step 2:</b> Fault Of Others	On the Defendants' "fault of others" specific defense, as explained in Instruction No. 13, in whose favor do you find? <i>(If you find in favor of the Defendants, please answer the question in Step 2(b). On the other hand, if you find in favor of the Stultses, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>	
<b>(a)</b>	___ The Defendants	___ The Stultses

<b>(b)</b>	<p><i>If you found in favor of the Defendants in <b>Step 2(a)</b>, please identify (i) which one or more non-parties were at fault, (ii) the way or ways in which each such non-party was at fault, and (iii) each such non-party's percentage of fault. You must then allocate the Defendants a percentage of fault. Remember that the percentage of the Defendants' fault and the percentage of fault of any non-parties must add up to 100 percent.</i></p>		
	<b>(i) non-parties at fault</b>	<b>(ii) way(s) that non-party was at fault</b>	<b>(iii) percentage of fault</b>
	<input type="checkbox"/> American Pop <input type="checkbox"/> Corn Company	<input type="checkbox"/> Design defect <input type="checkbox"/> Warning defect <input type="checkbox"/> Breach of implied warranty	<input type="text"/> %
	<input type="checkbox"/> ConAgra Foods, <input type="checkbox"/> Inc.	<input type="checkbox"/> Design defect <input type="checkbox"/> Warning defect <input type="checkbox"/> Breach of implied warranty	<input type="text"/> %
	<input type="checkbox"/> General Mills, <input type="checkbox"/> Inc.	<input type="checkbox"/> Design defect <input type="checkbox"/> Warning defect <input type="checkbox"/> Breach of implied warranty	<input type="text"/> %
	<input type="checkbox"/> Givaudan Flavors <input type="checkbox"/> Corp.	<input type="checkbox"/> Design defect <input type="checkbox"/> Warning defect <input type="checkbox"/> Breach of implied warranty	<input type="text"/> %
	<input type="checkbox"/> Chr. Hansen, <input type="checkbox"/> Inc.	<input type="checkbox"/> Design defect <input type="checkbox"/> Warning defect <input type="checkbox"/> Breach of implied warranty	<input type="text"/> %
	<input type="checkbox"/> Firmenich, Inc.	<input type="checkbox"/> Design defect <input type="checkbox"/> Warning defect <input type="checkbox"/> Breach of implied warranty	<input type="text"/> %
	<input type="checkbox"/> Sensient Flavors, <input type="checkbox"/> Inc.	<input type="checkbox"/> Design defect <input type="checkbox"/> Warning defect <input type="checkbox"/> Breach of implied warranty	<input type="text"/> %

	___ Symrise, Inc.	___ Design defect ___ Warning defect ___ Breach of implied warranty	_____ %
	The Defendants		_____ %
	<b>Total of the Defendants' and any Non-Parties' fault (Must add up to 100%)</b>		_____ %

\_\_\_\_\_ Date

Foreperson	Juror
Juror	Juror
Juror	Juror
Juror	Juror

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

DAVID and BARBARA STULTS,

Plaintiffs,

vs.

INTERNATIONAL FLAVORS AND  
FRAGRANCES, INC., and BUSH  
BOAKE ALLEN, INC.,

Defendants.

No. C 11-4077-MWB

**COURT’S PROPOSED  
INSTRUCTIONS  
TO THE JURY  
(08/06/14 REVISED  
“ANNOTATED” VERSION)**

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## **VERDICT FORM**

## No. 1 — INTRODUCTION<sup>1</sup>

Congratulations on your selection as a juror!

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

This is a civil case brought by plaintiffs David and Barbara Stults, alleging that the Defendants<sup>2</sup> breached the implied warranty of fitness of their butter flavorings containing diacetyl for a foreseeable use in microwave popcorn. They seek damages for David's lung injury and for the injury to Barbara's relationship with her husband.<sup>3</sup> The Defendants deny the Stultses' claims and assert certain specific defenses.<sup>4</sup>

You have been chosen and sworn as jurors to try the issues of fact related to the Stultses' claims and the Defendants' defenses. In making your decisions, you are the sole judges of the facts. You must not decide this case based on personal

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<sup>1</sup> My current "plain language" stock Jury Instructions. *Compare* 8th Cir. Model 1.03 (2013); Joint Proposed Preliminary Jury Instruction No. 1.

<sup>2</sup> I did not want to say—and I was convinced that the jurors would not want to hear—"BBA/IFF" as the designation for the defendants dozens of times in the course of the jury instructions. Consequently, I have decided to refer to the defendants simply as "the Defendants."

<sup>3</sup> **I decided that it was appropriate to continue to describe the "loss of consortium" claim as a claim of "injury to Barbara's relationship with her husband," consistent with the Statement of the Case, until "loss of consortium" is defined in Instruction No. 9.**

<sup>4</sup> *See* my Proposed Statement Of The Case; *and compare* Joint Proposed Jury Statement (docket no. 316).

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.<sup>5</sup> 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.<sup>6</sup>

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Individuals and corporations, such as the Defendants, stand equal before the law, and each is entitled to the same fair consideration.<sup>7</sup>

A corporation can act only through its agents or employees, however. Any agent or employee of a corporation may bind it by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation or within the scope of his or her duties as an employee of the corporation.<sup>8</sup>

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.

---

<sup>5</sup> My stock first instruction on “implicit bias.” *Compare* 8th Cir. Model 1.03 (2013) (penultimate paragraph); 9th Cir. Model 1.1B, unnumbered ¶ 3.

<sup>6</sup> *Compare* 8th Cir. Civil Model 1.03 (2013) (last paragraph); *see* Joint Proposed Jury Instruction No. 1.

<sup>7</sup> *See* Joint Proposed Jury Instruction No. 1.

<sup>8</sup> *See* 8th Cir. Model 5.23 (2013); *and compare* Joint Proposed Jury Instruction No. 1 (business entity acts only through natural persons).

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<sup>9</sup>

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.”<sup>10</sup> 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

---

<sup>9</sup> My “plain language” stock Jury Instructions. *Compare* 8th Cir. Model 3.04 (2013); Joint Proposed Jury Instruction No. 2.

<sup>10</sup> Because I have indicated that “the greater weight of the evidence” standard applies “[u]nless I tell you otherwise,” this instruction leaves open the possibility that certain matters may have a different burden of proof.

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<sup>11</sup>

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<sup>12</sup>
- 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<sup>13</sup>
- 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

---

<sup>11</sup> My “plain language” Jury Instructions. *Compare* 8th Cir. Model 1.04 (2013); Joint Proposed Jury Instruction Nos. 3 and 4.

<sup>12</sup> *Compare* 8th Cir. Model 2.14 (2013).

<sup>13</sup> *Compare* Iowa Civil Jury Instruction No. 100.6.

- If the parties stipulate that certain facts are true, then you must treat those facts as having been proved<sup>14</sup>

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

*Charts and summaries*

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

---

<sup>14</sup> 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.

- consider testimony about the way in which the summaries were prepared<sup>15</sup>

### ***“Direct” and “circumstantial” evidence***

You may have heard of “direct” and “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<sup>16</sup>

### ***Evidence admitted for a limited purpose***

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens

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<sup>15</sup> See 8th Cir. Civil Models 2.11 and 2.12 (2013) and the parties’ requested model instructions.

<sup>16</sup> 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 used<sup>17</sup>

### *Weight of evidence*

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.<sup>18</sup>

### *“Missing” evidence*<sup>19</sup>

The Defendants contend that David Stults destroyed or failed to preserve notes that he had made in June 2012 to identify the microwave popcorn brands that he allegedly consumed over the years. You may, but are not required to, find that

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<sup>17</sup> Compare 8th Cir. Model 2.09 (2013).

<sup>18</sup> See 9th Cir. Model 1.9 (modified), and compare 8th Cir. Model 1.02 (2012) (last unnumbered paragraph).

<sup>19</sup> See Joint Proposed Jury Instruction No. 21. The plaintiffs object to this instruction on the ground that I have not made, and will not be able to make, on the evidence in this case, the required preliminary findings before the issue of whether to draw the adverse inference is submitted to the jury. I have included this instruction to advise the parties of the form it will take, if such an instruction is given. I will also consider giving such an instruction, if at all, only as a separate, supplemental instruction.

I have based this instruction more directly on Michigan Civil Jury Instruction 6.01(a), and notes on its use, than on *Ratray v. Woodbury County*, 761 F. Supp. 2d 836, 848 n.5 (N.D. Iowa 2010), on which the Defendants in part relied, but which involved the adverse inference under Eighth Circuit law. I have substituted “unfavorable” for “adverse,” “significant to an issue in the case” for “material,” and “additional evidence” for “cumulative,” as more “jury friendly” synonyms.

the missing notes would have been unfavorable to the Stultses if you find all of the following:

- The notes were within the Stultses' control
- The Stultses could have produced the notes
- The Stultses have given no reasonable excuse for failure to produce the notes, and
- The notes would have been significant to an issue in the case, and not merely additional evidence on that issue<sup>20</sup>

Any finding that you may make about whether the missing notes would have been unfavorable to the Stultses should be based on all of the facts and circumstances in this case.

---

<sup>20</sup> **The Defendants objected to the fourth bullet, on the ground that “not merely additional evidence on that issue” is not part of Michigan Civil Jury Instruction 6.01 and improperly requires the Defendants to prove the contents of the destroyed notes. I disagree. Although this language is not in Michigan Civil Jury Instruction 6.01 itself, a requirement that the missing evidence is not merely cumulative is a preliminary requirement for the adverse inference. See Michigan Civil Jury Instruction 6.01, Notes On Use. Here, a reasonable juror could conclude, from the record evidence, that there is sufficient other evidence about what brands of microwave popcorn David Stults did or did not consume to make the notes cumulative. This language also does not require the Defendants to prove the *specific* contents of the notes beyond what the Defendants have already alleged were their *general* contents, that is, that the notes identified the microwave popcorn brands that David allegedly consumed over the years.**

**The Defendants also objected to the former fifth bullet, on the ground that notes that were never produced could not have been equally available to the Defendants. I agree with the Defendants that there is no jury question on whether or not the notes were equally available to the Defendants—they were not. Therefore, I have deleted the former fifth bullet.**

#### No. 4 — TESTIMONY OF WITNESSES<sup>21</sup>

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

---

<sup>21</sup> My "stock" Jury Instructions. Compare 8th Cir. Models 1.03 (2013) (unnumbered ¶¶ 5-6); *id.* 3.03; and Joint Proposed Jury Instruction No. 5 ("Credibility"). For some time, I have not given separate instructions on "testimony" and "credibility."

- whether the witness has been convicted of a felony offense, but only to help you decide whether to believe that witness and how much weight to give his or her testimony,<sup>22</sup> 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<sup>23</sup>

- Persons may become qualified as experts in some field by knowledge, skill, training, education, or experience
- Although witnesses ordinarily may only testify to factual matters within their personal knowledge, experts may state their opinions on matters in their field and may also state the reasons for their opinions<sup>24</sup>

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<sup>22</sup> See 8th Cir. Civil Model 2.10 (2013).

<sup>23</sup> Compare 9th Cir. Model 2.11 and Joint Proposed Jury Instruction No. 5 concerning expert and lay opinions. This language is ordinarily applied 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.

<sup>24</sup> **The Defendants requested that I reinsert the language from my instruction in *Kuiper*, to which the parties agreed, that “[o]rdinarily, witnesses may only testify to factual matters within their personal knowledge,” on the ground that such language would be helpful to the jurors to understand the differences between the permissible testimony of ordinary fact witnesses and experts. I agree that such language may be helpful to the jurors, so I have inserted it in this second bullet. The remainder of the language that the Defendants requested, from the *Kuiper* instruction, is already in the first and second bullets of this instruction.**

- 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<sup>25</sup>

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.<sup>26</sup>

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<sup>25</sup> Compare Iowa Civil Jury Instruction No. 100.11 (“hypothetical question”). Joint Proposed Jury Instruction No. 5 does not address “hypothetical questions,” nor do I find such an instruction in the Michigan Civil Jury Instructions.

<sup>26</sup> 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. 5 — THE PARTIES' CLAIMS AND DEFENSES<sup>27</sup>

The Stultses assert the following claims:

- a *“breach of implied warranty” claim*,<sup>28</sup> based on their allegation that the Defendants’ butter flavorings containing diacetyl were not reasonably fit for a reasonably foreseeable use in microwave popcorn; and
- a *“loss of consortium” claim*, based on their allegation that the injuries to David Stults from the Defendants’ wrongful conduct caused damage to his relationship with his wife, Barbara

You must decide your verdict on the Stultses’ claims without regard to either of the Defendants’ specific defenses, described below. I will determine the effect

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<sup>27</sup> Compare Joint Proposed Jury Instruction Nos. 7 (“The Stults’ Claims: In General”) and 17 (“BBA/IFF’s Defenses: In General”). I have included both the Stultses’ claims and the Defendants’ defenses in one instruction, because the evidence on these claims may not be neatly separated, even if the jurors are to consider the claims and defenses separately.

<sup>28</sup> The Defendants reiterate their objection to the inclusion of the “breach of implied warranty” claim. The Defendants’ additional arguments do not convince me that a “breach of implied warranty” claim is precluded in this case.

**In response to the 07/29/14 Version of the Jury Instructions, the Defendants again asserted that I should not instruct on a “breach of implied warranty” claim, if the specifications of breach of the implied warranty fall within the scope of a “design defect” or a “warning defect” under M.C.L. § 600.2945. The Stultses’ specifications of the alleged breaches of the implied warranty do not appear to “merge” with negligence claims for products liability, however.**

of any specific defense, described below, that you find the Defendants have proved.<sup>29</sup>

In addition to the Defendants' arguments that the Stultses cannot prove their claims, the Defendants assert two specific defenses<sup>30</sup> to the Stultses' claims:

- a “*sole proximate cause*” defense, based on their allegation that David Stults has a medical condition unrelated to his inhalation of butter flavorings containing diacetyl that is the sole proximate cause of his injuries; and
- a “*fault of others*” defense, based on their allegation that others were at fault for David's injuries

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<sup>29</sup> I prefer the term “specific defense” to “affirmative defense” for purposes of jury instructions. *Because I have directed the jurors to consider each claim and defense without regard to any other claim or defense, I will not reiterate the “specific defenses” at the conclusion of every “elements” instruction on the Stultses’ claims as the Defendants request.*

<sup>30</sup> The Defendants contend that they are entitled to instructions on their “untimeliness” defense. However, I have already concluded, as a matter of law, that the Stultses’ only surviving products claim, their “breach of implied warranty” claim, is timely under M.C.L. § 600.5833. Thus, I will not submit this defense to the jury. Likewise, because the Stultses’ “warning defect” claim is time-barred, the “sophisticated user” defense has no application to this case.

**Although the Defendants reiterated their contention that an “untimeliness” defense remains viable, I reiterate my conclusion that the Stultses’ “breach of implied warranty” claim is timely, as a matter of law, under M.C.L. § 600.5833. Also, I reject that Defendants’ reiterated contention that a “sophisticated user” defense is available, because the Stultses’ “breach of implied warranty” claim has not “merged” into a “negligent failure to warn” claim.**

Again, unless I tell you otherwise, you must consider each specific defense separately

- you must decide whether or not the Defendants have proved each specific defense without regard to any other claim or specific defense
- I will determine the effect of any specific defense that you find the Defendants have proved

Each claim or specific defense consists of “elements,” which are the parts of the claim or specific defense<sup>31</sup>

- The “elements” of each claim and specific defense are set out below in **bold**
- The party asserting the claim or specific defense must prove all of the elements of that claim or specific defense by the greater weight of the evidence
- I will explain the elements of the claims and specific defenses in the following instructions

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<sup>31</sup> We take for granted that claims and defenses consist of “elements,” but that concept may be foreign to jurors.

## No. 6 — “PROXIMATE CAUSE”<sup>32</sup>

The Stultses’ claims and some of the Defendants’ specific defenses have as an element whether or not certain conduct was a “proximate cause” of injury.

“Proximate cause” means *both* of the following

- that the conduct was a substantial factor in producing the plaintiff’s injury<sup>33</sup>

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<sup>32</sup> See Joint Proposed Jury Instruction No. 6; Michigan Civil Jury Instructions 15.01, 15.03.

<sup>33</sup> I have rephrased the first prong of “proximate cause,” the “cause in fact” requirement, in terms of whether the conduct was a “substantial factor” in producing the plaintiff’s injury, consistent with the Defendants’ request for such a “substantial factor” instruction if a number of factors contribute. Logically, the “substantial factor” requirement applies to the “cause in fact” analysis however many alleged causes may be at play. Moreover, contrary to the Stultses’ contentions, “substantial factor” language goes to “cause in fact,” not to the “natural and probable result” or “legal cause” prong of “proximate cause,” which involves foreseeability. See, e.g., *Skinner v. Square D Co.*, 516 N.W.2d 475, 479 (Mich. 1994) (explaining the two separate elements of “proximate cause” as “cause in fact” and “legal cause, also known as ‘proximate cause’”); *People v. Tims*, 534 N.W.2d 675, 680 (Mich. 1995) (explaining “cause in fact” to mean that “a defendant’s conduct must be ‘a substantial cause,’ which appears to combine two verbal formulas employed in other jurisdictions: that a defendant’s negligence must be a ‘but for’ cause, or that it must be a ‘substantial factor,’” and explaining that, even where this “cause in fact” requirement is met, cases arise in which the injury “is so remote from the defendant’s conduct that it would be unjust to permit conviction,” and, in such cases, requiring the jury to decide “whether the defendant’s conduct was the proximate or legal cause of the [injury].”).

- “‘Substantial’ means that the conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause<sup>34</sup>

*and*

- that the plaintiff’s injury was of a type that is a natural and probable result of the conduct

There may be more than one proximate cause.

- The conduct of a defendant need not be the only cause or the last cause of injury to be a proximate cause of that injury
- Conduct of a defendant may be a proximate cause of injury, even if that conduct and the conduct of another, or another force, or another circumstance acted at the same time or in combination to produce the injury<sup>35</sup>

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<sup>34</sup> **The Defendants requested inclusion of this definition of “substantial factor,” see, e.g., RESTATEMENT (SECOND) OF TORTS § 431, cmt. a (1965), and I agree that it is appropriate and likely to be helpful to the jurors.**

<sup>35</sup> I have paraphrased this “bullet” from the last sentence of Michigan Civil Jury Instruction 15.03 (“A cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence.”) to remove confusing references to “causes” by identifying the possible “causes” as conduct of a defendant, conduct of another, another force, or another circumstance.

**No. 7 — THE STULTSES’ “BREACH OF IMPLIED  
WARRANTY” CLAIM<sup>36</sup>**

The Stultses’ first claim is that the Defendants breached the implied warranty of fitness of their butter flavorings containing diacetyl for a foreseeable use in microwave popcorn. The Defendants deny this “breach of implied warranty” claim.

An “implied warranty” is a duty imposed by law on a manufacturer that its product be reasonably fit for a use or purpose anticipated or reasonably foreseeable by the manufacturer.<sup>37</sup> A manufacturer “breaches” an implied warranty when its product is not reasonably fit for a use or purpose anticipated or reasonably foreseeable by the manufacturer.

Thus, to win on their “breach of implied warranty” claim, the Stultses must prove all of the following elements by the greater weight of the evidence:

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<sup>36</sup> Michigan Civil Jury Instructions 25.22. *Compare* Joint Proposed Jury Instruction No. 10. Again, I recognize that the Defendants reiterate their objection to the inclusion of the “breach of implied warranty” claim. The Defendants’ additional arguments do not convince me that a separate “breach of implied warranty” claim is precluded in this case. The “breach of implied warranty” claim does not consist solely of a failure to warn or a defective design. *Smith v. E.R. Squibb & Son, Inc.*, 273 N.W.2d 476, 480 (Mich. 1979); *Prentis v. Yale Mfg. Co.*, 385 N.W.2d 176, 186 (Mich. 1984).

<sup>37</sup> *See* Michigan Civil Jury Instruction 25.21; Joint Proposed Jury Instruction No. 10, first paragraph.

**One, the use of the Defendants’ butter flavorings containing diacetyl in microwave popcorn was a use or purpose anticipated or reasonably foreseeable by the Defendants.<sup>38</sup>**

**Two, the Defendants’ butter flavorings containing diacetyl were not reasonably fit for use in microwave popcorn.**

The Stultses contend that the Defendants’ butter flavorings containing diacetyl were not reasonably fit for use in microwave popcorn in the following ways:

- The diacetyl fumes emitted from the heated butter flavoring were potentially hazardous to breathe
- Diacetyl-free butter flavorings, which did not emit fumes that were potentially hazardous to breathe, were available for use in microwave popcorn<sup>39</sup>

The Stultses are not required to prove that the Defendants’ butter flavorings containing diacetyl were not reasonably fit for use in microwave popcorn in *all* of these ways.

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<sup>38</sup> I conclude that much of the cumbersomeness and repetitiveness of Michigan Civil Jury Instruction 25.22 can be eliminated by setting off as a separate element the requirement that use of the product (the Defendants’ butter flavorings) *in microwave popcorn* was a use or purpose anticipated or reasonably foreseeable by the Defendants. Remaining elements can then focus on fitness of the flavorings for that purpose, injury, and proximate cause.

<sup>39</sup> *The plaintiffs must provide specifications of the way(s) in which the Defendants’ butter flavorings allegedly were not fit for use in microwave popcorn.*

I have now included the Stultses’ specifications of the ways in which the Defendants’ butter flavorings allegedly were not reasonably fit for use in microwave popcorn. These allegations of unfitness do not appear to “merge” into “design defect” or “warning defect” claims, so that the Defendants’ requests for additional instructions on the elements of a “warning defect” or “design defect” are overruled.

Rather, this element is proved if you find that the Defendants' butter flavorings containing diacetyl were not reasonably fit for use in one or more of these ways.

***Three*, the Defendants' butter flavorings containing diacetyl were not reasonably fit for use in microwave popcorn at the time that they left the Defendants' control.**

***Four*, David Stults suffered injury after consuming Orville Redenbacher Butter<sup>®</sup> microwave popcorn produced by ConAgra with the Defendants' butter flavorings containing diacetyl.<sup>40</sup>**

***Five*, the unfitness of the Defendants' butter flavorings containing diacetyl for use in microwave popcorn was a proximate cause of David Stults's injury.**

“Proximate cause” was defined for you in Instruction No. 6.<sup>41</sup> As to the “substantial factor” requirement of “proximate cause,” the unfitness of the Defendants' butter flavorings containing diacetyl for use in microwave popcorn was not a substantial factor in producing David Stults's injury, unless

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<sup>40</sup> See Michigan Civil Jury Instruction 25.22. The parties omit this element from Joint Proposed Jury Instruction No. 10. Although the parties apparently do not dispute that David has an injury, the injury is still an element of the claim. Furthermore, the mere fact of injury would be irrelevant unless the injury followed consumption of the product in question. The next element then addresses whether the unfitness of the product was the proximate cause of David's injury.

<sup>41</sup> The Stultses request the specific “proximate cause” instructions for breach of warranty claims in Michigan Civil Jury Instructions 25.01 and 25.02. I find, however, that these model instructions are entirely consistent with Michigan Civil Jury Instructions 15.01 and 15.03, and, consequently, with Instruction No. 6.

- the butter flavorings were in Orville Redenbacher Butter® microwave popcorn produced by ConAgra at the time that David Stults was injured
- David Stults consumed that microwave popcorn, and
- the butter flavorings had such an effect in producing damage as to lead a reasonable person to regard them as a cause of the damage

Remember that, to establish “proximate cause,” the Stultses must also prove the second requirement, that David’s injury was of a type that is a natural and probable result of the unfitness of the Defendants’ butter flavorings containing diacetyl for use in microwave popcorn.<sup>42</sup>

If the Stultses do *not* prove *all* of these elements by the greater weight of the evidence, then you must find in favor of the Defendants on the Stultses’ “breach of implied warranty” claim. On the other hand, if the Stultses *do* prove *all* of these elements by the greater weight of the evidence, then you must consider their claims for “damages” for a “breach of implied warranty.”<sup>43</sup>

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<sup>42</sup> **The Defendants objected to the prior specific explanation of the “substantial factor” requirement of “proximate cause” for this claim on the ground that it did not include that the butter flavorings had such an effect in producing the injury as to lead a reasonable person to regard it as a cause. To eliminate that concern, I have now modified this explanation of the “substantial factor” requirement and reminded the jurors that “proximate cause” also has a “natural and probable result” requirement.**

<sup>43</sup> I find it unnecessary to reiterate the Defendants’ specific defenses, if the jury finds that the Stultses have proved the elements of the “breach of implied warranty” claim. The parties agreed, in Joint Proposed Jury Instructions Nos. 7 and 17, and I explained in Instruction No. 5, that claims are to be considered without regard to specific

**No. 8 — PERMANENT LOSS OF A VITAL BODILY  
FUNCTION AND RECKLESSNESS<sup>44</sup>**

The Stultses contend that the wrongful conduct of the Defendants at issue in their “breach of implied warranty” claim (1) caused David a permanent loss of a vital bodily function and (2) was reckless. If the Stultses win on their “breach of implied warranty” claim, you must also consider whether the Stultses have proved these contentions.

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defenses and that I will determine the effect of any specific defenses that the Defendants may prove.

<sup>44</sup> See Joint Proposed Jury Instruction No. 16, concerning “gross negligence.” See also Michigan Civil Jury Instruction 14.10; M.C.L. 600.2945(d), 600.2946a(3). I recognize that the Defendants object to submission of “gross negligence” to the jury, because it will be “unsupported by the evidence.” I find that the better course is to submit the issue to the jury, then consider the sufficiency of evidence supporting any finding of “gross negligence” post-trial, because the effect of such a finding is for me to decide. I also find it appropriate to construct this instruction in terms of “loss of vital bodily function,” so that the confusing terms “gross negligence” and “recklessness” can be entirely avoided.

**Both the Stultses and the Defendants have pointed out that, under M.C.L. § 600.2946a(1) and (3), causing a permanent loss of a vital bodily function raises the damages “cap” on non-economic loss and that gross negligence in doing so removes any “cap.” Thus, the two findings must be made successively. Consequently, I have revised this instruction much as the parties have suggested. I still find it unnecessary to use the term “gross negligence,” but I agree with the Defendants that the term “recklessly” is more readily understood by jurors and that the instruction should define (and eliminate use of the term) “gross negligence” using the statutory definition, “so reckless as to demonstrate a substantial lack of concern for whether injury results.” See M.C.L. § 600.2945(d).**

***Permanent loss of a vital bodily function***

To win on their contention that the Defendants' wrongful conduct caused David a permanent loss of a vital bodily function, the Stultses must prove the following element by the greater weight of the evidence:

**As a result of the Defendants' breach of the implied warranty of fitness of their butter flavorings containing diacetyl for use in microwave popcorn, David sustained a permanent loss of a vital bodily function.**

A "vital bodily function" is a bodily function that has a high degree of importance.<sup>45</sup>

If the Stultses do *not* prove this element by the greater weight of the evidence, then you must indicate in the Verdict Form that the Defendants' wrongful conduct at issue in the Stultses' "breach of implied warranty" claim did not cause a "permanent loss of a vital bodily function." On the other hand, if the Stultses *do* prove this element by the greater weight of the evidence, then you must indicate in the Verdict Form that the Defendants' wrongful conduct at issue in the Stultses' "breach of implied warranty" claim did cause a "permanent loss of a vital bodily function."

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<sup>45</sup> See *Lewis v. Krogol*, 582 N.W.2d 524, 527 (Mich. Ct. App. 1998). Contrary to the Defendants' contentions, this case does not make clear that a "reduction" of a vital bodily function is not enough to be a "loss." The question under the statute is whether the "loss" is "permanent," not whether it is "total," "partial," or a "reduction." A partial "loss" may be "permanent."

### ***Recklessness***

If you find that the Defendants' wrongful conduct caused a permanent loss of a vital bodily function, then you must also decide whether the Defendants' wrongful conduct was reckless.

To win on their contention that the Defendants' wrongful conduct was reckless, the Stultses must prove the following element by the greater weight of the evidence:

**The Defendants' breach of the implied warranty of fitness of their butter flavorings containing diacetyl for use in microwave popcorn was so reckless as to demonstrate a substantial lack of concern for whether an injury would result.**

If the Stultses do *not* prove this element by the greater weight of the evidence, then you must indicate in the Verdict Form that the Defendants' wrongful conduct at issue in the Stultses' "breach of implied warranty" claim was not "reckless." On the other hand, if the Stultses *do* prove this element by the greater weight of the evidence, then you must indicate in the Verdict Form that the Defendants' wrongful conduct at issue in the Stultses' "breach of implied warranty" claim was "reckless."

You need not be concerned with the effect of your determinations on these two contentions. The effect of your determinations on these contentions is for me to decide.

**No. 9 — THE STULTSES’ “LOSS OF CONSORTIUM”  
CLAIM<sup>46</sup>**

The Stultses’ second claim is that the injuries to David Stults from the Defendants’ breach of implied warranty caused damage to his relationship with his wife, Barbara. A claim of damage to the spousal relationship is called a “loss of consortium” claim. The Defendants deny this “loss of consortium” claim.

To win on their “loss of consortium” claim, the Stultses must prove both of the following elements by the greater weight of the evidence:

***One*, the Stultses have proved their “breach of implied warranty” claim.<sup>47</sup>**

***Two*, the injuries to David resulting from the Defendants’ breach of implied warranty proximately caused damage to Barbara’s relationship with David.**

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<sup>46</sup> Joint Proposed Jury Instruction No. 11, like Michigan Civil Jury Instruction 52.01, fails to address the *elements* of a loss of consortium claim, as distinguished from *the measure of damages* for such a claim. *See, e.g., Thorn v. Mercy Mem. Hosp. Corp.*, 761 N.W.2d 414, 424-25 (Mich. Ct. App. 2008) (noting that courts treat loss of consortium not as an item of damages, but as an independent cause of action); *Wesche v. Mecosta Cnty. Rd. Comm’n*, 705 N.W.2d 136, 139 (Mich. Ct. App. 2005).

<sup>47</sup> *Wesche*, 705 N.W.2d at 139 (recognizing that “[a] claim of loss of consortium is derivative and recovery is contingent upon the injured spouse’s recovery of damages for the injury” (quotation marks and citations omitted)).

“Proximate cause” was defined for you in Instruction No. 6. Damage to the marital relationship includes

- Barbara’s loss of the services of her injured husband
- Barbara’s loss of the society, companionship, and sexual relationship with her injured husband<sup>48</sup>

If the Stultses do *not* prove *both* of these elements by the greater weight of the evidence, then you must find in favor of the Defendants on the Stultses’ “loss of consortium” claim. On the other hand, if the Stultses *do* prove *both* of these elements by the greater weight of the evidence, then you must consider their claims for “damages” for “loss of consortium.”

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<sup>48</sup> See Joint Proposed Jury Instruction No. 11; Michigan Civil Jury Instruction 52.01 (identifying the aspects of injury to the marital relationship as items of damages); *Berryman v. K Mart Corp.*, 483 N.W.2d 642, 646 (Mich. Ct. App. 1992) (“Loss of consortium includes loss of conjugal fellowship, companionship, services, and all other incidents of the marriage relationship.”).

## No. 10 — DAMAGES IN GENERAL<sup>49</sup>

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

If you find for the Stultses on their “breach of implied warranty” claim, you must determine what damages to award. “Damages” are the amount of money that will reasonably and fairly compensate the Stultses for any injury that you find they suffered as a result of the Defendants’ 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
- Your verdict must be solely to compensate the Stultses damages, and not to punish the Defendants<sup>50</sup>
- The amount of money to be awarded for certain items of damages cannot be proved in a precise dollar amount
  - The law leaves such amount to your sound judgment

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<sup>49</sup> My stock instruction for damages, as modified to be consistent with Michigan Civil Jury Instruction 50.01 and applicable law. *Compare* Joint Proposed Jury Instruction No. 12.

<sup>50</sup> Michigan Civil Jury Instruction 50.01, last paragraph. This caution applies to all determinations of damages, not just damages that cannot be proved in a precise dollar amount.

- You must base your determination of the amount of such damages on the evidence presented<sup>51</sup>
- 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

You may award future damages, if you find that the damages are of a continuing nature. Future damages

- must be limited to the length of time that the injury may continue
- must be limited to David's life expectancy, if the injury is permanent<sup>52</sup>
  - a Standard Mortality Table indicates that the normal life expectancy of people who are the same age as David is an additional 27.9 years, or until he is 81.9 years of age, but those statistics are not conclusive<sup>53</sup>

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<sup>51</sup> Michigan Civil Jury Instruction 50.01, last paragraph.

<sup>52</sup> See Joint Proposed Jury Instruction No. 12; Michigan Civil Jury Instruction 50.01, ¶ 6 (continuing damage).

<sup>53</sup> See Michigan Civil Jury Instruction 53.01. *The parties must provide the appropriate statistic from a Standard Mortality Table.*

**The Stultses have now supplied the pertinent statistical information, which I have included here.**

- must not be reduced to “present cash value”<sup>54</sup>
- may be adjusted to consider the effect of inflation<sup>55</sup>

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<sup>54</sup> See Michigan Civil Jury Instruction 53.03A.

<sup>55</sup> See Michigan Civil Jury Instruction 53.06. I have *not* included Joint Proposed Jury Instruction 15, requested by the Stultses, concerning pre-complaint interest, because the Stultses have not identified how and when they pleaded a request for such interest.

## No. 11 — ITEMS OF DAMAGES<sup>56</sup>

The Stultses seek certain items of past and future “economic” and “non-economic” damages.<sup>57</sup> “Economic” damages consist of such things as medical expenses, lost wages or lost earning potential, and miscellaneous expenses. “Non-economic” damages consist of such things are damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, mental anguish, embarrassment, humiliation, mortification, and denial of social pleasures and enjoyments.<sup>58</sup>

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<sup>56</sup> Compare Joint Proposed Jury Instruction No. 13. I recognize, as do the parties, that Michigan law requires separation of damages into “economic” and “non-economic” categories. See M.C.L. 600.6305; Michigan Civil Jury Instruction 50.21.

<sup>57</sup> I have attempted to construct the damages instructions and verdict form to obviate the need for Joint Proposed Jury Instruction No. 14, as the parties suggest.

<sup>58</sup> Michigan Civil Jury Instruction 50.21.

**The Defendants request that I remove “inconvenience” from the list of compensable items of damages. This request is overruled. “Inconvenience” does not appear in the specific list of compensable items of damages asserted by the Stultses. Rather, it appears here, as in Michigan Civil Jury Instruction 50.21, as part of a *general description* of things that constitute “non-economic” damages. See also Joint Proposed Jury Instruction No. 14.**

**The Defendants also request that I remove “humiliation” and “mortification,” presumably from both this list of examples of “non-economic” damages and from the Stultses’ specific itemization of “non-economic” damages, on the ground that these terms are just duplicative of “embarrassment,” but less commonly used and understood. This request is overruled. “Humiliation,” “mortification,” and “embarrassment” are not simply synonymous, but differ substantially in *degree*. Moreover, the jurors are not being asked to distinguish the amounts of damages for each of these alleged injuries.**

“Past” damages are to compensate the Stultses from the date of injury to the time of your verdict. “Future” damages are to compensate the Stultses for continuing damage from the date of your verdict into the future.

You must consider each item of damages separately and award only those amounts of damages, if any, that will compensate the Stultses for injuries that they suffered as a result of the Defendants’ breach of implied warranty.

### *Damages For David’s Injuries*

If you find that the Stultses have proved their “breach of implied warranty” claim, you may award the following items of damages, as proved by the evidence.

#### *Economic Damages*<sup>59</sup>

- “Past economic damages” include, but are not limited to, the following

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<sup>59</sup> Although the Defendants apparently do not object to these identifications of “economic” damages, they do object to listing them as individual items of damages in the Verdict Form, on the ground that doing so overemphasizes damages while unfairly minimizing the elements that the Stultses must prove to recover any damages, and Michigan law, M.C.L. §§ 600.2946a, 600.6305, only requires separation of “economic” and “non-economic” damages. The Michigan statute may not *require* any further itemization, but I believe that post-trial review will be facilitated by itemization of specific “economic” damages and separation of such damages into past and future damages. Indeed, items of “future economic” damages that are specifically itemized in § 600.6305(b) include future “medical and other costs of health care” and future “lost wages or lost earning capacity and other economic loss.” I see little likelihood that itemization of damages will overemphasize damages and diminish the elements of proof on the Stultses’ “breach of implied warranty” claim or “loss of consortium” claim. I have repeatedly stated that the Stultses must prove all of the elements of a claim to win on that claim.

- reasonable expenses of necessary medical care, treatment, and services
- lost wages
- reasonable expenses that have been required as a result of David's injury<sup>60</sup>
- **“Future economic damages”** include, but are not limited to, the following:
  - reasonable expenses of necessary medical care, treatment, and services that David Stults is reasonably certain to require in the future
  - loss of future earning capacity
  - reasonable expenses that are reasonably certain to be required in the future as a result of David's injury

### *Non-Economic Damages*<sup>61</sup>

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<sup>60</sup> I recognize that the Defendants object to this item of damages, unless it is definitively supported by the evidence. If there is ultimately no support for additional reasonable expenses at trial, I can strike consideration of this item of damages or strike it on post-trial motions.

<sup>61</sup> **For essentially the same reasons that the Defendants object to excessive itemization of “economic” damages, they object to excessive itemization of “non-economic” damages, both here and in the Verdict Form. On this point, they may have a better argument, because some the items of “non-economic” damages do appear to overlap or may not be susceptible to separate valuation. I believe that the “non-economic” damages fall more or less roughly into three categories: “mental pain and suffering,” consisting of mental anguish, denial of social pleasure and enjoyments, and embarrassment, humiliation, or mortification; “physical pain and suffering”; and “physical disability,” including the loss or impairment of lung**

- **“Past non-economic damages”** include, but are not limited to, the following:
  - mental pain and suffering, including mental anguish, denial of social pleasure and enjoyments, and embarrassment, humiliation, or mortification<sup>62</sup>
  - physical pain and suffering, and
  - disability, including the loss or impairment of lung function
- **“Future non-economic damages”** include, but are not limited to, the following:
  - mental pain and suffering that is reasonably certain to continue in the future
  - physical pain and suffering that is reasonably certain to continue in the future, and
  - disability, including the loss or impairment of lung function, that is reasonably certain to continue in the future

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**function. I have recast the items of “non-economic” damages accordingly. I believe that this is sufficient itemization to facilitate post-trial review for lack of evidentiary support without unduly emphasizing damages over elements of proof of a claim.**

<sup>62</sup> Again, I recognize that the Defendants object to this item of damages, unless it is definitively supported by the evidence. If there is ultimately no support for embarrassment, humiliation, or mortification at trial, I can strike consideration of this item of damages or strike it on post-trial motions.

### *Damages For Loss Of Consortium*<sup>63</sup>

If you find that the Stultses have proved their “loss of consortium” claim, you may award the following items of damages, as proved by the evidence.

#### *Economic Damages*

- **“Past economic damages”** for loss of consortium consist of Barbara’s loss of the services of her injured husband
- **“Future economic damages”** for loss of consortium consist of Barbara’s loss of the services of her injured husband that are reasonably certain to continue in the future

#### *Non-Economic Damages*

- **“Past non-economic damages”** for loss of consortium consist of Barbara’s loss of the society, companionship, and sexual relationship with her injured husband<sup>64</sup>
- **“Future non-economic damages”** for loss of consortium consist of Barbara’s loss of the society, companionship, and sexual relationship with her injured husband that is reasonably certain to continue in the future

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<sup>63</sup> See Michigan Civil Jury Instruction 53.01; Joint Proposed Jury Instruction No. 11.

<sup>64</sup> See *Thorn*, 761 N.W.2d at 663 (“[D]amages awarded . . . for loss of society and companionship’ . . . are ‘clearly noneconomic.’” (quoting *Jenkins v. Patel*, 684 N.W.2d 346, 352 (Mich. 2004))).

**No. 12 — THE DEFENDANTS’ “SOLE PROXIMATE  
CAUSE” SPECIFIC DEFENSE<sup>65</sup>**

The Defendants’ first specific defense is a “sole proximate cause” defense, based on their allegation that David Stults has a medical condition unrelated to his inhalation of butter flavorings containing diacetyl that is the sole proximate cause of his injuries.

To prove their “sole proximate cause” specific defense, the Defendants must prove both of the following elements by the greater weight of the evidence:

***One, David Stults has a medical condition unrelated to his inhalation of butter flavoring containing diacetyl.***

***Two, that medical condition was the sole proximate cause of David Stults’s damages.***

“Proximate cause” was defined for you in Instruction No. 6. To be the “sole proximate cause,” the medical condition in question

- must be the *only* cause of David’s injury

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<sup>65</sup> Michigan Civil Jury Instructions 15.06 is cast in terms of a “force” that is the “sole proximate cause,” and Notes On Use do identify examples as “flood, fire, or wind.” Even so, and the unpublished decision in *Manetta v. Johnson*, 2007 WL 3171282, \*3-\*4 (Mich. Ct. App. Oct. 30, 2007), notwithstanding, I do not believe that Michigan law precludes consideration of other “causes,” beside flood, fire, or wind, as the basis for a “sole proximate cause” defense. Indeed, the definition of “a proximate cause” invites a “sole proximate cause” defense based on, for example, a pre-existing medical condition or a medical condition unrelated to the conduct of the Defendants.

- must not have acted at the same time or in combination with the Defendants' breach of implied warranty to produce David's injury<sup>66</sup>

If the Defendants do *not* prove *both* of these elements by the greater weight of the evidence, then you must find in favor of the Stultses on the Defendants' "sole proximate cause" defense. On the other hand, if the Defendants *do* prove *both* of these elements by the greater weight of the evidence, then you must find in favor of the Defendants on their "sole proximate cause" defense. You must not be concerned with the effect of your finding on this specific defense. The effect of your finding on this specific defense is for me to determine.

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<sup>66</sup> These "bullets" are the "obverse" of the instruction concerning "*a proximate cause*."

**The Defendants objected to my inclusion of an "aggravation" instruction, based on Michigan Civil Jury Instruction 50.04, and a "combination" instruction concerning when the medical condition asserted by the Defendants is *not* the "sole proximate cause." The Defendants are correct that the effect of a "combination" of causes has already been adequately addressed in the second bullet point, so I have deleted the former "combination" instruction in reference to what is *not* sole proximate cause. Also, while a "sole proximate cause" defense would seem to invite an "aggravation" argument in response, at least in the alternative to a denial of any other cause, I may have jumped the gun by assuming that the Stultses could or would make such an argument. If the evidence at trial supports an "aggravation" instruction, I can give such an appropriate "aggravation" instruction as a supplemental instruction. For now, I have removed the "aggravation" instruction.**

**No. 13 — THE DEFENDANTS’ “FAULT OF OTHERS”  
SPECIFIC DEFENSE<sup>67</sup>**

The Defendants’ second specific defense is a “fault of others” defense, based on their allegation that others were at fault for David’s injuries. The fault of a non-party<sup>68</sup> does not bar recovery by the Stultses against the Defendants. Rather,

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<sup>67</sup> I will assume, for the sake of argument, that a “fault of others” specific defense is applicable to a “breach of implied warranty” claim under Michigan law. *See, e.g.*, Michigan Civil Jury Instruction 25.45 (“Breach of Warranty: Comparative Fault—Burden of Proof (To Be Used in Cases Filed on or After March 28, 1996)”). I do not believe that both Joint Proposed Jury Instruction No. 22 (offered by the Defendants) and Joint Proposed Jury Instruction No. 23 (offered as an agreed instruction) are required; a single instruction will do.

The Stultses have now objected to application of a “fault of others” defense to their “breach of implied warranty” claim, because such a claim imposes “strict” liability and makes M.C.L. § 600.6304 inapplicable. This contention can be addressed post-trial.

<sup>68</sup> The Defendants now object to identification of the “others” who may be at fault as “non-parties,” preferring “released parties,” arguing that is the appropriate term under M.C.L. § 600.6304. This objection is overruled. The Defendants offered no such objection to Joint Proposed Jury Instruction No. 22 and, instead, offered an instruction identifying the “others” at fault as “non-parties.” “Non-parties” is accurate, for purposes of jury instructions, as none of the “others” identified by the Defendants is *currently* a party, and introducing “released party” would unnecessarily refer to settlements and releases. The critical point, for purposes of the Defendants “fault of others” specific defense is that “others” may have been at fault and who those “others” are, not how they are identified. The present instruction, referring to those “others” as “non-parties” is adequate. The Defendants also argue that the “notice” requirement of MCR 2.112(K)(3) only applies to “non-parties,” but not to “released parties.” This instruction, identifying “others” who may be at fault as “non-parties,” for purposes of jury instructions, has no impact on the applicability of the “notice” requirement in MCR 2.112(K)(3)

if you find that the Defendants and one or more identified non-parties are at fault, then you must allocate the total fault among the Defendants and the identified non-parties who are at fault.<sup>69</sup> The Stultses deny that anyone other than the Defendants was at fault for their injuries.

To prove its “fault of others” specific defense, the Defendants must prove both of the following elements by the greater weight of the evidence:

***One, one or more microwave popcorn manufacturers or suppliers of butter flavorings containing diacetyl were at fault for the Stultses’ injuries.***

“Fault” includes an act or an omission, including a design defect, a warning defect, or a breach of warranty, sufficient to impose liability, that is a proximate cause of damage sustained by a party.<sup>70</sup>

A manufacturer or supplier has a duty to use “reasonable care” in designing or providing warnings with its product to eliminate any unreasonable risk of foreseeable injury. “Reasonable care” means the degree of care that a reasonably prudent manufacturer would exercise under the circumstances that you find existed in this case.<sup>71</sup>

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**to any of the “others” allegedly at fault in this case, which is a matter that can be properly and separately determined post-trial.**

<sup>69</sup> See Michigan Civil Jury Instruction 42.05; *cf.* Michigan Civil Jury Instruction 25.45. I believe that it is appropriate to indicate to the jurors that this is a partial defense, requiring allocation of fault, not a defense that completely excuses the Defendants from liability.

<sup>70</sup> M.C.L. § 600.6304(8). I have limited the list of kinds of “fault” to kinds relevant here.

<sup>71</sup> The definition of the duty of “reasonable care,” in the context of a “design defect” claim, is elimination of unreasonable risks of harm or injury that were reasonably foreseeable. See *Ghrist v. Chrysler Corp.*, 547 N.W.2d 272, 248 (Mich. 1996) (“A

To prove that a non-party was at fault for a design defect, the Defendants must prove the following elements:<sup>72</sup>

- the non-party designed butter flavorings containing diacetyl for microwave popcorn
- the non-party failed to use reasonable care at the time of designing butter flavorings containing diacetyl
- the butter flavorings containing diacetyl were not reasonably safe for consumers as an ingredient of microwave popcorn at the time that they left the non-party's control
- a reasonable alternative safer design existed at the time of sale or distribution of the non-party's butter flavorings containing diacetyl

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manufacturer has a duty to design its product to eliminate 'any unreasonable risk of foreseeable injury.'" (quoting *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 693, 365 N.W.2d 176 (1984)). Similarly, the definition of the duty of "reasonable care," in the context of a "warning defect" claim, is elimination of unreasonable risks of harm or injury that were reasonably foreseeable. See Michigan Civil Jury Instruction 25.31 (stating the "reasonable care" standard for "production," which includes "warning"); cf. *Ghrist*, 547 N.W.2d at 248 ("A manufacturer has a duty to design its product to eliminate 'any unreasonable risk of foreseeable injury.'" (quoting *Prentis*, 421 Mich. at 693, 365 N.W.2d 176)). Consequently, I have used these definitions to explain "reasonable care." The Stultses contend that "reduce" risk of harm is the appropriate formulation, relying on the decision in *Peck v. Bridgeport Machines, Inc.*, 237 F.3d 614, 617-18 (6th Cir. 2001), but I agree with the Defendants that "eliminate" is the appropriate requirement, as stated in Michigan Civil Jury Instruction 25.31. See also *Ghrist*, 547 N.W.2d at 248.

<sup>72</sup> Compare Michigan Civil Jury Instructions 25.31, 25.32; Joint Proposed Jury Instruction No. 8. I have also rearranged the parts of Michigan Civil Jury Instruction 25.31 and 25.32 into what I believe is a more logical order.

- This element requires proof that
  - a practical and technically feasible alternative design was available, *and*
  - that alternative design would have prevented the harm that David Stults suffered<sup>73</sup>
- the design defect in the non-party's butter flavorings containing diacetyl was a proximate cause of David Stults's injury

To prove that a non-party was at fault for a warning defect, the Defendants must prove the following elements:

- the non-party labeled and distributed butter flavorings containing diacetyl for microwave popcorn
- the non-party was in a position to warn consumers of the dangers of butter flavorings containing diacetyl in microwave popcorn
- the non-party failed to use reasonable care in providing warnings on its butter flavorings containing diacetyl
- the omission of one or more instructions or warnings rendered the non-party's butter

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<sup>73</sup> I found the treatment of a “reasonable alternative safer design” in Michigan Civil Jury Instruction 25.32, like the treatment of that concept Iowa Model Jury Instruction 1000.2, at best cumbersome and at worst confusing, particularly when tied to the factors relevant to the determination of whether there was such a “reasonable alternative safer design.” I have tried to separate the element from the relevant factors, which I have stated in the explanation to the element.

flavorings containing diacetyl not reasonably safe for consumers of microwave popcorn

- the omission of one or more instructions or warnings on the non-party's butter flavoring containing diacetyl was a proximate cause of David Stults's injury

To prove that a non-party was at fault for breach of an implied warranty, the Defendants must prove the elements explained in Instruction No. 7.

The Defendants contend that one or more of the following non-parties were at fault for the Stultses' injuries:

- manufacturers of microwave popcorn consumed by David Stults:
  - American Pop Corn Company
  - ConAgra Foods, Inc., and
  - General Mills, Inc.
- other suppliers of microwave popcorn butter flavorings containing diacetyl:
  - Givaudan Flavors Corporation
  - Chr. Hansen, Inc.
  - Firmenich Inc.
  - Sensient Flavors, Inc., and
  - Symrise, Inc.

You must decide whether the Defendants have proved that one or more of these non-parties were at fault, in one or more of the ways alleged, for the Stultses' injuries.<sup>74</sup>

***Two, the fault of such a non-party was a proximate cause of the Stultses' injuries.***

“Proximate cause” was defined for you in Instruction No. 6. The fault of a non-party was not a substantial factor in producing David Stults's injury, unless

- that non-party made butter flavoring containing diacetyl for microwave popcorn or made microwave popcorn with butter flavoring containing diacetyl at the time that David Stults was injured
- David Stults consumed that butter flavoring in microwave popcorn or consumed that microwave popcorn, and
- the butter flavoring had such an effect in producing damage as to lead a reasonable person to regard it as a cause of the damage

Remember that, to be a “proximate cause” of David's injury, David's injury must also have been of a type that is a natural and probable result of consuming the non-party's butter flavoring containing diacetyl or the non-

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<sup>74</sup> **The Defendants requested an instruction making clear that they only had to prove that one or more non-parties were liable on one or more theories of liability. I have modified this paragraph to indicate that the jurors must decide if a non-party was at fault “in one or more of the ways alleged,” thus avoiding any reference to “theories of liability.”**

party's microwave popcorn with butter flavoring containing diacetyl.<sup>75</sup>

If the Defendants prove that a particular non-party was at fault, by proving both of these elements as to that non-party, then you must allocate a percentage of fault to that non-party. In determining the percentage of fault of the Defendants and any non-parties found to be at fault, you must consider the nature of the conduct of each entity and the extent to which each entity's conduct caused or contributed to the Stultses' injury. The total must add up to 100 percent.<sup>76</sup>

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<sup>75</sup> The Defendants objected to the prior specific explanation of the “substantial factor” requirement of “proximate cause” for this defense on the ground that it did not include that the butter flavorings had such an effect in producing the injury as to lead a reasonable person to regard it as a cause. To eliminate that concern, I have now modified this explanation of the “substantial factor” requirement and reminded the jurors that “proximate cause” also has a “natural and probable result” requirement. I have also taken this opportunity to clarify that the non-party must have made butter flavoring containing diacetyl or microwave popcorn with butter flavoring containing diacetyl.

<sup>76</sup> See Michigan Civil Jury Instruction 42.05, 25.45.

## No. 14 — OUTLINE OF THE TRIAL<sup>77</sup>

I will now explain how the trial will proceed.

After I have read all but the last Instruction,

- The lawyers may make opening statements
  - An opening statement is not evidence
  - It is simply a summary of what the lawyer expects the evidence to be
- The Stultses will present evidence and call witnesses and the lawyer for the Defendants may cross-examine them
- The Defendants may present evidence and call witnesses, and the lawyer for the Stultses 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

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<sup>77</sup> My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.02, numbered ¶ 3; Joint Proposed Jury Instruction No. 24.

- You will indicate your verdict on the Stultses' claims and the Defendants' 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. 15 — OBJECTIONS<sup>78</sup>

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

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<sup>78</sup> My “stock” Jury Instructions. Compare 8th Cir. Model 1.02, numbered ¶ 3; Joint Proposed Jury Instruction No. 25.

## No. 16 — BENCH CONFERENCES<sup>79</sup>

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

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<sup>79</sup> My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.03; Joint Proposed Jury Instruction No. 26.

## No. 17 — NOTE-TAKING<sup>80</sup>

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.

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<sup>80</sup> My “stock” Jury Instructions. *Compare* 8th Cir. Model 1.05; Joint Proposed Jury Instruction No. 27.

## No. 18 — CONDUCT OF JURORS DURING TRIAL<sup>81</sup>

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.

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<sup>81</sup> My “stock” Jury Instructions. Compare 8th Cir. Model 1.05; Joint Proposed Jury Instruction No. 28.

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

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

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

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

## No. 19 — DELIBERATIONS<sup>82</sup>

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.

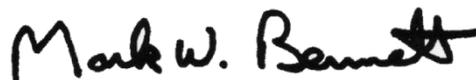
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<sup>82</sup> My “stock” Jury Instructions. *Compare* 8th Cir. Model 3.06 & 3.07; Joint Proposed Jury Instruction No. 29.

- 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 11th day of August, 2014.



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

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

DAVID and BARBARA STULTS,

Plaintiffs,

vs.

INTERNATIONAL FLAVORS AND  
FRAGRANCES, INC., and BUSH  
BOAKE ALLEN, INC.,

Defendants.

No. C 11-4077-MWB

**COURT’S PROPOSED  
VERDICT FORM**  
(08/06/14 REVISED VERSION)

On the Stultses’ claims and the Defendants’ specific defenses, we, the Jury,  
find as follows:

<b>I. THE STULTSES’ CLAIMS</b>	
<b>Step 1: Verdicts</b>	On each of the Stultses’ claims, in whose favor do you find? <i>(If you find in favor of the Stultses on their “breach of implied warranty” claim, go on to consider your verdict on Barbara Stults’s “loss of consortium” claim in Step 1(b) and the remaining questions in the verdict form. On the other hand, if you find in favor of the Defendants on the Stultses’ “breach of implied warranty” claim in Step 1(a), then do not answer any further questions in the Verdict Form. Instead, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict.)</i> <sup>83</sup>

<sup>83</sup> The Defendants objection to the “Verdict” section of the Verdict Form on the ground that it does not query the jurors on each element of the Sultses’ claim, as does the verdict form in Michigan Civil Jury Instruction 68.03, or, at least, query whether the jurors find that each element has been proved, is overruled. A finding for the Sultses necessarily requires a finding that each element has been proved, and a finding for the Defendants necessarily requires a finding that one or more elements have not been proved. Further inquiry is not *required* by Michigan law and will not facilitate post-trial review. The Instructions also make abundantly clear that a verdict for the Stultses on a claim cannot be entered unless the Stultses prove all of the elements of that claim.

<b>(a)</b>	On the “breach of implied warranty” claim, as explained in Instruction No. 7?	___ The Stultses	___ The Defendants
<b>(i)</b>	<i>If you found in favor of the Stultses on the “breach of implied warranty” claim in Step 1(a), in which one or more of the following ways was the implied warranty breached?<sup>84</sup></i>		
	___ The diacetyl fumes emitted from the heated butter flavoring were potentially hazardous to breathe		
	___ Diacetyl-free butter flavorings, which did not emit fumes that were potentially hazardous to breathe, were available for use in microwave popcorn		
<b>(ii)</b>	<i>If you found in favor of the Stultses on the “breach of implied warranty” claim in Step 1(a), did the wrongful conduct of the Defendants at issue in the “breach of implied warranty” claim cause David a permanent loss of a vital bodily function, as explained in Instruction No. 8? (I will determine the effect of your determination on this question.)</i>		
	___ Yes	___ No	
<b>(iii)</b>	<i>If you found in favor of the Stultses on the “breach of implied warrant” claim in Step 1(a), and you found that David Stults sustained a permanent loss of a vital bodily function in Step(1)(a)(ii), do you find that the Defendants’ conduct in causing the permanent loss of a vital bodily function was so reckless as to demonstrate a substantial lack of concern for whether an injury would result, as explained in Instruction No. 8?<sup>85</sup></i>		
	___ Yes	___ No	
<b>(b)</b>	On the “loss of consortium” claim, as explained in Instruction No. 9?	___ The Stultses	___ The Defendants

<sup>84</sup> The Defendants’ objection to inquiry about which one or more breaches of the implied warranty were proved, because such an inquiry is “unnecessary,” is overruled. Such an inquiry will facilitate post-trial review of the sufficiency of the evidence supporting any breach found by the jurors, the legal sufficiency of any such breach, and whether or not such a breach in fact “merges” with an untimely negligence claim.

<sup>85</sup> As both parties have requested, I have included an additional separate inquiry concerning “recklessness” (“gross negligence”), because it may have a separate, additional impact on the damages “cap.”

<b>Step 2: Damages</b>	What amounts, if any, do you award for each of the following items of compensatory damages, on each claim on which you found that the Stultses won in <b>Step 1(a)</b> , as items of damages are explained in Instruction No. 11? <sup>86</sup>	
<b>(a)</b>	<b>Damages For David's Injuries</b>	
<b>(i)</b>	<b>Economic damages</b>	
	Past reasonable expenses of necessary medical care, treatment, and services:	\$ _____
	Future reasonable expenses of necessary medical care, treatment, and services:	\$ _____
	Past lost wages:	\$ _____
	Future lost earning capacity:	\$ _____
	Past reasonable expenses that have been required as a result of David's injury:	\$ _____
	Future reasonable expenses that are reasonably certain to be required in the future as a result of David's injury:	\$ _____
	<b>Total of economic damages:</b>	<b>\$ _____</b>
<b>(ii)</b>	<b>Non-economic damages</b>	
	Past mental pain and suffering <sup>87</sup>	\$ _____
	Future mental pain and suffering:	\$ _____
	Past physical pain and suffering:	\$ _____
	Future physical pain and suffering:	\$ _____
	Past disability, including the loss or impairment of lung function:	\$ _____

<sup>86</sup> I have recast this signal, *sua sponte*, because the prior version might have suggested that Barbara could win on her “loss of consortium” claim, even if the Stultses did not win on the “breach of implied warranty” claim. The Defendants suggestion that it is enough to cross-reference the “damages” instruction without listing every item of damages is overruled. Instead, I have modified the items of damages as stated in revised Instruction No. 11.

<sup>87</sup> Again, I recognize that the Defendants object to this item of damages, unless it is definitively supported by the evidence. If there is ultimately no support for embarrassment, humiliation, or mortification at trial, I can strike consideration of this item of damages or strike it on post-trial motions.

	Future disability, including the loss or impairment of lung function	\$ _____	
	<b>Total of non-economic damages:</b>	\$ _____	
<b>(b)</b>	<b>Damages For Loss Of Consortium</b>		
<b>(i)</b>	<b>Economic damages</b>		
	Past loss of the services:	\$ _____	
	Future loss of services:	\$ _____	
	<b>Total of economic damages:</b>	\$ _____	\$ _____
<b>(ii)</b>	<b>Non-economic damages</b>		
	Past loss of the society, companionship, and sexual relationship:	\$ _____	
	Future loss of the society, companionship, and sexual relationship:	\$ _____	
	<b>Total of non-economic damages:</b>	\$ _____	

<b>II. THE DEFENDANTS' SPECIFIC DEFENSES</b>		
<b>Step 1:</b> Sole Proximate Cause	On the Defendants' "sole proximate cause" specific defense, as explained in Instruction No. 12, in whose favor do you find? <i>(You must not be concerned with the effect of your finding on this specific defense. The effect of your finding on this specific defense is for me to determine.)</i>	
	___ The Defendants	___ The Stultses
<b>Step 2:</b> Fault Of Others	On the Defendants' "fault of others" specific defense, as explained in Instruction No. 13, in whose favor do you find? <i>(If you find in favor of the Defendants, please answer the question in Step 2(b). On the other hand, if you find in favor of the Stultses, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>	
<b>(a)</b>	___ The Defendants	___ The Stultses
<b>(b)</b>	<i>If you found in favor of the Defendants in Step 2(a), please identify (i) which one or more non-parties were at fault, (ii) the way or ways in which each such non-party was at fault, and (iii) each such non-party's percentage of fault. You must then allocate the Defendants a percentage of fault. Remember that the percentage of the Defendants' fault and the percentage of fault of any non-parties must add up to 100 percent.</i>	

<b>(i) non-parties at fault</b>	<b>(ii) way(s) that non-party was at fault</b>	<b>(iii) percentage of fault</b>
___ American Pop Corn Company	___ Design defect ___ Warning defect ___ Breach of implied warranty	___ %
___ ConAgra Foods, Inc.	___ Design defect ___ Warning defect ___ Breach of implied warranty	___ %
___ General Mills, Inc.	___ Design defect ___ Warning defect ___ Breach of implied warranty	___ %
___ Givaudan Flavors Corp.	___ Design defect ___ Warning defect ___ Breach of implied warranty	___ %
___ Chr. Hansen, Inc.	___ Design defect ___ Warning defect ___ Breach of implied warranty	___ %
___ Firmenich, Inc.	___ Design defect ___ Warning defect ___ Breach of implied warranty	___ %
___ Sensient Flavors, Inc.	___ Design defect ___ Warning defect ___ Breach of implied warranty	___ %
___ Symrise, Inc.	___ Design defect ___ Warning defect ___ Breach of implied warranty	___ %
The Defendants		___ %
<b>Total of the Defendants' and any Non-Parties' fault (Must add up to 100%)</b>		___ %

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Date

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Foreperson

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Juror

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Juror

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Juror

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Juror

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Juror

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Juror

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Juror