

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

BODEANS CONE COMPANY,
L.L.C.; BODEANS WAFER
COMPANY, L.L.C.; and BODEANS
BAKING HOLDING COMPANY,
L.L.C.,

Plaintiffs,

vs.

NORSE DAIRY SYSTEMS, L.L.C.;
and INTERBAKE FOODS, L.L.C.,

Defendants.

No. C 09-4014-MWB

JURY INSTRUCTIONS

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VERDICT FORM

INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, before the lawyers make their opening statements, I am giving you these instructions to help you better understand the trial and your role in it. Consider these instructions, together with all written and oral instructions given to you during or at the end of the trial, and apply them as a whole to the facts of the case.

As I explained during jury selection, this is a civil lawsuit involving plaintiff BoDeans's claims for money damages against defendant Norse Dairy for alleged violations of the antitrust laws. BoDeans asserts two "monopolization" claims: "monopolization" and "attempt to monopolize." BoDeans also asserts two "anticompetitive conduct" claims: "unlawful exclusive dealing arrangements," and "unlawful tying arrangements." Norse Dairy denies these claims.

BoDeans's claims each consist of one or more "elements," which you must find by the greater weight of the evidence in order for BoDeans to win on that claim. In these Instructions, I will explain the elements of BoDeans's claims. You must give separate consideration to each of BoDeans's claims.

You have been chosen and sworn as jurors to try the issues of fact presented by the parties. You will determine the facts from the evidence. You are the sole judges of the facts, but you must follow the law as stated in these instructions, whether you agree with it or not. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law in these Instructions.

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. For purposes of these instructions, BoDeans and Norse Dairy are both “firms.” Just because the parties are firms does not mean that they are entitled to any greater or lesser consideration than you would give to an individual. Similarly, just because one of the firms is located in Iowa and the other is not does not mean that you should give either firm any greater or lesser consideration. All persons, including individuals and firms, and Iowa and non-Iowa firms, stand equal before the law and are entitled to the same fair consideration. When firms are involved, however, they may act only through natural persons, such as their employees and managers, as their agents.

Although you must follow my Instructions, you should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be. Therefore, if I ask questions of witnesses during the trial, do not assume that I have any opinion on the matters to which my questions relate.

Before explaining the elements of BoDeans’s claims, I must explain some preliminary matters, including the standard of proof for claims, what is evidence, and credibility of witnesses.

INSTRUCTION NO. 2 - STANDARD OF PROOF

In these Instructions, you are told that your verdict depends on whether you find that certain facts have been proved “by the greater weight of the evidence,” which is sometimes called “the preponderance of the evidence.” To find something “by the greater weight of the evidence” means to find that it is more likely true than not true. In deciding whether a fact has been proved “by the greater weight of the evidence,” it does not matter which party presented which evidence. The “greater weight of the evidence” is determined by considering all of the evidence and deciding which evidence is more 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. The “greater weight of the evidence” is not necessarily determined by the greater number of witnesses or exhibits a party has presented. The testimony of a single witness that produces in your mind a belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony. This is so, even though a number of witnesses may have testified to the contrary, if, after consideration of all of the evidence in the case, you hold a greater belief in the accuracy and reliability of that one witness.

You may have heard of the term “proof beyond a reasonable doubt.” That is a stricter standard, which applies in criminal cases. It does not apply in civil cases such as this. Therefore, you should put it out of your minds.

INSTRUCTION NO. 3 - DEFINITION OF EVIDENCE

Your verdict must be based only on the evidence presented in this case and these and any other instructions that may be given to you during the trial. Evidence is the following:

1. Testimony.
2. Exhibits that are admitted into evidence.
3. Stipulations, which are agreements between the parties.

Evidence may be “direct” or “circumstantial.” The law makes no distinction between the weight to be given to direct and circumstantial evidence. The weight to be given any evidence is for you to decide.

A particular item of evidence is sometimes admitted only for a limited purpose, and not for any other purpose. I will tell you if that happens, and instruct you on the purposes for which the item can and cannot be used.

The fact that an exhibit may be shown to you does not mean that you must rely on it more than you rely on other evidence.

The following are not evidence:

1. Statements, arguments, questions, and comments by the lawyers.
2. Objections and rulings on objections.
3. Testimony that I tell you to disregard.
4. Anything that you see or hear about this case outside the courtroom.

The weight of the evidence is not determined merely by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the

weight of the evidence is not determined merely by the number or volume of documents or exhibits. The weight of the evidence depends upon its quality, which means how convincing it is, and not merely upon its quantity. 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 the witness's testimony. Also, you are free to disbelieve the testimony of any or all witnesses. The quality and weight of the evidence are for you to decide.

INSTRUCTION NO. 4 - CERTAIN KINDS OF EVIDENCE

Depositions

Certain testimony from a “deposition” may be put into evidence. A deposition is testimony taken under oath before the trial and preserved in writing or on video. Consider that testimony as if it had been given in court.

Interrogatories

During this trial, you may hear the word “interrogatory.” An interrogatory is a written question asked 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.

Stipulated Facts

BoDeans and Norse Dairy have “stipulated” or agreed to certain facts and have reduced these facts to a written agreement or stipulation. Either counsel may, at any time during the trial, read to you all or a portion of the stipulated facts. You should treat stipulated facts as having been proved.

INSTRUCTION NO. 5 - CREDIBILITY

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness or unreasonableness of the testimony, and the extent to which the testimony is consistent or inconsistent with any other evidence. In deciding whether or not to believe a witness, keep in mind that people sometimes see or hear things differently and sometimes forget things. You need to consider, therefore, whether a contradiction results from an innocent misrecollection or sincere lapse of memory, or instead from an intentional falsehood or pretended lapse of memory.

Ordinarily, witnesses may only testify to factual matters within their personal knowledge. However, you may hear evidence from persons described as experts. Persons may become qualified as experts in some field by knowledge, skill, training, education, or experience. Such experts may state their opinions on matters in that field and may also state the reasons for their opinions. You should consider expert testimony just like any other testimony. You may believe all of what an expert says, only part of it, or none of it, considering the expert's qualifications, the

soundness of the reasons given for the opinion, the acceptability of the methods used, the reasonableness or correctness of any underlying assumptions or comparisons, any reason that the expert may be biased, and all of the other evidence in the case.

A person who is not an expert may also give an opinion, if that opinion is rationally based on the witness's perception. You may give an opinion of a non-expert witness whatever weight, if any, you think it deserves, based on 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.

If earlier statements of a witness are admitted into evidence, they will not be admitted to prove that the contents of those statements are true, unless I tell you otherwise. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and, therefore, whether they affect the credibility of that witness.

INSTRUCTION NO. 6 - OVERVIEW OF ANTITRUST TERMINOLOGY AND THE ANTITRUST LAWS

Antitrust Terminology

I have provided each of you with a separate *Glossary of Antitrust Terminology*. Terms in the following Instructions that are defined in the *Glossary* appear in *bold and italics*. It is your duty as jurors to read and apply the definitions in the *Glossary* to all of the terms that appear in *bold and italics* in these Instructions, because those definitions are part of the Instructions. You may also refer to the *Glossary* at any time that you think it would be helpful to understand the evidence presented in this case.

The Antitrust Laws

The United States economy is based on a system of free markets. Free and open markets are the foundation of a vibrant economy. Aggressive competition among sellers in an open marketplace gives consumers—both individuals and businesses—the benefits of lower prices, higher quality products and services, more choices, and greater innovation.

The purpose of the antitrust laws is to preserve free and open competition in the marketplace. Thus, the antitrust laws are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. Competition necessarily results in some competitors losing while others succeed. The antitrust laws protect this

competitive process and do not guarantee success to competing firms, because those laws recognize that, in the natural operation of our economic system, some competitors are going to lose business, or even go out of business, while others will grow their businesses and prosper. Thus, the fact that one competitor loses business as a result of vigorous competition, by itself, is not evidence of an antitrust law violation.

One provision of the antitrust laws at issue here prohibits “every contract, combination, or conspiracy in restraint of trade.” This provision does not prohibit every restraint of trade, only those that are unreasonable.

A second provision at issue here prohibits any “*monopolization*” or “attempted *monopolization*.” This provision does not prohibit all *monopolies*, only those that result from *anticompetitive conduct* or that result in unreasonable restraints on trade. Thus, this provision is not violated simply because one firm’s vigorous competition and lower prices take sales from its less efficient competitors—that is competition working properly. On the other hand, this provision is violated when a firm controls the market for a product or service, in other words, has a *monopoly*, and it has obtained or maintained its *monopoly power* by suppressing competition with *anticompetitive conduct*, not because its products or services are superior to the products or services of others.

A third provision of the antitrust laws at issue here makes it unlawful to sell goods on the “condition, agreement, or understanding” that the purchaser refrain from dealing with competitors of the seller if the effect “may be to substantially lessen competition or tend to create a *monopoly* in any line of commerce.” Two

types of restrictions on competition that may be challenged under this provision are “*exclusive dealing arrangements*” and “*tying arrangements.*”

The antitrust laws apply only to conduct or restraints that affect interstate or foreign commerce. In this case, BoDeans and Norse Dairy agree that you should assume that Norse Dairy’s alleged conduct occurred in interstate commerce.

The antitrust laws allow a person or entity to sue for damages when the person or entity has been harmed by conduct that violates the antitrust laws.

I will now explain, in more detail, BoDeans’s claims that Norse Dairy has violated these antitrust laws and, therefore, is entitled to money damages for the resulting injuries to its business.

INSTRUCTION NO. 7 - BODEANS'S CLAIMS: MONOPOLIZATION

BoDeans's first claim is "*monopolization.*" In this claim, BoDeans contends that Norse Dairy acquired or maintained *monopoly power* in the *relevant markets* for novelty cones or wafers in the United States and Canada by engaging in certain *anticompetitive conduct*, identified as *exclusive dealing arrangements* and *tying arrangements*. Norse Dairy denies this claim.

The antitrust laws prohibit *monopolization*. For BoDeans to win on its "*monopolization*" claim, you must find the following elements by the greater weight of the evidence:

One, a relevant market existed for the product in question, including a relevant product market and a relevant geographic market.

BoDeans alleges that there are two separate *relevant product markets* relevant to its *monopolization* claim: (1) the novelty cones used in the manufacture of novelty ice cream cones; and 2) the wafers used in the manufacture of novelty ice cream sandwiches. You do not have to find that there is a *relevant product market* for both of these products, only that there is a *relevant product market* for at least one of these products. However, you may only consider BoDeans's *monopolization* claim further as to a product for which there is both a *relevant product market* and a *relevant geographical market*.

BoDeans and Norse Dairy agree that you should assume that the *relevant geographic markets* for novelty cones and wafers is the United States and Canada, but

only if you find *relevant product markets* for these products.

Two, Norse Dairy possessed *monopoly power* in one or more of the alleged *relevant markets*.

You may find that Norse Dairy has *monopoly power* based on either “direct proof” or “indirect proof.”

Direct proof of *monopoly power* is evidence that Norse Dairy has the power to control prices and exclude competition in the *relevant market*. Such evidence must prove that Norse Dairy has had the power to maintain prices above a competitive level over time. If Norse Dairy attempted to maintain prices above competitive levels, but would lose so much business to other competitors that the price increase would become unprofitable and would have to be withdrawn, then Norse Dairy does not have *monopoly power*. Similarly, direct evidence must prove that Norse Dairy has the ability to exclude competition. For example, if Norse Dairy attempted to maintain prices above competitive levels, but new competitors could enter the *relevant market* or existing competitors could expand their sales and take so much business that Norse Dairy’s price increase would become unprofitable and would have to be withdrawn, then Norse Dairy does not have *monopoly power*.

Indirect proof of *monopoly power* may include evidence of the structure of the market showing that Norse Dairy has *monopoly power*. Indirect proof may include evidence of Norse Dairy’s *market share*, the existence or lack of *barriers to entry, market entry and exit* by other firms, and the *number and size of other competitors*. If the greater weight of this evidence establishes that Norse Dairy has the power to control prices and to exclude

competition in a *relevant market*, then you may conclude that Norse Dairy has *monopoly power* in that market.

You may hear evidence about transactions in 2000 in which Interbake Foods purchased Norse Dairy and purchased the novelty cone manufacturing assets of Ace Baking Company. You may consider evidence of these transactions only for the purpose of determining whether Norse Dairy had *monopoly power* in one or more *relevant markets*.

Three, Norse Dairy willfully acquired or maintained monopoly power in one or more of the relevant markets in question by engaging in anticompetitive conduct.

A *monopolist's* conduct only becomes unlawful where it involves *anticompetitive acts* done “willfully,” that is, voluntarily and intentionally, for the purpose of acquiring or maintaining *monopoly power*. Similarly, even if you determine that Norse Dairy has *monopoly power*, mere possession of *monopoly power* is not unlawful. Rather, for this element to be proved, you must find by the greater weight of the evidence that Norse Dairy not only had *monopoly power*, but willfully took *anticompetitive actions* designed to maintain or abuse that *monopoly power*.

The willful acquisition or maintenance of *monopoly power* is not the same as growth or development as a consequence of a superior product, business acumen, or historic accident. A *monopolist* may compete aggressively, engage in normal methods of competition, and charge high prices without violating the antitrust laws.

BoDeans alleges that Norse Dairy willfully acquired or maintained *monopoly power* by engaging in the following *anticompetitive conduct*: *exclusive dealing*

arrangements and/or *tying arrangements*. More specifically, BoDeans claims that Norse Dairy has willfully maintained *monopoly power* in the alleged *relevant markets* for novelty cones and wafers in the following ways: (1) by entering long-term *exclusive supply agreements* with dairies for novelty cones and wafers; and (2) by *tying* the placement of novelty cone filling machines and wafer filling machines to the purchase of novelty cones and wafers by requiring dairies to run only novelty cones and wafers purchased from Norse Dairy on the filling machines provided by Norse Dairy. You must determine whether Norse Dairy has willfully maintained *monopoly power* in the alleged *relevant markets* through either or both of the *anticompetitive acts* alleged. You should consider the effect of any practice of *tying* or *exclusive dealing* in restraining access to those markets by competitors, including BoDeans. In doing so, you may consider the combined effect of each practice on the marketplace, as the restraint on competition caused by one practice may have been magnified by the other.

Again, you may hear evidence about transactions in 2000 in which Interbake Foods purchased Norse Dairy and purchased the novelty cone manufacturing assets of Ace Baking Company. BoDeans does not allege that either transaction was *anticompetitive conduct*, and you may not consider it as evidence of the willful acquisition or maintenance of *monopoly power*. You may consider evidence of these transactions only for the purpose of determining whether Norse Dairy had *monopoly power* in one or more *relevant markets*.

If you find all of these elements by the greater weight of the evidence, as to either novelty cones, or wafers, or both, then a “*monopolization*” violation of the

antitrust laws has been proved. On the other hand, if you do not find all of these elements by the greater weight of the evidence, as to either novelty cones or wafers, then no “*monopolization*” violation of the antitrust laws has been proved.

**INSTRUCTION NO. 8 - BODEANS'S CLAIMS:
ATTEMPT TO MONOPOLIZE**

BoDeans's second claim is "*attempt to monopolize.*" In this claim, BoDeans asserts that, if Norse Dairy did not already possess and unlawfully maintain *monopoly power*, then Norse Dairy attempted to monopolize two separate *relevant markets*, the markets for novelty cones and wafers in the United States and Canada, through *anticompetitive conduct*, again identified as *exclusive dealing arrangements* and *tying arrangements*. Norse Dairy denies this claim.

The antitrust laws also make it unlawful for firms to attempt to acquire *monopoly power* through *anticompetitive actions*. You should consider BoDean's "*attempt to monopolize*" claim whatever your determination might be on BoDean's first claim of "*monopolization,*" explained in Instruction No. 7.

For BoDeans to win on its "*attempt to monopolize*" claim, you must find the following elements by the greater weight of the evidence:

One, Norse Dairy engaged in anticompetitive conduct.

BoDeans claims that Norse Dairy engaged in *anticompetitive conduct* in the following ways: (1) by entering long-term *exclusive supply agreements* with dairies for novelty cones and wafers; and (2) by *tying* the placement of novelty cone filling machines and wafer filling machines to the purchase of novelty cones and wafers by requiring dairies to run only novelty cones and wafers purchased from Norse Dairy on the filling machines provided by Norse Dairy. The greater weight of the evidence must prove that such arrangements were *anticompetitive acts*.

Two, Norse Dairy engaged in such anticompetitive conduct with a specific intent to achieve monopoly power in one or more of the alleged relevant markets.

The greater weight of the evidence must show that there is a *relevant market* for novelty cones, wafers, or both. The greater weight of the evidence must then show that Norse Dairy had the specific intent to *monopolize* either or both of those alleged *relevant markets*. “Specific intent to achieve *monopoly power*” is having the aim to acquire the power to control prices and to exclude competition in the alleged *relevant markets*.

There are several ways in which the evidence may prove that Norse Dairy had the specific intent to *monopolize*.

For instance, there may be evidence of direct statements by Norse Dairy indicating an intent to obtain a *monopoly* in the *relevant market*. However, while specific intent may be established by documents prepared or statements made by responsible officers or employees of Norse Dairy or its directors at or about the time of the conduct in question, you must be careful to distinguish between Norse Dairy’s intent to compete lawfully, which may be accompanied by aggressive or colorful language, and a true intent to acquire *monopoly power* using *anticompetitive means*. Colorful language indicating an intent to compete lawfully is not enough, because a desire to increase market share, or even to drive a competitor out of business through vigorous competition on the merits, is not sufficient to prove this element.

Even if you decide that the evidence does not prove directly that Norse Dairy actually intended to obtain a *monopoly*, specific intent may be inferred from what Norse Dairy did. For example, if the evidence shows that the natural and probable consequence of Norse Dairy’s

conduct in the *relevant market* was to give it control over prices and to exclude or destroy competition, and that this consequence was plainly foreseeable by Norse Dairy, then you may (but are not required to) infer that Norse Dairy specifically intended to acquire *monopoly power*.

Three, there was a dangerous probability that Norse Dairy would achieve its goal of monopoly power in one or more of the alleged relevant markets.

A “dangerous probability of success” means that there was a substantial and real likelihood that Norse Dairy would ultimately acquire *monopoly power*. In determining whether there was a dangerous probability that Norse Dairy would acquire the ability to control price or exclude competition in the alleged *relevant markets*, you should consider such factors as the following: (1) Norse Dairy’s *market share*; (2) whether Norse Dairy’s *market share* has been increasing or declining (its *market share trend*); (3) whether there are *barriers to entry* into each of the alleged *relevant markets* that make it difficult for competitors to enter the market; and (4) the likely effect of any *anticompetitive conduct* on Norse Dairy’s *market share* in the alleged *relevant markets*.

If you find all of these elements by the greater weight of the evidence, as to either novelty cones, or wafers, or both, then an “*attempt to monopolize*” violation of the antitrust laws has been proved. On the other hand, if you do not find all of these elements by the greater weight of the evidence, as to either novelty cones or wafers, then no “*attempt to monopolize*” violation of the antitrust laws has been proved.

**INSTRUCTION NO. 9 - BODEANS'S CLAIMS: UNLAWFUL
EXCLUSIVE DEALING ARRANGEMENTS**

BoDeans's third claim is "*unlawful exclusive dealing arrangements.*" In this claim, BoDeans contends that Norse Dairy entered into arrangements with customers that obligated the customers to purchase all or substantially all of their novelty cones and/or wafers from Norse Dairy, which unreasonably restrained trade by substantially harming competition in a substantial share of the *relevant markets* for novelty cones and/or wafers. Norse Dairy denies this claim.

The antitrust laws at issue here make it unlawful to sell goods on the "condition, agreement, or understanding" that the purchaser refrain from dealing with competitors of the seller if the effect "may be to substantially lessen competition or tend to create a *monopoly* in any line of commerce."

For BoDeans to win on its "*unlawful exclusive dealing arrangements*" claim, you must find the following elements by the greater weight of the evidence:

One, Norse Dairy had one or more written or unwritten agreements with one or more customers that obligated the customers to purchase all or substantially all of their novelty cones and/or wafers from Norse Dairy.

"Substantial" means of considerable amount or value.

Two, such agreements unreasonably restrained trade by causing substantial harm to competition in a substantial share of a relevant market.

The alleged *relevant markets* here are the markets for novelty cones and/or wafers.

Again, “substantial” means of considerable amount or value. A “substantial harm to competition” in a *relevant market* means that the challenged conduct affected more than just one firm’s own welfare. Antitrust laws protect competition, not competitors. Harm that occurs merely to the individual business or property of one firm, such as BoDeans, is not sufficient, by itself, to demonstrate harm to competition generally. In other words, harm to a single competitor or group of competitors does not necessarily mean that there has been “harm to competition.”

A substantial harm to competition, or a competitive harm, refers to a reduction in competition that results in the loss of some of the benefits of competition, such as lower prices, increased output, and higher product quality. If the challenged conduct has not resulted in or is not likely to result in increased prices above competitive levels, decreased output, lower quality, or the loss of some other competitive benefit, then there has been no competitive harm and you should find that the challenged conduct was not unreasonable.

You may hear evidence that one or more companies have offered customers lower prices in exchange for long-term or exclusive contracts. You should not consider those lower prices to be evidence that the contracts are necessarily anticompetitive. Offering a lower price to gain new business is the essence of competition. Similarly, acts that are ordinary business practices typical of those used in a competitive market ordinarily do not constitute *anticompetitive conduct*.

In determining whether the challenged restraint has produced or is likely to produce competitive harm, you may look at the following factors: current and historical use of the restraint in the industry; the past, and probable

immediate and future effect of the restraint on prices, output, product quality, and service; the purpose and nature of the restraint; the nature and structure of the alleged *relevant market* before and after the restraint was imposed; the number of competitors in the alleged *relevant market* and the level of competition among them; the proportional volume of business involved in the restraint in relation to the total volume of business available in the relevant market; and whether Norse Dairy possessed *market power*. A mere showing that a restraint involves a substantial number of dollars, however, is ordinarily of little consequence.

If Norse Dairy does not possess *market power*, then it is less likely that the challenged restraint has resulted in or will result in a substantial harmful effect on competition in the *relevant market*. If the share of the *relevant market* removed from competition by the *exclusive dealing arrangements* is so great that it invariably indicates that the firm imposing the *exclusive dealing arrangements* has substantial *market power*, you may rely on that fact alone to establish a violation of the antitrust laws. However, if the share of the *relevant market* removed from competition by the *exclusive dealing arrangements* is neither substantial nor even apparent, for this element to be proved, you must find by the greater weight of the evidence that other factors in the *relevant market* made worse the negative effect of the *exclusive dealing arrangements*.

If you find by the greater weight of the evidence that Norse Dairy's alleged *exclusive dealing arrangements* resulted, or are likely to result, in a substantial harm to competition in one or more of the alleged *relevant markets* for novelty cones and/or wafers, then you next must determine whether the *exclusive*

dealing arrangements also benefitted competition in other ways. If you find that the challenged conduct does result in competitive benefits, then you also must consider whether the *exclusive dealing arrangements* were reasonably necessary to achieve those benefits. If you find by the greater weight of the evidence that the same benefits could have been readily achieved by other, reasonably available alternative means that create substantially less harm to competition, then the benefits to competition cannot be used to justify the *exclusive dealing arrangements*.

Finally, if you find by the greater weight of the evidence that Norse Dairy's alleged *exclusive dealing arrangements* were reasonably necessary to achieve competitive benefits, then you must balance those competitive benefits against the competitive harm resulting from the same restraint. If the competitive harm substantially outweighs the competitive benefits, then the challenged conduct is unreasonable. Similarly, if the competitive harm does not substantially outweigh the competitive benefits, then the challenged conduct is not unreasonable. In conducting this balancing of competitive benefits and competitive harms, you must consider the benefits and harms to competition and to customers, not just to a single competitor or group of competitors.

If you find both of these elements by the greater weight of the evidence, as to either novelty cones, or wafers, or both, then an “*unlawful exclusive dealing arrangement*” violation of the antitrust laws has been proved. On the other hand, if you do not find both of these elements by the greater weight of the evidence, as to either novelty cones or wafers, then no “*unlawful exclusive dealing arrangement*” violation of the antitrust laws has been proved.

INSTRUCTION NO. 10 - BODEANS'S CLAIMS: UNLAWFUL TYING ARRANGEMENTS

BoDeans's fourth claim is "*unlawful tying arrangements.*" In this claim, BoDeans contends that Norse Dairy provided filling machines for novelty cones or wafers to customers only on the condition that the customers purchase the novelty cones or wafers run on those machines from Norse Dairy, thus "*tying*" the availability of the filling machines to the purchase of the cones or wafers from Norse Dairy, and harming competition. Norse Dairy denies this claim.

Again, the antitrust laws at issue here make it unlawful to sell goods on the "condition, agreement, or understanding" that the purchaser refrain from dealing with competitors of the seller if the effect "may be to substantially lessen competition or tend to create a *monopoly* in any line of commerce."

For BoDeans to win on its "*unlawful tying arrangements*" claim, you must find the following elements by the greater weight of the evidence:

One, novelty cone filling machines, wafer filling machines, and the novelty cones and the wafers run on those machines, are each separate and distinct products.

To determine whether novelty cone filling machines constitute a separate and distinct market from novelty cones, you should consider whether there would be demand for each of them if they were offered separately. If enough customers would want to purchase novelty cone filling machines separately from novelty cones to induce sellers to provide the novelty cone filling machines alone, then the novelty cone filling machines and novelty cones

are separate products for purposes of the *tying* claim. The same is true for wafer filling machines and wafers. On the other hand, if there is very little demand for one of the products by itself—that is, without the other product—then they are not two separate products for the purposes of the *tying* claim, even if they are sometimes sold separately.

Products may be separate products even if one of them is useless without the other. The relevant issue is whether there is sufficient demand from customers that sellers should be induced to provide them separately, even if the customer needs to obtain both products from one or more suppliers.

Two, Norse Dairy provided its novelty cone filling machines to customers only on the condition that they also purchase the novelty cones run on those filling machines from Norse Dairy or Norse Dairy provided its wafer filling machines to customers only on the condition that they also purchase the wafers run on those filling machines from Norse Dairy.

You may find that a *tying arrangement* exists between novelty cone filling machines and novelty cones and/or wafer filling machines and wafers if Norse Dairy has refused to place filling machines with customers unless customers also agree to buy the novelty cones or wafers to run on those machines from Norse Dairy, or at least agree not to run novelty cones or wafers from any other supplier on those machines. For this element to be proved, you do not have to find *tying arrangements* for both novelty cone filling machines and novelty cones *and* wafer filling machines and wafers, but you must find that there was a *tying arrangement* for novelty cone filling machines and novelty cones, *or* wafer filling machines and wafers, *or* both.

Three, Norse Dairy has sufficient market power in the relevant market for novelty cone filling machines to enable it to restrain competition in the relevant market for novelty cones, or Norse Dairy has sufficient market power in the relevant market for wafer filling machines to enable it to restrain competition in the relevant market for wafers.

You must first determine whether there are *relevant markets* (including both *relevant product markets* and *relevant geographic markets*) for the filling machines (the *tying products*) as well as *relevant markets* for the novelty cones or wafers (the *tied products*). If you do not find *relevant markets* for both a *tying product* and the related *tied product* by the greater weight of the evidence, then BoDeans cannot win on its unlawful *tying arrangement* claim as to the *tying* of those products. Norse Dairy agrees that, if there are *relevant product markets* for novelty cones and wafers, then the *relevant geographic market* for those products is the United States and Canada. Norse Dairy does not agree that there is either a *relevant product market* or a *relevant geographic market* for filling machines. Therefore, you must determine whether there are *relevant product markets* for these *tying products*, and if so, whether the *relevant geographic market* is the United States and Canada.

If you determine that there are *relevant markets* for both a *tying product* (a filling machine) and its related *tied product* (the novelty cones or wafers), then you must determine whether Norse Dairy has *market power* in the *relevant market* for the *tying product* (the filling machine). You may find that Norse Dairy has *market power* in the alleged *relevant markets* for novelty cone filling machines or wafer filling machines (the *tying*

products) if Norse Dairy can force a customer in need of novelty cone or wafer filling machines to accept terms for placement of the machines that it would not accept in a competitive market.

You may find that Norse Dairy has *market power* in the alleged *relevant markets* even if you do not find that Norse Dairy has *monopoly power* in that alleged *relevant market*. The *market power* required for a *tying* claim is something less than the *monopoly power* required for a *monopolization* claim.

Four, the alleged tying arrangement has foreclosed a substantial volume of commerce in the alleged relevant markets for novelty cones or wafers.

A substantial volume of commerce is “foreclosed” if competitors cannot compete for a substantial volume of commerce as a result of the challenged arrangement. In determining whether Norse Dairy has foreclosed “a substantial volume of commerce” in the alleged *relevant markets* for novelty cones and wafers, you should consider the total dollar amount of Norse Dairy’s sales of novelty cones and/or wafers achieved by the alleged *tying arrangements*. There is no restraint of a substantial volume of commerce if only a small percentage of sales of novelty cones and wafers is affected by the *tying arrangements*.

If you find all of these elements by the greater weight of the evidence, as to either novelty cone filling machines and novelty cones, or wafer filling machines and wafers, or both pairs of products, then an “*unlawful tying arrangement*” violation of the antitrust laws has been proved. On the other hand, if you do not find all of these elements by the greater weight of the evidence, as to either pair of

products, then no “*unlawful tying arrangement*” violation of the antitrust laws has been proved.

**INSTRUCTION NO. 11 - NORSE DAIRY'S BUSINESS
JUSTIFICATION DEFENSE TO THE UNLAWFUL TYING
ARRANGEMENTS CLAIM**

If you find that an “unlawful tying arrangements” violation of the antitrust laws has been proved, as that claim is explained in Instruction No. 10, then you must also consider Norse Dairy’s “business justification” defense to that claim. However, you need not be concerned with the effect of your determination, if any, that there was a business justification for Norse Dairy’s tying arrangements. The effect of such a determination, if any, is for me to decide.

Norse Dairy contends that the tying arrangement was justified because (1) it provided substantial efficiencies to customers by coordinating equipment service, maintenance, spare parts, manufacturing advice, research and development, and input supply all in one transaction; (2) it promoted the supply of higher quality equipment and lower production costs for customers; (3) it eliminated “free riding” by other manufacturers on Norse Dairy’s designs, “know how,” and product development efforts; and (4) it provided customers the benefits of “one-stop” shopping.

In determining whether any of these reasons are sufficient to justify the tying arrangement, you must decide by the greater weight of the evidence whether the tying arrangement served a legitimate business purpose of Norse Dairy. In making that determination, you may consider the following:

One, whether the justifications that Norse Dairy offers are the real reasons that it imposed the tying arrangement.

You may find that an asserted justification for a practice is not the real reason for that practice if, for example, you find by the greater weight of the evidence that the asserted justification is inconsistent with any other announced reasons for the practice, Norse Dairy's conduct in enforcing the practice, its competitors' actions, and customers' behavior in the marketplace.

Two, whether Norse Dairy's claimed objective could reasonably have been realized through less restrictive means.

In deciding whether Norse Dairy's objective could reasonably have been realized through less restrictive means, you may consider the following factors, among others: (1) whether other means to achieve Norse Dairy's objective were more or less expensive than the means chosen by Norse Dairy, (2) whether other means to achieve Norse Dairy's objective were more or less effective than the means chosen by Norse Dairy, and (3) whether any benefits and efficiencies of the tying arrangement are outweighed by the harm it caused to competition. If you find by the greater weight of the evidence that Norse Dairy could reasonably have achieved its legitimate business purpose by less restrictive means, then you may find that there was no business justification for the tying arrangement in question.

If you find by the greater weight of the evidence that Norse Dairy's tying arrangement served a legitimate business purpose, as to a particular pair of products, then you must so indicate in the part of the Verdict Form concerning this defense. Again, you need not be concerned with the effect of your determination,

if any, that there was a business justification for one or more of Norse Dairy's tying arrangements. The effect of such a determination, if any, is for me to decide.

INSTRUCTION NO. 12 - DAMAGES: IN GENERAL

The fact that I am instructing you on the proper measure of damages should not be considered as an indication that I have any view as to whether BoDeans is entitled to your verdict on its antitrust claims in this case. Instructions on the measure of damages are given only for your guidance in the event that you should find by the greater weight of the evidence that Norse Dairy violated the antitrust laws in one or more of the ways BoDeans has alleged, in accord with the other instructions.

In arriving at an amount of damages, you cannot establish a figure by taking down the estimate of each juror as to damages and agreeing in advance that the average of those estimates shall be your award of damages. Rather, you must use your sound judgment based upon an impartial consideration of the evidence.

Remember that, throughout your deliberations, you must not engage in any speculation, guess, or conjecture. You must not award damages under these Instructions by way of punishment or through sympathy. Your judgment must not be exercised arbitrarily or out of sympathy or prejudice for or against any of the parties.

On the other hand, damages do not have to be proved with absolute certainty. The law permits some degree of imprecision in the proof of the amount of damages. This is so, in part, because of the difficulty of ascertaining business damages with certainty—the vagaries of the marketplace usually deny us sure knowledge of what a plaintiff's situation would have been in the absence of the defendant's antitrust

violation—and, in part, because it would be improper to allow a wrongdoer to block recovery by insisting upon specific and certain proof of the injury which it has itself inflicted.

Therefore, you are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damage suffered by BoDeans. If you find by the greater weight of the evidence the elements required for proof of damages set forth in Instruction No. 13, then you are permitted to make a just and reasonable estimate of BoDeans's damages. So long as there is a reasonable basis in the evidence for a damages award, BoDeans should not be denied a right to be fairly compensated just because damages cannot be determined with absolute mathematical certainty. The amount of damages must, however, be based on reasonable, nonspeculative assumptions and estimates. If you find by the greater weight of the evidence that there is a reasonable basis for determining damages, then you may award damages based on a just and reasonable estimate supported by the evidence.

The law provides that a party injured by an antitrust violation should be fairly compensated for all damages to its business or property that were materially caused by the antitrust violation. More specifically, the purpose of awarding damages in an antitrust action is to put an injured party into as nearly as possible the same position it would have enjoyed if the alleged antitrust violation had not occurred. The law does not permit you to award damages in an antitrust case to punish a wrongdoer—what we sometimes refer to as punitive damages—or to deter an antitrust violator from particular conduct in the future, or to provide a windfall to

a plaintiff. Antitrust damages are compensatory only. In other words, they are designed to compensate an injured party for the particular injuries it suffered as a result of the alleged violation of the antitrust laws. You also are not permitted to award any amount for attorney fees or the costs of maintaining the lawsuit.

You must award BoDeans the full amount of damages, if any, that are proved by the greater weight of the evidence to be caused by Norse Dairy's antitrust violations, if any. Attached to these Instructions is a Verdict Form, which you must fill out. Again, in the "damages" section of the Verdict Form, you should only award those damages, if any, that are proved by the greater weight of the evidence to have been caused by Norse Dairy's antitrust violations, if any.

Also, although BoDeans and Norse Dairy may present evidence about events that happened earlier, the antitrust laws do not permit recovery of damages for any injuries to BoDeans caused by conduct that occurred before March 1, 2005. Therefore, BoDeans is only seeking compensation for injuries caused by acts of Norse Dairy that occurred after March 1, 2005, and you may only award damages for injuries caused by acts of Norse Dairy that occurred after that date.

**INSTRUCTION NO. 13 - DAMAGES:
INJURY IN FACT, ANTITRUST INJURY, AND CAUSATION**

If you find that Norse Dairy has violated the antitrust laws as alleged in one or more of BoDeans's claims, then you must decide if BoDeans is entitled to recover money damages from Norse Dairy. BoDeans is entitled to recover damages for an injury to its business or property if you find the following by the greater weight of the evidence:

One, BoDeans was in fact injured in its business or property as a result of Norse Dairy's alleged violation of the antitrust laws.

This first element is sometimes called the "injury in fact" or "fact of damage" element. For BoDeans to recover damages, you must find by the greater weight of the evidence that BoDeans was injured as a result of Norse Dairy's alleged violation or violations of the antitrust laws. Proving the fact of damage requires only that BoDeans prove that it was in fact injured by an antitrust violation.

The "injury in fact" must have been to BoDeans's "business or property." BoDeans claims an injury to its "business." The term "business" includes any commercial interest or venture. BoDeans has been injured in its "business" if you find that it has suffered injury to any of its commercial interests or enterprises as a result of an antitrust violation.

Two, BoDeans's injury is an injury of the type that the antitrust laws were intended to prevent.

This element is sometimes called the “antitrust injury” element. “Antitrust injury” means injury that flows from harm to competition itself. The antitrust laws protect competition, not individual competitors. Mere loss of business to a competitor is not necessarily “antitrust injury.” In fact, such loss may be nothing more than the byproduct of vigorous competition, something the antitrust laws encourage and do not protect against. Accordingly, even in markets containing very few or even only two competing firms, a party seeking relief must still prove “antitrust injury” (that is, injury that flows from harm to competition as a whole).

Norse Dairy's conduct caused “antitrust injury” if Norse Dairy's conduct caused prices to increase beyond competitive levels, caused output or quality to decrease, or limited the customer's choice to one source of a product or prevented customers from making free choices between market alternatives. If BoDeans's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm customers, then BoDeans's injuries are “antitrust injuries.”

On the other hand, if BoDeans's injuries were caused only by legitimate competition, the competitive process itself, or by conduct that benefits customers overall, then BoDeans's injuries are not “antitrust injuries” and BoDeans may not recover damages for those injuries under the antitrust laws. You should bear in mind that businesses may incur losses for many reasons that the antitrust laws are not designed to prohibit or protect against—such as where a competitor offers better products

or services or where a competitor is more efficient and can charge lower prices while still earning a profit—and the antitrust laws do not permit a plaintiff to recover damages for losses that were caused by the competitive process or conduct that benefits customers overall.

Three, Norse Dairy’s alleged anticompetitive conduct was a material cause of BoDeans’s injury.

This element is sometimes called the “material cause” element. The greater weight of the evidence must establish as a matter of fact and with a fair degree of certainty that Norse Dairy’s alleged illegal conduct was a “material cause” of BoDeans’s injury, if any. The antitrust violation was a “material cause” of BoDeans’s injury, if BoDeans’s injury was caused by the alleged antitrust violation, and not by some other cause.

The antitrust violation does not have to be the sole cause of BoDeans’s injury, nor does BoDeans have to eliminate all other possible causes of injury. If, however, you find that BoDeans’s injury was caused primarily by something other than the alleged antitrust violation, then BoDeans cannot recover damages from Norse Dairy for that injury.

Similarly, BoDeans is not entitled to recover for any injuries that resulted from lawful conduct by Norse Dairy or that are merely the natural consequences of vigorous competition. If you find that BoDeans’s alleged injuries were caused by factors other than Norse Dairy’s alleged *anticompetitive conduct*, then you cannot award BoDeans any damages for such injuries.

If you find that BoDeans’s alleged injuries were caused in part by the alleged antitrust violation and in part by other factors, then you may award damages only for that portion of BoDeans’s alleged injuries that were

caused by the alleged antitrust violation. The evidence must establish damages with reasonable certainty, including the apportionment of damages between lawful and unlawful causes. If you find that there is no reasonable basis to apportion BoDeans's alleged injury between lawful and unlawful causes, or that apportionment can only be accomplished through speculation or guesswork, then you may not award any damages at all.

If you find all of these elements by the greater weight of the evidence, then you must award BoDeans damages for Norse Dairy's antitrust violations. On the other hand, if you do not find all of these elements by the greater weight of the evidence, then you cannot award BoDeans any damages for Norse Dairy's antitrust violations.

**INSTRUCTION NO. 14 - DAMAGES:
LOST PROFITS**

The damages that BoDeans seeks as a result of Norse Dairy's alleged antitrust violations are "lost profits." "Past lost profits" are the difference between BoDeans's actual profits during the period of any antitrust violation, ending at the time of trial, and the profits that BoDeans would have had, if there had been no antitrust violation. You may also award BoDeans "future lost profits," but only if you find by the greater weight of the evidence that harm from a past antitrust violation will extend into the future.

Determination of "lost profits" requires you to determine BoDeans's "net profit." "Net profit" is the amount by which BoDeans's gross revenues did exceed or would have exceeded all of the costs and expenses that were or would have been necessary to produce those revenues.

To calculate "past lost profits," you must first calculate the "net profit" that BoDeans actually had during the period of any antitrust violation, ending at the time of trial, and the "net profit" that BoDeans would have had during that period, if there had been no antitrust violation.

Similarly, to calculate "future lost profits," you must first calculate, or reasonably estimate, the "net profit" that BoDeans would have for the period from the end of trial into the future during which the harm from any past antitrust violation is likely to extend, and the "net profit" that BoDeans would have had during the same period, if there had been no antitrust violation. Damages for

“future lost profits” must be reduced to “present value.” “Present value” is a sum of money paid now, in advance, that, together with interest earned at a reasonable rate of return, will compensate a plaintiff for future losses. The parties’ evidence concerning damages for “future lost profits” may already take into account a reduction to “present value.” It is for you to determine whether the parties’ calculations are reasonable.

BoDeans has calculated the net profits it would have earned if there had been no antitrust violation by showing evidence of the *market share* it contends that it would have had in the absence of the alleged antitrust violations. If you find that there is reliable evidence of what BoDeans’s *market share* would have been in the absence of the antitrust violation, then you may calculate BoDeans’s lost profits by considering *market share*, evidence of the size of the market, and evidence relating to the *profit margin* BoDeans would have secured on such sales.

You may find, however, that there is no reasonable evidence of what BoDeans’s *market share* would have been in the absence of the alleged antitrust violation, such as if BoDeans’s *market share* were impacted by changed economic conditions, mismanagement, increased competition, changing technology, or other factors. You may also find that there is no reasonable evidence of the *profit margin* that BoDeans would have incurred in the absence of any alleged antitrust violation. If you find that the evidence of BoDeans’s *market share* and/or *profit margins* is not reasonable, and that lost profits may only be calculated using speculation or guesswork, you may not award damages for lost profits based on *market share* or *profit margins*.

INSTRUCTION NO. 15 - ORDER OF TRIAL

I will now explain how the trial will proceed.

After I have read all but the last Instruction, BoDeans's lawyer may make an opening statement. Next, the lawyer for Norse Dairy may make an opening statement. An opening statement is not evidence, but simply a summary of what the lawyer expects the evidence to be.

After opening statements, BoDeans will present evidence and call witnesses and the lawyer for Norse Dairy may cross-examine them. Following BoDeans's case, Norse Dairy may present evidence and call witnesses and the lawyer for BoDeans may cross-examine them.

After the evidence is concluded, the lawyers will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence.

Following the parties' closing arguments, I will give you the last Instruction, on "deliberations," and you will retire to deliberate on your verdict.

I will now give you some Instructions on conduct of the trial.

INSTRUCTION NO. 16 - 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. Also, the lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer has made objections.

INSTRUCTION NO. 17 - BENCH CONFERENCES

During the trial it may be necessary for me to talk with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please be patient, because while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, to avoid confusion and error, and to save your valuable time. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

INSTRUCTION NO. 18 - NOTE-TAKING

If you want to take notes during the trial, you may, but be sure that your note-taking does not interfere with listening to and considering all the evidence. If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

Notes you take during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

If you take notes, do not discuss them with anyone before you begin your deliberations. At the end of each day, please leave your notes on your chair. At the end of the trial, you may take your notes out of the notebook and keep them, or leave them, and we will destroy them. No one will read the notes, either during or after the trial.

You will notice that we have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching your verdict.

INSTRUCTION NO. 19 - 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. Thus, to ensure fairness, you must obey the following rules:

First, 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.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.

Third, when you are outside the courtroom, do not let anyone tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, or ask you about your participation in 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.

Fourth, during the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day. It is important that you do justice and also maintain the appearance of doing justice. If a person from one side of the case sees you talking to a person from the other side—even to pass the time of day—a suspicion about your fairness might arise. If any lawyer, party, or witness does not speak to you, it is because he or she is not supposed to talk to you, either.

Fifth, it may be necessary for you to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can explain when you are required to be in court and warn them not to ask you about this case, tell you anything they know or think they know about this case, or discuss this case in your presence. You must not communicate with anyone about the parties, witnesses, participants, claims, evidence, or anything else related to this case, or tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. During the trial, while you are in the courthouse and after you leave for the day, do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.

Sixth, do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation *about this case* 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. Also do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge.

Seventh, 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. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. 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.

Eighth, 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 during deliberations.

Ninth, if at anytime 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, 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.

INSTRUCTION NO. 20 - DELIBERATIONS

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

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion 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 at all times that you are not advocates, you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, 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.*

Fourth, your verdict must be based 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.

Finally, I am giving you the Verdict Form. A Verdict Form is simply the written notice of the decision that you reach in this case. *Your verdict on each claim must be unanimous.* You will take the Verdict Form to the jury room. When you have reached a unanimous verdict on each claim, your foreperson must complete one copy of the Verdict Form and all of you must sign that copy to record your individual agreement with the verdict and to show that it is unanimous. 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

DATED this 9th day of November, 2009.

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**

BODEANS CONE COMPANY,
L.L.C.; BODEANS WAFER
COMPANY, L.L.C.; and BODEANS
BAKING HOLDING COMPANY,
L.L.C.,

Plaintiffs,

vs.

NORSE DAIRY SYSTEMS, L.L.C.;
and INTERBAKE FOODS, L.L.C.,

Defendants.

No. C 09-4014-MWB

VERDICT FORM

On plaintiff BoDeans’s antitrust claims in this action, we, the Jury, find as follows:

I. LIABILITY											
Claim 1: Monopolization											
<p>On BoDeans’s claim of “monopolization,” as explained in Instruction No. 7, for which one or more of the following products, if any, do you find by the greater weight of the evidence (a) that Norse Dairy willfully acquired or maintained <i>monopoly power</i> in a <i>relevant market</i> by engaging in <i>anticompetitive acts</i>, and (b) for each product, if any, that you find Norse Dairy monopolized, which one or more <i>anticompetitive acts</i> did Norse Dairy engage in to acquire or maintain <i>monopoly power</i>?</p>											
(a)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; padding: 5px;"> <input type="checkbox"/> novelty cones used in the manufacture of novelty ice cream cones </td> <td style="width: 50%; padding: 5px;"> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%; padding: 5px; vertical-align: top;">(b)</td> <td style="padding: 5px;"> by engaging in <input type="checkbox"/> <i>exclusive dealing arrangements</i> <input type="checkbox"/> <i>tying arrangements</i> </td> </tr> <tr> <td style="padding: 5px;"> <input type="checkbox"/> wafers used in the manufacture of novelty ice cream sandwiches </td> <td style="padding: 5px;"> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%; padding: 5px; vertical-align: top;">(b)</td> <td style="padding: 5px;"> by engaging in <input type="checkbox"/> <i>exclusive dealing arrangements</i> <input type="checkbox"/> <i>tying arrangements</i> </td> </tr> <tr> <td style="padding: 5px;"> <input type="checkbox"/> Neither product </td> <td style="background-color: #cccccc; padding: 5px;"></td> </tr> </table> </td> </tr> </table> </td> </tr> </table>	<input type="checkbox"/> novelty cones used in the manufacture of novelty ice cream cones	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%; padding: 5px; vertical-align: top;">(b)</td> <td style="padding: 5px;"> by engaging in <input type="checkbox"/> <i>exclusive dealing arrangements</i> <input type="checkbox"/> <i>tying arrangements</i> </td> </tr> <tr> <td style="padding: 5px;"> <input type="checkbox"/> wafers used in the manufacture of novelty ice cream sandwiches </td> <td style="padding: 5px;"> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%; padding: 5px; vertical-align: top;">(b)</td> <td style="padding: 5px;"> by engaging in <input type="checkbox"/> <i>exclusive dealing arrangements</i> <input type="checkbox"/> <i>tying arrangements</i> </td> </tr> <tr> <td style="padding: 5px;"> <input type="checkbox"/> Neither product </td> <td style="background-color: #cccccc; padding: 5px;"></td> </tr> </table> </td> </tr> </table>	(b)	by engaging in <input type="checkbox"/> <i>exclusive dealing arrangements</i> <input type="checkbox"/> <i>tying arrangements</i>	<input type="checkbox"/> wafers used in the manufacture of novelty ice cream sandwiches	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%; padding: 5px; vertical-align: top;">(b)</td> <td style="padding: 5px;"> by engaging in <input type="checkbox"/> <i>exclusive dealing arrangements</i> <input type="checkbox"/> <i>tying arrangements</i> </td> </tr> <tr> <td style="padding: 5px;"> <input type="checkbox"/> Neither product </td> <td style="background-color: #cccccc; padding: 5px;"></td> </tr> </table>	(b)	by engaging in <input type="checkbox"/> <i>exclusive dealing arrangements</i> <input type="checkbox"/> <i>tying arrangements</i>	<input type="checkbox"/> Neither product	
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(b)	by engaging in <input type="checkbox"/> <i>exclusive dealing arrangements</i> <input type="checkbox"/> <i>tying arrangements</i>										
<input type="checkbox"/> Neither product											

Claim 2: Attempt To Monopolize

On BoDeans’s claim of “attempt to monopolize,” as explained in Instruction No. 8, for which one or more of the following products, if any, do you find by the greater weight of the evidence **(a)** that Norse Dairy attempted to acquire *monopoly power* in a *relevant market* by engaging in *anticompetitive acts* and had a dangerous probability of acquiring such *monopoly power*, and **(b)** for each product, if any, that you find Norse Dairy attempted to monopolize, which one or more *anticompetitive acts* did Norse Dairy engage in to attempt to acquire *monopoly power*?

(a)	___ novelty cones used in the manufacture of novelty ice cream cones	(b)	by engaging in ___ <i>exclusive dealing arrangements</i> ___ <i>tying arrangements</i>
	___ wafers used in the manufacture of novelty ice cream sandwiches		by engaging in ___ <i>exclusive dealing arrangements</i> ___ <i>tying arrangements</i>
	___ Neither product		

Claim 3: Unlawful Exclusive Dealing Arrangements

On BoDeans’s claim of “unlawful exclusive dealing arrangements,” as explained in Instruction No. 9, for which one or more of the following products, if any, do you find by the greater weight of the evidence that Norse Dairy had *exclusive dealing arrangements* that unreasonably restrained trade in a substantial share of a *relevant market* by causing substantial harm to competition?

___ novelty cones used in the manufacture of novelty ice cream cones

___ wafers used in the manufacture of novelty ice cream sandwiches

___ Neither product

Claim 4: Unlawful Tying Arrangements

**Step 1:
Liability**

On BoDeans’s claim of “unlawful tying arrangements,” as explained in Instruction No. 10, for which one or more of the following pairs of separate and distinct products, if any, do you find by the greater weight of the evidence that Norse Dairy had *tying arrangements* that foreclosed a substantial volume of commerce in the *tied product*?

___ novelty cone filling machines and novelty cones run on those filling machines (foreclosing a substantial volume of commerce in novelty cones)

___ wafer filling machines and wafers run on those filling machines (foreclosing a substantial volume of commerce in wafers)

___ Neither pair of products

Step 2: Business Justification Defense	<i>If you found one or more unlawful tying arrangements in Step 1, (a) for each such tying arrangement, do you find that Norse Dairy had business reasons sufficient to justify the tying arrangement, and (b) if so, which one or more business reasons do you find sufficient, as Norse Dairy’s “business justification” defense to BoDeans’s “unlawful tying arrangements” claim is explained in Instruction No. 11? (The effect of this determination is for the court to decide.)</i>	
	(a)(1)	As to tying of novelty cone filling machines and novelty cones ___ Yes ___ No
	(b)(1)	___ it provided substantial efficiencies to customers by coordinating equipment service, maintenance, spare parts, manufacturing advice, research and development, and input supply all in one transaction
		___ it promoted the supply of higher quality equipment and lower production costs for customers
		___ it eliminated “free riding” by other manufacturers on Norse Dairy's designs, “know how,” and product development efforts
		___ it provided customers the benefits of “one-stop” shopping
	(a)(2)	As to tying of wafer filling machines and wafers ___ Yes ___ No
	(b)(2)	___ it provided substantial efficiencies to customers by coordinating equipment service, maintenance, spare parts, manufacturing advice, research and development, and input supply all in one transaction
		___ it promoted the supply of higher quality equipment and lower production costs for customers
		___ it eliminated “free riding” by other manufacturers on Norse Dairy's designs, “know how,” and product development efforts
	___ it provided customers the benefits of “one-stop” shopping	

II. DAMAGES

You may award damages only if you found one or more antitrust violations in Section I on "Liability."

What amount, if any, do you award as BoDeans's "lost profits" damages for Norse Dairy's antitrust violation or violations, as the standards for damages in an antitrust case are explained to you in Instructions Nos. 12 and 13 and "lost profits" are explained to you in Instruction No. 14? *(When you have completed the Verdict Form, please sign it and notify the Court Security Officer (CSO) that you have reached a verdict.)*

\$ _____ for "past lost profits" for antitrust violations involving novelty cones

\$ _____ for "future lost profits" for antitrust violations involving novelty cones

\$ _____ for "past lost profits" for antitrust violations involving wafers

\$ _____ for "future lost profits" for antitrust violations involving wafers

Date: _____ **Time:** _____

_____ Foreperson	_____ Juror
_____ Juror	_____ Juror
_____ Juror	_____ Juror
_____ Juror	_____ Juror