

**FILED**

AUG 16 2013

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CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

HOT STUFF FOODS, LLC,

Plaintiff,

vs.

HOUSTON CASUALTY COMPANY,

Defendant.

CIV. 11-4055-KES

**FINAL  
INSTRUCTIONS  
TO THE JURY**

**TABLE OF CONTENTS**

FINAL INSTRUCTION

NO. 1 – INTRODUCTION . . . . .	1
NO. 2 – BURDEN OF PROOF . . . . .	2
NO. 3 – IMPEACHMENT . . . . .	3
NO. 4 – COMPANIES AS PARTIES . . . . .	4
NO. 5 – LOSS . . . . .	5
NO. 6 – RECALL EXPENSE . . . . .	6
NO. 7 – LOST GROSS PROFIT . . . . .	8
NO. 8 – CRISIS RESPONSE/CONSULTANT EXPENSES . . . . .	9
NO. 9 – DUE DILIGENCE . . . . .	10
NO. 10 – DUTIES DURING DELIBERATIONS . . . . .	11

VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because **all** are important. This is true even though some of those I gave you at the beginning of and during the trial are not repeated here.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. This does not mean they are more important than my oral instructions. **All** instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater convincing force, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

### FINAL INSTRUCTION NO. 3 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the testimony of witnesses. I now give you this further instruction on how the testimony of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by:

1. Contradictory evidence
2. A showing that the witness testified falsely concerning a material matter
3. Evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony
  - a. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true.
  - b. 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.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 4 – COMPANIES AS PARTIES

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The fact that the parties to this lawsuit are companies is immaterial. In the eyes of the law, companies are no different than individual parties and all parties are entitled to the same fair and impartial treatment.

All persons, including companies, stand equal before the law and all are to be dealt with as equals in a court of justice. Passion and sympathy should not influence your verdict. Your verdict must be unaffected by anything except the evidence, your common sense, and the law.

FINAL INSTRUCTION NO. 5 – LOSS

Under the terms of the insurance policy, Houston Casualty agreed to pay Hot Stuff for LOSS resulting directly from an Accidental Product Contamination/Mislabeleding.

The court has already determined that an Accidental Product Contamination/Mislabeleding occurred. Your job as the jury is to determine the amount of LOSS, if any, that resulted directly from the Accidental Product Contamination/Mislabeleding. The burden is on Hot Stuff to prove by the greater convincing force of the evidence the amount of LOSS.

“LOSS,” for purposes of the insurance policy involved in this case, means:

- **Recall Expense;**
- **Lost Gross Profit;**
- **and Crisis Response/Consultant Expenses**

Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 6 – RECALL EXPENSE

**“Recall Expense”** means:

1. Any reasonable expenses necessarily incurred by Hot Stuff in the procedure for recall, inspection, examination, destruction, or disposal of its products including but not limited to:
  - chemical analysis in order to ascertain whether Hot Stuff’s products have been contaminated and/or to ascertain the potential effect of the Accidental Product Contamination/Mislabeleding,
  - transportation and relocation of the contaminated/mislabeled products,
  - radio, television, and print announcements, including the costs of any necessary correspondence,
  - salaries and/or wages of additional employees hired in connection with the resolution of a LOSS covered by this policy (and all reasonable expenses incurred in connection with the hiring of said individuals),
  - remuneration paid to the hourly employees of Hot Stuff (other than salaried employees) at a rate not to exceed the employee’s base (hourly) rate of pay for straight time or overtime (if required),
  - expenses incurred by Hot Stuff or its employees for transportation and accommodations,
  - expenses for rental of additional warehouse/storage space necessitated by the Accidental Product Contamination/Mislabeleding,
  - retail slotting fees and cancellation fees in connection with advertising and/or promotion commitments that were made by Hot Stuff and which could not be honored by Hot Stuff because of the Accidental Product Contamination/Mislabeleding,
  - expenses incurred by Hot Stuff to properly dispose of unused packaging and point-of-purchase marketing material in connection with contaminated/mislabeled products if said products cannot be used or reused,
  - costs of cleaning Hot Stuff’s equipment and physical plant which has been contaminated solely and directly by contaminated/mislabeled products,
  - the reasonable additional expenses which are both: (a) over and above expenses normally incurred in procuring product supplied by contract manufacturer sources and (b) incurred solely as a result of Hot Stuff’s inability to secure product from contract

- manufacturer sources customarily used by Hot Stuff, and costs of redistributing rehabilitated product or replacement product.
2. The value of any recalled or destroyed contaminated/mislabeled products, including the value of packaging materials that cannot be reused, calculated on an actual cash value basis or a replacement cost basis, whichever is less.
  3. The amount Hot Stuff was obligated to reimburse its customers who incurred expenses of the type listed in the twelve bullet points above.



FINAL INSTRUCTION NO. 7 – LOST GROSS PROFIT

**“Lost Gross Profit”** means loss of Gross Profit, incurred as a result of an ascertainable reduction in sales revenue caused solely and directly by an Accidental Product Contamination/Mislabeled for the period:

- of twelve months following discovery of the Accidental Product Contamination/Mislabeled, or
- during which Hot Stuff’s sales revenue for its products remains less than the level that could have been reasonably projected had the Accidental Product Contamination/Mislabeled not occurred, whichever shall be the period first to expire.

“Gross Profit” means the difference between:

- the revenue that could have been reasonably projected, but which has been lost solely and directly as a result of the Accidental Product Contamination/Mislabeled, and
- the variable costs that would have been incurred, but which have been saved as a result of not making these sales (including the cost of raw materials, and all other saved costs).

FINAL INSTRUCTION NO. 8 – CRISIS RESPONSE/CONSULTANT EXPENSES

**“Crisis Response/Consultant Expenses”** means, provided Houston Casualty has given prior written consent, fees and expenses of any other persons (including public relations consultants and recall consultants) retained by Hot Stuff to assist in the investigation of (and/or response to) the Accidental Product Contamination/Mislabeled.

FINAL INSTRUCTION NO. 9 – DUE DILIGENCE

Hot Stuff was obligated to use due diligence and do (and assist in doing) all things reasonably practicable to avoid or diminish any LOSS. Houston Casualty has the burden to prove by the greater convincing force of the evidence that Hot Stuff could have avoided or diminished the LOSS and that Hot Stuff failed to do so. If Houston Casualty establishes by the greater convincing force of the evidence that Hot Stuff could have avoided or diminished any or all LOSS but failed to do so, Hot Stuff is entitled only to the LOSS that would have occurred had Hot Stuff taken appropriate action to avoid or diminish LOSS.


## FINAL INSTRUCTION NO. 10 – DUTIES DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

1. Select a foreperson to preside over your discussions and to speak for you here in court.
2. Discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.
3. 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.
4. 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 partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.
5. If you need to communicate with me during your deliberations, you may send a note to me through the marshal or 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.**
6. Your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.
7. The verdict form is simply the written notice of the decision that

you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated August 16, 2013.

  
KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE