24.04D PLAINTIFF’S ANTICIPATORY BREACH BY REPUDIATION — NO ADEQUATE ASSURANCES (AFFIRMATIVE DEFENSE)

[Defendant] claims that [his her its] failure, if any, to perform [his her its] obligations under the contract is excused because before [defendant] was required to perform, [plaintiff] failed to give [defendant] adequate assurance that [plaintiff] would perform [his her its] obligations under the contract.

For the [defendant] to be excused from failure to perform on this basis, you must decide that it is more likely true than not true that:

(1) [Defendant] had reasonable grounds to believe that [plaintiff] would not or could not perform [his her its] obligations under the contract; and

(2) [Defendant] made a reasonable effort to get assurances from [plaintiff] that [he she it] would perform as agreed; and

(3) Under the circumstances, [plaintiff] failed to give adequate assurances to [defendant] within a reasonable time.

If all three of these things are more likely true than not true, [defendant] was excused from performing [his her its] obligations under the contract, and [defendant] did not breach the contract by failing to perform. Otherwise, [defendant's] failure to perform [his her its] obligations under the contract is not excused [for this reason].

# **Use Note**

This instruction should be used when a defendant claims that the defendant's alleged breach is excused on the grounds that the plaintiff anticipatorily breached the agreement by failing to give adequate assurances.

The bracketed language in the last sentence should be used when the defendant claims more than one reason for non‑performance.

If the defendant asserts that the defendant requested assurances, but the request was unnecessary because the repudiation was so clear, Instructions 24.04C and 24.04D should both be given and a special verdict form should be used.

**Comment**

*See* Comment to Instruction 24.04A.