24.04C PLAINTIFF'S ANTICIPATORY BREACH BY REPUDIATION — UNEQUIVOCAL (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] indicated that [he she it] would not perform [his her its] obligations under the contract.

A party to a contract is excused from performing its obligations under a contract if the other party to the contract clearly indicates in advance that [he she it] will not or cannot perform [his her its] contractual obligations. Words or conduct that are ambiguous, or that merely raise doubts about a party’s future performance, are not enough to excuse the other party from performing [his her its] obligations.

You must decide if it is more likely true than not true that [plaintiff’s] words or conduct, as reasonably interpreted, clearly indicated that [he she it] would not or could not perform [his her its] obligations under the contract. If so, [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 and the defendant is not claiming that further assurances were sought.

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

**Comment**

*See* Comment to Instruction 24.04A.