Steve Sowle, a Korean Chef with a passion for soul food, owns and operates Seoul Soul, a restaurant specializing in a Korean interpretation of soul food. On May 10, Sowle is negotiating with Brill’s Broccoli and More, a food importer. Sowle says, “What about selling me 50 pounds of chitterlings and 100 pounds of hog maws? delivery shall be on August 28.” Brill agrees. Chitterlings are pig intestines, and hog maws are pig stomachs, but Brill, unfamiliar with soul food terms, thinks that chitterlings are pig stomachs, and hog maws are pig intestines.

In June, a virus is discovered in several different shipments of hog maws to various restaurants, and the world’s main hog maw supplier closes its plant to investigate. The price of hog maws increases ten times as a result. Neither Brill nor Sowle expected or even contemplated the virus attack. Brill does, however, subscribe to the “Hog Maw Supplier Alert,” a service which sends suppliers of hog maws alerts about events that may affect the hog maw market. An alert was sent on May 1 about a virus that was likely to spread to hog maws worldwide, but Brill was away from his office; his e-mail is forwarded to his Blackberry, and he saw the e-mail but did not open it because he misread the subject line and did not realize it was from the Hog Maw Supplier Alert.

When Sowle learns of the virus attack, he sends the following letter to Brill:

The virus attack has made me concerned about your ability to deliver the hog maws. I saw a report from the Association of Hog Maw Suppliers which predicted that 90% of suppliers would not be able to fulfill their current contracts without sustaining unacceptable business loses. They predicted that the majority of suppliers would fail to deliver. Please confirm in writing that you will be able to perform.

Brill immediately replied:

Fortunately, I have been absolutely assured by Hog Maws R Us that they have in stock sufficient supplies of virus-free hog maws to deliver the necessary amount at the pre-virus market price in time for me to deliver them to you.

Hog Maws R Us is a very well-known and reputable company. As Sowle knew, its promises of delivery could be relied on with complete confidence; however, despite Brill’s reply, Sowle remained concerned that Brill would be unable to perform. The repeated warnings in the press of a hog maw shortage convinced him Brill would not perform; consequently, failed to pay Brill a partial payment due under the contract on June 20. Sowle assured Brill that if he did deliver the hog maws, Sowle would pay in full on the day of delivery. Brill replied, “You should make the partial payment, but, rest assured, I am delivering on August 28 even though by doing so I am waiving no right to damages under the contract.”

Did Sowle have a right to withhold the payment?

1. Yes
2. No