

1 ANDRÉ BIROTTE JR.
 United States Attorney
 2 DENNISE D. WILLETT
 Assistant United States Attorney
 3 Chief, Santa Ana Branch
 LAWRENCE E. KOLE (Cal. Bar No. 141582)
 4 Assistant United States Attorney
 411 West Fourth Street, Suite 8000
 5 Santa Ana, California 92701
 Telephone: (714) 338-3594
 6 Facsimile: (714) 338-3564
 Email: larry.kole@usdoj.gov

7 Attorneys for Plaintiff
 8 United States of America

9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA
 11 SOUTHERN DIVISION

13 UNITED STATES OF AMERICA,)	Case No. SA CR 08-180-DOC
)	
14 Plaintiff,)	JOINT PROPOSED JURY
)	INSTRUCTIONS
15 v.)	
)	(ANNOTATED SET)
16 MOSES ONCIU, BEATA GIZELLA)	
PRIORE, and IRENE PEMKOVA,)	Date: September 17, 2013
)	Time: 2:00 p.m.
17 Defendants.)	Place: Courtroom of the
)	Honorable David O. Carter

19 The parties respectfully submit the attached proposed joint
 20 jury instructions. The parties request leave to propose such

21 / / /
 22 / / /
 23 / / /
 24 / / /
 25 / / /
 26 / / /
 27 / / /
 28 / / /

1 other instructions as may become appropriate during the course of
2 trial.

3 Dated: September 13, 2013.

4 ANDRÉ BIROTTE JR.
United States Attorney
5 DENNISE D. WILLETT
Assistant United States Attorney
6 Chief, Santa Ana Branch Office

7 _____/S/
8 LAWRENCE E. KOLE
Assistant United States Attorney
9 Attorneys for Plaintiff United
10 States of America

11 Dated: September 13, 2013.

12 _____/S/*
13 GERALD WERKSMAN
14 *pursuant to 9/13/13
telephonic authorization
15 Attorney for Defendant
Moses Onciu

16 Dated: September 13, 2013.

17 _____/S/*
18 JOEL LEVINE
19 *pursuant to 9/13/13
20 email authorization
21 Attorney for Defendant
22 Beata Gizella Priore

23 Dated: September 13, 2013.

24 _____/S/*
25 DIANE BASS
26 *pursuant to 9/13/13
email authorization
27 Attorney for Defendant
28 Irene Pemkova

1 INDEX OF JOINT PROPOSED INSTRUCTIONS

No.	TITLE	SOURCE	PAGE
3 4	1. Duty of Jury	Ninth Circuit Model Criminal Jury Instruction No. 1.1	1
5 6	2. The Charge-Presumption of Innocence	Ninth Circuit Model Criminal Jury Instruction No. 1.2	2
7 8	3. What Is Evidence	Ninth Circuit Model Criminal Jury Instruction No. 1.3	3
9 10	4. What Is Not Evidence	Ninth Circuit Model Criminal Jury Instruction No. 1.4	4
11 12	5. Direct and Circumstantial Evidence	Ninth Circuit Model Criminal Jury Instruction No. 1.5	5
13 14	6. Ruling on Objections	Ninth Circuit Model Criminal Jury Instruction No. 1.6	6
15 16	7. Credibility of Witnesses	Ninth Circuit Model Criminal Jury Instruction No. 1.7	7
17 18	8. Conduct of the Jury	Ninth Circuit Model Criminal Jury Instruction No. 1.8	8-9
19 20	9. No Transcript Available to Jury	Ninth Circuit Model Criminal Jury Instruction No. 1.9	10
21 22	10. Taking Notes	Ninth Circuit Model Criminal Jury Instruction No. 1.10	11
23 24	11. Outline of Trial	Ninth Circuit Model Criminal Jury Instruction No. 1.11	12
25 26	12. Cautionary Instruction- First Recess	Ninth Circuit Model Criminal Jury Instruction No. 2.1	13
27 28	13. Bench Conferences and Recesses	Ninth Circuit Model Criminal Jury Instruction No. 2.2	14

No.	TITLE	SOURCE	PAGE
14.	Stipulations of Fact	Ninth Circuit Model Criminal Jury Instruction No. 2.4	15
15.	Duties of Jury to Find Facts and Follow Law	Ninth Circuit Model Criminal Jury Instruction No. 3.1	16
16.	Charge Against Defendant Not Evidence-Presumption of Innocence-Burden of Proof	Ninth Circuit Model Criminal Jury Instruction No. 3.2	17
17.	Defendant's Decision Not to Testify (If Applicable)	Ninth Circuit Model Criminal Jury Instruction No. 3.3	18
18.	Defendant's Decision to Testify (If Applicable)	Ninth Circuit Model Criminal Jury Instruction No. 3.4	19
19.	Reasonable Doubt -- Defined	Ninth Circuit Model Criminal Jury Instruction No. 3.5	20
20.	What Is Evidence	Ninth Circuit Model Criminal Jury Instruction No. 3.6	21
21.	What Is Not Evidence	Ninth Circuit Model Criminal Jury Instruction No. 3.7	22
22.	Direct and Circumstantial Evidence	Ninth Circuit Model Criminal Jury Instruction No. 3.8	23
23.	Credibility of Witnesses	Ninth Circuit Model Criminal Jury Instruction No. 3.9	24
24.	Activities Not Charged	Ninth Circuit Model Criminal Jury Instruction No. 3.10	25
25.	Separate Consideration of Multiple Counts -- Multiple Defendants	Ninth Circuit Model Criminal Jury Instruction No. 3.13	26
26.	Statements by Defendant	Ninth Circuit Model Criminal Jury Instruction No. 4.1	27

No.	TITLE	SOURCE	PAGE
27.	Government's Use of Undercover Agents and Informants	Ninth Circuit Model Criminal Jury Instruction No. 4.10	28
28.	Opinion Evidence, Expert Witness	Ninth Circuit Model Criminal Jury Instruction No. 4.14	29
29.	Summaries Not Received in Evidence	Ninth Circuit Model Criminal Jury Instruction No. 4.15	30
30.	Conspiracy -- Elements	Ninth Circuit Model Criminal Jury Instruction No. 8.20	31-32
31.	Conspiracy -- Knowledge of and Association with Other Conspirators	Ninth Circuit Model Criminal Jury Instruction No. 8.23	33
32.	Conspiracy -- Liability for Substantive Offense Committed by Co-conspirator (<u>Pinkerton Charge</u>)	Ninth Circuit Model Criminal Jury Instruction No. 8.25	34
33.	Wire Fraud (18 U.S.C. § 1343)	Ninth Circuit Model Criminal Jury Instruction Nos. 8.121 and 8.124	35-36
34.	Scheme to Defraud -- Vicarious Liability	Ninth Circuit Model Criminal Jury Instruction No. 8.122	37
35.	Aiding and Abetting	Ninth Circuit Model Criminal Jury Instruction No. 5.1	38
36.	Knowingly -- Defined	Ninth Circuit Model Criminal Jury Instruction No. 5.6	39
37.	Proof of Knowledge or Intent	1A O'Malley, Grenig & Lee, <u>Federal Jury Practice and Instructions</u> , 604-05, § 17.07 (6th ed. 2008)	40

No.	TITLE	SOURCE	PAGE
38.	Intent to Defraud -- Defined	Ninth Circuit Model Criminal Jury Instruction, No. 3.16	41
39.	On or About -- Explained	1A O'Malley, Grenig & Lee, <u>Federal Jury Practice and Instructions</u> , 234, § 13.05 (6th ed. 2008)	42
40.	Good Faith	Comment to Ninth Circuit Model Criminal Jury Instruction No. 3.16	43
41.	Duty to Deliberate	Ninth Circuit Model Criminal Jury Instruction No. 7.1	44
42.	Consideration of Evidence -- Conduct of the Jury	Ninth Circuit Model Criminal Jury Instruction No. 7.2	45-46
43.	Use of Notes	Ninth Circuit Model Criminal Jury Instruction No. 7.3	47
44.	Jury Consideration of Punishment	Ninth Circuit Model Criminal Jury Instruction No. 7.4	48
45.	Verdict Form	Ninth Circuit Model Criminal Jury Instruction No. 7.5	49
46.	Communication with Court	Ninth Circuit Model Criminal Jury Instruction No. 7.6	50

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 1

3 Jurors: You now are the jury in this case, and I want to
4 take a few minutes to tell you something about your duties as
5 jurors and to give you some preliminary instructions. At the end
6 of the trial I will give you more detailed [written] instructions
7 that will control your deliberations. When you deliberate, it
8 will be your duty to weigh and to evaluate all the evidence
9 received in the case and, in that process, to decide the facts.
10 To the facts as you find them, you will apply the law as I give
11 it to you, whether you agree with the law or not. You must
12 decide the case solely on the evidence and the law before you and
13 must not be influenced by any personal likes or dislikes,
14 opinions, prejudices, or sympathy. Please do not take anything I
15 may say or do during the trial as indicating what I think of the
16 evidence or what your verdict should be -- that is entirely up to
17 you.

18
19
20
21
22
23 Ninth Circuit Model Jury Instruction No. 1.1 [Duty of Jury].
24
25
26
27
28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 2

3 This is a criminal case brought by the United States
4 government. The government charges the defendants with conspiracy
5 and wire fraud. The charges against the defendants are contained
6 in the indictment. The indictment simply describes the charges
7 the government brings against the defendants. The indictment is
8 not evidence and does not prove anything.

9 The defendants have pleaded not guilty to the charge and are
10 presumed innocent unless and until the government proves the
11 defendants guilty beyond a reasonable doubt. In addition, the
12 defendants have the right to remain silent and never have to
13 prove innocence or to present any evidence.

14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 1.2
24 [The Charge - Presumption of Innocence].
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 3

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits which are received in evidence; and
- (3) any facts to which the parties agree.

Ninth Circuit Model Criminal Jury Instruction, No. 1.3
[What is Evidence].

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 4

3 The following things are not evidence, and you must not
4 consider them as evidence in deciding the facts of this case:

5 (1) statements and arguments of the attorneys;

6 (2) questions and objections of the attorneys;

7 (3) testimony that I instruct you to disregard; and

8 (4) anything you may see or hear when the court is not in
9 session even if what you see or hear is done or said by one of
10 the parties or by one of the witnesses.

11
12
13
14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 1.4 [What is
24 Not Evidence].

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 5

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Ninth Circuit Model Criminal Jury Instruction, No. 1.5 [Direct and Circumstantial Evidence].

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 6

3 There are rules of evidence that control what can be
4 received in evidence. When a lawyer asks a question or offers an
5 exhibit in evidence and a lawyer on the other side thinks that it
6 is not permitted by the rules of evidence, that lawyer may
7 object. If I overrule the objection, the question may be
8 answered or the exhibit received. If I sustain the objection,
9 the question cannot be answered, or the exhibit cannot be
10 received. Whenever I sustain an objection to a question, you
11 must ignore the question and must not guess what the answer would
12 have been.

13 Sometimes I may order that evidence be stricken from the
14 record and that you disregard or ignore the evidence. That means
15 that when you are deciding the case, you must not consider the
16 evidence that I told you to disregard.

17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 1.6 [Ruling on
24 Objections].
25
26
27
28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 7

3 In deciding the facts in this case, you may have to decide
4 which testimony to believe and which testimony not to believe.
5 You may believe everything a witness says, or part of it, or none
6 of it.

7 In considering the testimony of any witness, you may take
8 into account:

9 (1) the witness's opportunity and ability to see or hear or
10 know the things testified to;

11 (2) the witness's memory;

12 (3) the witness's manner while testifying;

13 (4) the witness's interest in the outcome of the case, if
14 any;

15 (5) the witness's bias or prejudice, if any;

16 (6) whether other evidence contradicted the witness's
17 testimony;

18 (7) the reasonableness of the witness's testimony in light
19 of all the evidence; and

20 (8) any other factors that bear on believability.

21 The weight of the evidence as to a fact does not necessarily
22 depend on the number of witnesses who testify about it.

23
24 Ninth Circuit Model Criminal Jury Instruction, No. 1.7

25 [Credibility of Witnesses].
26
27
28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 8

3 I will now say a few words about your conduct as jurors.

4 First, keep an open mind throughout the trial, and do not
5 decide what the verdict should be until you and your fellow
6 jurors have completed your deliberations at the end of the case.

7 Second, because you must decide this case based only on the
8 evidence received in the case and on my instructions as to the
9 law that applies, you must not be exposed to any other
10 information about the case or to the issues it involves during
11 the course of your jury duty. Thus, until the end of the case or
12 unless I tell you otherwise:

13 Do not communicate with anyone in any way and do not let
14 anyone else communicate with you in any way about the merits of
15 the case or anything to do with it. This includes discussing the
16 case in person, in writing, by phone or electronic means, via
17 email, text messaging, or any Internet chat room, blog, website
18 or other feature. This applies to communicating with your fellow
19 jurors until I give you the case for deliberation, and it applies
20 to communicating with everyone else including your family
21 members, your employer, the media or press, and the people
22 involved in the trial, although you may notify your family and
23 your employer that you have been seated as a juror in the case.
24 But, if you are asked or approached in any way about your jury
25 service or anything about this case, you must respond that you
26 have been ordered not to discuss the matter and to report the
27 contact to the court.

28 Page One of Two Pages

1 Because you will receive all the evidence and legal
2 instruction you properly may consider to return a verdict: do
3 not read, watch, or listen to any news or media accounts or
4 commentary about the case or anything to do with it; do not do
5 any research, such as consulting dictionaries, searching the
6 Internet or using other reference materials; and do not make any
7 investigation or in any other way try to learn about the case on
8 your own.

9 The law requires these restrictions to ensure the parties
10 have a fair trial based on the same evidence that each party has
11 had an opportunity to address. A juror who violates these
12 restrictions jeopardizes the fairness of these proceedings[, and
13 a mistrial could result that would require the entire trial
14 process to start over]. If any juror is exposed to any outside
15 information, please notify the court immediately.

16
17
18
19
20
21
22
23
24
25
26
27
28

Ninth Circuit Model Criminal Jury Instruction, No. 1.8 [Conduct
of Jury].

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 9

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not have a written transcript of the trial. I urge you to pay close attention to the testimony as it is given.

Ninth Circuit Model Criminal Jury Instruction, No. 1.9 [No Transcript Available to Jury].

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 10

3 If you wish, you may take notes to help you remember the
4 evidence. If you do take notes, please keep them to yourself
5 until you and your fellow jurors go to the jury room to decide
6 the case. Do not let note-taking distract you from being
7 attentive. When you leave court for recesses, your notes should
8 be left in the courtroom. No one will read your notes.

9 Whether or not you take notes, you should rely on your own
10 memory of the evidence. Notes are only to assist your memory. You
11 should not be overly influenced by your notes or those of your
12 fellow jurors.

13
14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 1.10
24 [Taking Notes].
25
26
27
28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 11

3 The next phase of the trial will now begin. First, each
4 side may make an opening statement. An opening statement is not
5 evidence. It is simply an outline to help you understand what
6 that party expects the evidence will show. A party is not
7 required to make an opening statement.

8 The government will then present evidence and counsel for
9 the defendants may cross-examine. Then, if a defendant chooses
10 to offer evidence, counsel for the government may cross-examine.

11 After the evidence has been presented, I will instruct you
12 on the law that applies to the case and the attorneys will make
13 closing arguments.

14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 1.11

24 [Outline of Trial].
25
26
27
28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 12

3 We are about to take our first break. Remember, until the
4 trial is over, do not discuss this case with anyone, including
5 your fellow jurors, members of your family, people involved in
6 the trial, or anyone else, and do not allow others to discuss the
7 case with you. This includes discussing the case in Internet
8 chat rooms or through Internet blogs, Internet bulletin boards,
9 emails or text messaging. If anyone tries to communicate with
10 you about the case, please let me know about it immediately. Do
11 not read, watch, or listen to any news reports or other accounts
12 about the trial or anyone associated with it, including any
13 online information. Do not do any research, such as consulting
14 dictionaries, searching the Internet or using other reference
15 materials, and do not make any investigation about the case on
16 your own. Finally, keep an open mind until all the evidence has
17 been presented and you have heard the arguments of counsel, my
18 instructions on the law, and the views of your fellow jurors.

19 If you need to speak with me about anything, simply give a
20 signed note to the clerk to give to me.

21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 2.1

24 [Cautionary Instruction-First Recess].
25
26
27
28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 13

3 From time to time during the trial, it may become necessary
4 for me to take up legal matters with the attorneys privately,
5 either by having a conference at the bench or, when necessary, by
6 calling a recess.

7 We will do what we can to keep the number and length of
8 these conferences to a minimum. I may not always grant an
9 attorney's request for a conference.

10
11
12
13
14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 2.2 [Bench
24 Conferences and Recesses]
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___
PROPOSED INSTRUCTION NO. 14
[IF APPLICABLE]

The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved.

Ninth Circuit Model Criminal Jury Instruction, No. 2.4
[Stipulations of Fact]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 15

3 Members of the jury, now that you have heard all the
4 evidence, it is my duty to instruct you on the law that applies
5 to this case. A copy of these instructions will be available in
6 the jury room for you to consult.

7 It is your duty to weigh and to evaluate all the evidence
8 received in the case and, in that process, to decide the facts.
9 It is also your duty to apply the law as I give it to you to the
10 facts as you find them, whether you agree with the law or not.
11 You must decide the case solely on the evidence and the law and
12 must not be influenced by any personal likes or dislikes,
13 opinions, prejudices, or sympathy. You will recall that you took
14 an oath promising to do so at the beginning of the case.

15 You must follow all these instructions and not single out
16 some and ignore others; they are all important. Please do not
17 read into these instructions or into anything I may have said or
18 done any suggestion as to what verdict you should return -- that
19 is a matter entirely up to you.

20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 3.1 [Duties of
24 Jury to Find Facts and Follow Law]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 16

3 The indictment is not evidence. The defendants have pleaded
4 not guilty to the charges. Each defendant is presumed to be
5 innocent unless and until the government proves that defendant
6 guilty beyond a reasonable doubt. In addition, the defendants do
7 not have to testify or present any evidence to prove innocence.
8 The government has the burden of proving every element of each
9 charge beyond a reasonable doubt.

10

11

12

13

14

15

16

17

18

19

20

21

22

23 Ninth Circuit Model Criminal Jury Instruction, No. 3.2 [Charge
24 Against Defendant Not Evidence -- Presumption of Innocence --
25 Burden of Proof]

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___
PROPOSED INSTRUCTION NO. 17

[IF APPLICABLE]

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that a defendant has not testified.

Ninth Circuit Model Criminal Jury Instruction, No. 3.3
[Defendant's Decision Not to Testify]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___
PROPOSED INSTRUCTION NO. 18

[IF APPLICABLE]

A defendant has testified. You should treat this testimony just as you would the testimony of any other witness.

Ninth Circuit Model Criminal Jury Instruction, No. 3.4
[Defendant's Decision to Testify]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 19

3 Proof beyond a reasonable doubt is proof that leaves you
4 firmly convinced a defendant is guilty. It is not required that
5 the government prove guilt beyond all possible doubt.

6 A reasonable doubt is a doubt based upon reason and common
7 sense and is not based purely on speculation. It may arise from
8 a careful and impartial consideration of all the evidence, or
9 from lack of evidence.

10 If after a careful and impartial consideration of all the
11 evidence, you are not convinced beyond a reasonable doubt that a
12 defendant is guilty, it is your duty to find that defendant not
13 guilty. On the other hand, if after a careful and impartial
14 consideration of all the evidence, you are convinced beyond a
15 reasonable doubt that a defendant is guilty, it is your duty to
16 find that defendant guilty.

17
18
19
20
21
22 Ninth Circuit Model Criminal Jury Instruction, No. 3.5

23 [Reasonable Doubt - Defined]
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 20

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits received in evidence; and
- (3) any facts to which the parties have agreed.

Ninth Circuit Model Criminal Jury Instruction, No. 3.6 [What Is Evidence]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 21

3 In reaching your verdict you may consider only the testimony
4 and exhibits received in evidence. The following things are not
5 evidence and you may not consider them in deciding what the facts
6 are:

7 1. Questions, statements, objections, and arguments by the
8 lawyers are not evidence. The lawyers are not witnesses.
9 Although you must consider a lawyer's questions to understand the
10 answers of a witness, the lawyer's questions are not evidence.
11 Similarly, what the lawyers have said in their opening
12 statements, closing arguments and at other times is intended to
13 help you interpret the evidence, but it is not evidence. If the
14 facts as you remember them differ from the way the lawyers state
15 them, your memory of them controls.

16 2. Any testimony that I have excluded, stricken, or
17 instructed you to disregard is not evidence. In addition, some
18 evidence was received only for a limited purpose; when I have
19 instructed you to consider certain evidence in a limited way, you
20 must do so.

21 3. Anything you may have seen or heard when the court was
22 not in session is not evidence. You are to decide the case solely
23 on the evidence received at the trial

24
25 Ninth Circuit Model Criminal Jury Instruction, No. 3.7 [What Is
26 Not Evidence]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___
PROPOSED INSTRUCTION NO. 22

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Ninth Circuit Model Criminal Jury Instruction, No. 3.8 [Direct and Circumstantial Evidence]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 23

3 In deciding the facts in this case, you may have to decide
4 which testimony to believe and which testimony not to believe.
5 You may believe everything a witness says, or part of it, or none
6 of it.

7 In considering the testimony of any witness, you may take
8 into account:

9 (1) the witness's opportunity and ability to see or hear or
10 know the things testified to;

11 (2) the witness's memory;

12 (3) the witness's manner while testifying;

13 (4) the witness's interest in the outcome of the case, if
14 any;

15 (5) the witness's bias or prejudice, if any;

16 (6) whether other evidence contradicted the witness's
17 testimony;

18 (7) the reasonableness of the witness's testimony in light
19 of all the evidence; and

20 (8) any other factors that bear on believability.

21 The weight of the evidence as to a fact does not necessarily
22 depend on the number of witnesses who testify. What is important
23 is how believable the witnesses were, and how much weight you
24 think their testimony deserves.

25
26 Ninth Circuit Model Criminal Jury Instruction, No. 3.9

27 [Credibility of Witnesses]

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 24

You are here only to determine whether the defendants are guilty or not guilty of the charges in the indictment. The defendants is not on trial for any conduct or offense not charged in the indictment.

Ninth Circuit Model Criminal Jury Instruction, No. 3.10
[Activities Not Charged]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 25

3 A separate crime is charged against the defendants in each
4 count. The charges have been joined for trial. You must decide
5 the case of each defendant on each crime charged against that
6 defendant separately. Your verdict on any count as to any
7 defendant should not control your verdict on any other count or
8 as to any other defendant.

9 All the instructions apply to each defendant and to each
10 count unless a specific instruction states that it applies only
11 to a specific count.

12
13
14
15
16
17
18
19
20
21
22
23
24
25 Ninth Circuit Model Criminal Jury Instruction, No. 3.13 [Separate
26 Consideration of Multiple Counts -- Multiple Defendants]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 26

You have heard testimony that a defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Ninth Circuit Model Criminal Jury Instruction, No. 4.1
[Statements by Defendant]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 27

3 You have heard testimony from an undercover agent who was
4 involved in the government's investigation in this case. Law
5 enforcement officials may engage in stealth and deception, such
6 as the use of informants and undercover agents, in order to
7 investigate criminal activities. Undercover agents may use false
8 names and appearances.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 4.10
24 [Government's Use of Undercover Agents and Informants] (as
25 modified to comport with indictment)
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___
PROPOSED INSTRUCTION NO. 28

You have heard testimony from persons who, because of education or experience, were permitted to state opinions and the reasons for their opinions.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Ninth Circuit Model Criminal Jury Instruction, No. 4.14 [Opinion Evidence, Expert Witness]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 29

3 [IF APPLICABLE]

4 During the trial, certain charts and summaries were shown to
5 you in order to help explain the evidence in the case. These
6 charts and summaries were not admitted in evidence and will not
7 go into the jury room with you. They are not themselves evidence
8 or proof of any facts. If they do not correctly reflect the
9 facts or figures shown by the evidence in the case, you should
10 disregard these charts and summaries and determine the facts from
11 the underlying evidence.

12
13
14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 4.15

24 [Summaries Not Received in Evidence]
25
26
27
28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 30

3 Defendants are charged in Count One of the indictment with
4 conspiring to commit wire fraud in violation of Section 371 of
5 Title 18 of the United States Code. In order for a defendant to
6 be found guilty of that charge, the government must prove each of
7 the following elements beyond a reasonable doubt:

8 First, beginning on or about November 29, 2006, and ending
9 on or about March 7, 2007, there was an agreement between two or
10 more persons to commit at least one crime as charged in the
11 indictment; and

12 Second, the defendant became a member of the conspiracy
13 knowing of at least one of its objects and intending to help
14 accomplish it; and

15 Third, one of the members of the conspiracy performed at
16 least one overt act on or after November 29, 2006 for the purpose
17 of carrying out the conspiracy, with all of you agreeing on a
18 particular overt act that you find was committed.

19 A conspiracy is a kind of criminal partnership -- an
20 agreement of two or more persons to commit one or more crimes.
21 The crime of conspiracy is the agreement to do something
22 unlawful; it does not matter whether the crime agreed upon was
23 committed.

24 For a conspiracy to have existed, it is not necessary that
25 the conspirators made a formal agreement or that they agreed on
26 every detail of the conspiracy. It is not enough, however, that
27

1 they simply met, discussed matters of common interest, acted in
2 similar ways, or perhaps helped one another. You must find that
3 there was a plan to commit at least one of the crimes alleged in
4 the indictment as an object of the conspiracy with all of you
5 agreeing as to the particular crime which the conspirators agreed
6 to commit.

7 One becomes a member of a conspiracy by willfully
8 participating in the unlawful plan with the intent to advance or
9 further some object or purpose of the conspiracy, even though the
10 person does not have full knowledge of all the details of the
11 conspiracy. Furthermore, one who willfully joins an existing
12 conspiracy is as responsible for it as the originators. On the
13 other hand, one who has no knowledge of a conspiracy, but happens
14 to act in a way which furthers some object or purpose of the
15 conspiracy, does not thereby become a conspirator. Similarly, a
16 person does not become a conspirator merely by associating with
17 one or more persons who are conspirators, nor merely by knowing
18 that a conspiracy exists.

19 An overt act does not itself have to be unlawful. A lawful
20 act may be an element of a conspiracy if it was done for the
21 purpose of carrying out the conspiracy. The government is not
22 required to prove that the defendant personally did one of the
23 overt acts.

24

25 Ninth Circuit Criminal Jury Instructions No. 8.20 [Conspiracy --
26 Elements]

27

28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 31

3 A conspiracy may continue for a long period of time and may
4 include the performance of many transactions. It is not
5 necessary that all members of the conspiracy join it at the same
6 time, and one may become a member of a conspiracy without full
7 knowledge of all the details of the unlawful scheme or the names,
8 identities, or locations of all of the other members.

9 Even though a defendant did not directly conspire with
10 another defendant in the overall scheme, the defendant has, in
11 effect, agreed to participate in the conspiracy if the government
12 proves each of the following beyond a reasonable doubt that:

13 (1) the defendant directly conspired with one or more
14 conspirators to carry out at least one of the objects of the
15 conspiracy;

16 (2) the defendant knew or had reason to know that other
17 conspirators were involved with those with whom the defendant
18 directly conspired; and

19 (3) the defendant had reason to believe that whatever
20 benefits the defendant might get from the conspiracy were
21 probably dependent upon the success of the entire venture.

22 It is not a defense that a person's participation in a
23 conspiracy was minor or for a short period of time.

24
25 Ninth Circuit Criminal Jury Instructions No. 8.23 [Conspiracy --
26 Knowledge of and Association with Other Conspirators]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 32

3 Each member of the conspiracy is responsible for the actions
4 of the other conspirators performed during the course and in
5 furtherance of the conspiracy. If one member of a conspiracy
6 commits a crime in furtherance of a conspiracy, the other members
7 have also, under the law, committed that crime.

8 Therefore, you may find a defendant guilty of conspiracy to
9 commit wire fraud as charged in Count One of the indictment if
10 the government has proved each of the following elements beyond a
11 reasonable doubt:

12 First, a person named in Count One of the indictment
13 committed the crime of wire fraud as alleged in that count;

14 Second, the person was a member of the conspiracy
15 charged in Count One of the indictment;

16 Third, the person committed the crime of wire fraud in
17 furtherance of the conspiracy;

18 Fourth, the defendant was a member of the same
19 conspiracy at the time the offense charged in Count One was
20 committed; and

21 Fifth, the offense fell within the scope of the
22 unlawful agreement and could reasonably have been foreseen to be
23 a necessary or natural consequence of the unlawful agreement.

24
25 Ninth Circuit Criminal Jury Instructions No. 8.25 [Conspiracy -
26 - Liability for Substantive Offense Committed by Co-conspirator
27 (Pinkerton Charge)]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 33

3 Defendants are charged in Counts Two through Six of the
4 indictment with wire fraud in violation of Section 1343 of Title
5 18 of the United States Code. In order for a defendant to be
6 found guilty of that charge, the government must prove each of
7 the following elements beyond a reasonable doubt:

8 First, the defendant knowingly participated in a scheme or
9 plan to defraud, or a scheme or plan for obtaining money or
10 property by means of false or fraudulent pretenses,
11 representations, or promises;

12 Second, the statements made or facts omitted as part of the
13 scheme were material; that is, they had a natural tendency to
14 influence, or were capable of influencing, a person to part with
15 money or property;

16 Third, the defendant acted with the intent to defraud; that
17 is, the intent to deceive or cheat; and

18 Fourth, the defendant transmitted, or caused to be
19 transmitted, a wire communication in interstate commerce to carry
20 out or attempt to carry out an essential part of the scheme.

21 In determining whether a scheme to defraud exists, you may
22 consider not only a defendant's words and statements, but also
23 the circumstances in which they are used as a whole.

24 A "wire communication" as that term is used in these
25 instructions includes e-mail messages, faxes, and telephone
26 calls.

1 A wire communication is caused when one knows that the wire
2 communication will be used in the ordinary course of business or
3 when one can reasonably foresee such use. It does not matter
4 whether the material wired was itself false or deceptive so long
5 as the wire communication was used as a part of the scheme, nor
6 does it matter whether the scheme or plan was successful or that
7 any money or property was obtained.

8
9
10 Ninth Circuit Model Criminal Jury Instruction, Nos. 8.121 and
11 8.124 [Wire Fraud (18 U.S.C. § 1343)] (modified to state elements
12 of wire fraud and to comport with allegations in indictment; see
13 Sophia v. Myicis, 2008 WL 5411479 (N.D.Cal. 2008) (unpublished)
14 (use of internet qualifies as use of wires under § 1343); United
15 States v. Rodriguez, 2008 WL 5157891 at *1 (D.P.R.
16 2008) (unpublished) (§ 1343 definition of "wire communication"
17 includes use of telephone lines and the internet); United States
18 v. Stephens, 571 F.3d 401, 406 (5th Cir. 2009) (wire fraud
19 conviction properly based on email messages); Mattel, Inc. v. MGA
20 Entertainment, Inc., 782 F.Supp.2d 911, 1029 (C.D.Cal. 2011)
21 (recognizing that emails qualify as "wire communications" under
22 § 1343); United States v. Hard, 490 Fed.Appx. 887, 888 (9th Cir.
23 2012) (unpublished) (affirming wire fraud conviction that was
24 based on email messages)).

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 34

3 If you decide that a defendant was a member of a scheme to
4 defraud and that the defendant had the intent to defraud, the
5 defendant may be responsible for other co-schemers' actions
6 during the course of and in furtherance of the scheme, even if
7 the defendant did not know what they said or did.

8 For a defendant to be guilty of an offense committed by a
9 co-schemer in furtherance of the scheme, the offense must be one
10 that the defendant could reasonably foresee as a necessary and
11 natural consequence of the scheme to defraud.

12
13
14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 8.122 [Scheme
24 to Defraud -- Vicarious Liability]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 35

3 A defendant may be found guilty of wire fraud, even if the
4 defendant personally did not commit the act or acts constituting
5 the crime but aided and abetted in its commission. To prove a
6 defendant guilty of aiding and abetting, the government must
7 prove beyond a reasonable doubt:

8 First, wire fraud was committed by someone;

9 Second, the defendant knowingly and intentionally aided,
10 counseled, commanded, induced or procured that person to commit
11 each element of wire fraud; and

12 Third, the defendant acted before the crime was completed.

13 It is not enough that the defendant merely associated with
14 the person committing the crime, or unknowingly or
15 unintentionally did things that were helpful to that person, or
16 was present at the scene of the crime. The evidence must show
17 beyond a reasonable doubt that the defendant acted with the
18 knowledge and intention of helping that person commit wire fraud.

19 The government is not required to prove precisely which
20 defendant actually committed the crime and which defendant aided
21 and abetted.

22
23
24
25
26 Ninth Circuit Model Criminal Jury Instruction, No. 5.1 [Aiding
27 and Abetting]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 36

3 An act is done knowingly if the defendant is aware of the
4 act and does not act through ignorance, mistake, or accident.
5 The government is not required to prove that the defendant knew
6 that his or her acts or omissions were unlawful. You may
7 consider evidence of the defendant's words, acts, or omissions,
8 along with all the other evidence, in deciding whether the
9 defendant acted knowingly.

10
11
12
13
14
15
16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 5.6 [Knowingly
24 -- Defined].
25
26
27
28

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 37

3 The intent of a person or the knowledge that a person
4 possesses at any given time may not ordinarily be proved directly
5 because there is no way of directly scrutinizing the workings of
6 the human mind. In determining the issue of what a person knew
7 or what a person intended at a particular time, you may consider
8 any statements made or acts done by that person and all other
9 facts and circumstances received in evidence which may aid in
10 your determination of that person's knowledge or intent.

11 You may infer, but you are certainly not required to infer,
12 that a person intends the natural and probable consequences of
13 acts knowingly done or knowingly omitted. It is entirely up to
14 you, however, to decide what facts to find from the evidence
15 received during this trial.

16
17
18
19
20
21
22
23 1A O'Malley, Grenig & Lee, Federal Jury Practice and
24 Instructions, 604-05, § 17.07 (6th ed. 2008) [Proof of Knowledge
25 or Intent]; see also United States v. Beltran-Garcia, 179 F.3d
26 1200, 1203-05 (9th Cir. 1999).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 38

An intent to defraud is an intent to deceive or cheat.

Ninth Circuit Model Jury Instruction No. 3.16 [Intent to Defraud
-- defined].

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 39

The indictment charges that the offenses alleged were committed "on or about" a certain date. Although it is necessary for the government to prove beyond a reasonable doubt that the offenses were committed on a date reasonably near the dates alleged in the indictment, it is not necessary for the government to prove that the offenses were committed precisely on the dates charged.

1A O'Malley, Grenig & Lee, Federal Jury Practice and Instructions, 234, § 13.05 (6th ed. 2008) [On or About -- Explained]; see United States v. Shea, 493 F.3d 1110, 1118 (9th Cir. 2007).

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 40

3 [IF APPLICABLE]

4 You may determine whether a defendant had an honest, good
5 faith belief in the truth of representations made to others in
6 determining whether or not the defendant acted with intent to
7 defraud. However, a defendant's belief that a person to whom one
8 or more representations were made would be paid in the future or
9 would sustain no economic loss is no defense to the crimes
10 charged in the indictment.

11
12
13
14
15
16
17
18
19
20
21
22
23 Comment to Ninth Circuit Model Jury Instruction No. 3.16 [Good
24 Faith / Intent to Defraud -- defined]; United States v. Molinaro,
25 11 F.3d 853, 863 (9th Cir. 1993); United States v. Treadwell, 593
26 F.3d 990, 996-99 (9th Cir. 2010); United States v. Benny, 786
27 F.2d 1410, 1417 (9th Cir. 1986).

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 41

3 When you begin your deliberations, elect one member of the
4 jury as your foreperson who will preside over the deliberations
5 and speak for you here in court.

6 You will then discuss the case with your fellow jurors to
7 reach agreement if you can do so. Your verdict, whether guilty
8 or not guilty, must be unanimous.

9 Each of you must decide the case for yourself, but you
10 should do so only after you have considered all the evidence,
11 discussed it fully with the other jurors, and listened to the
12 views of your fellow jurors.

13 Do not be afraid to change your opinion if the discussion
14 persuades you that you should. But do not come to a decision
15 simply because other jurors think it is right.

16 It is important that you attempt to reach a unanimous
17 verdict but, of course, only if each of you can do so after
18 having made your own conscientious decision. Do not change an
19 honest belief about the weight and effect of the evidence simply
20 to reach a verdict.

21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 7.1 [Duty to
24 Deliberate]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 42

3 Because you must base your verdict only on the evidence
4 received in the case and on these instructions, I remind you that
5 you must not be exposed to any other information about the case
6 or to the issues it involves. Except for discussing the case
7 with your fellow jurors during your deliberations:

8 Do not communicate with anyone in any way and do not let
9 anyone else communicate with you in any way about the merits of
10 the case or anything to do with it. This includes discussing the
11 case in person, in writing, by phone or electronic means, via
12 email, text messaging, or any Internet chat room, blog, website
13 or other feature. This applies to communicating with your family
14 members, your employer, the media or press, and the people
15 involved in the trial. If you are asked or approached in any way
16 about your jury service or anything about this case, you must
17 respond that you have been ordered not to discuss the matter and
18 to report the contact to the court.

19 Do not read, watch, or listen to any news or media accounts
20 or commentary about the case or anything to do with it; do not do
21 any research, such as consulting dictionaries, searching the
22 Internet or using other reference materials; and do not make any
23 investigation or in any other way try to learn about the case on
24 your own.

25 The law requires these restrictions to ensure the parties
26 have a fair trial based on the same evidence that each party has
27 had an opportunity to address. A juror who violates these

28 Page One of Two Pages

1 restrictions jeopardizes the fairness of these proceedings, and a
2 mistrial could result that would require the entire trial process
3 to start over. If any juror is exposed to any outside
4 information, please notify the court immediately.

5

6 Ninth Circuit Model Criminal Jury Instruction, No. 7.2

7 [Consideration of Evidence -- Conduct of the Jury]

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

Page Two of Two Pages

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___
PROPOSED INSTRUCTION NO. 43

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Ninth Circuit Model Criminal Jury Instruction, No. 7.3
[Use of Notes]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___

PROPOSED INSTRUCTION NO. 44

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

Ninth Circuit Model Criminal Jury Instruction, No. 7.4
[Jury Consideration of Punishment]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COURT'S INSTRUCTION NO. ___
PROPOSED INSTRUCTION NO. 45

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the clerk that you are ready to return to the courtroom.

Ninth Circuit Model Criminal Jury Instruction, No. 7.5
[Verdict Form]

1 COURT'S INSTRUCTION NO. ___

2 PROPOSED INSTRUCTION NO. 46

3 If it becomes necessary during your deliberations to
4 communicate with me, you may send a note through the clerk,
5 signed by any one or more of you. No member of the jury should
6 ever attempt to communicate with me except by a signed writing,
7 and I will respond to the jury concerning the case only in
8 writing or here in open court. If you send out a question, I
9 will consult with the lawyers before answering it, which may take
10 some time. You may continue your deliberations while waiting for
11 the answer to any question. Remember that you are not to tell
12 anyone -- including me -- how the jury stands, numerically or
13 otherwise, on any question submitted to you, including the
14 question of the guilt of the defendant, until after you have
15 reached a unanimous verdict or have been discharged.

16
17
18
19
20
21
22
23 Ninth Circuit Model Criminal Jury Instruction, No. 7.6

24 [Communication with Court]
25
26
27
28