IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

STIPULATED JURY INSTRUCTIONS

The United States and defendant Joseph P. Nacchio, by their undersigned counsel, hereby submit the attached proposed stipulated jury instructions. Pursuant to the Court's rules, this submission includes two hard copies of a set with citations to authority, as well as an electronic copy on disk in Wordperfect 9.

Respectfully submitted this 1st day of March, 2007.

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STIPULATED INSTRUCTION NO. 1.1

GENERAL PRINCIPLES - GENERAL INTRODUCTION - PROVINCE OF THE COURT AND JURY

MEMBERS OF THE JURY:

I will now instruct you concerning the law which you must apply in this case. You will not receive these instructions in writing. Also, it is not ordinarily proper for you to request that a single phrase or part of an instruction be read back to you during your deliberations. It is therefore important for you to pay careful attention to the instructions as I explain them to you now.

You have two main duties as jurors. The first is to decide what the facts are. The second is to follow the law stated in the instructions of the court, apply the law to the facts and decide if the Government has proved the defendant guilty beyond a reasonable doubt. All the instructions are important, and you are not to focus on one instruction alone. You must consider the instructions as a whole. This is the reason why you cannot ask me to repeat a single phrase or instruction after you begin to deliberate.

You are not to be concerned with the wisdom of any rule of law stated in these instructions. Even though you may have a different opinion as to what the law ought to be, it would be a violation of the oath which you have sworn as jurors to base your verdict on anything other than the law as presented in these instructions and the facts as you find them.

Counsel have referred to some of the governing rules of law in their arguments. There is nothing wrong with this, but jurors sometimes think they see a variance between counsel's

statements and the court's instructions. If you think there is a difference between what counsel said about the law and what the court is now telling you, you must heed what the court says. The court - not the lawyers - decides what law you must apply.

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine what witnesses and what evidence to believe. You resolve conflicts in the testimony. Nothing I have said during the trial was meant to influence your decision about the facts in any way.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. The court and the parties expect that you will carefully and impartially consider all of the evidence, follow the law, and reach a just verdict, regardless of the consequences.

COURT'S INSTRUCTION NO. 1.1

STIPULATED INSTRUCTION NO. 1.2

THE GOVERNMENT AS A PARTY

You are also to perform your duty in an attitude of complete fairness and impartiality. The case is important to the government, for the enforcement of criminal laws is a matter of concern to the community. Equally, it is important to the defendant, who is charged with a serious crime. The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All criminal cases brought by the federal government are brought in the name of the United States. All parties, whether government or individuals, stand as equals at the bar of justice.

COURT'S INSTRUCTION NO. 1.2 (adapted to add the statement "All criminal cases brought by the federal government are brought in the name of the United States.").

STIPULATED INSTRUCTION NO. 1.3

ORGANIZATION OF INSTRUCTIONS

I have divided these instructions into several parts. I will start by stating certain general rules that you must remember as you review the indictment and consider the case. I will next remind you once again what is evidence and what is not evidence in the case and tell you how the law requires you to view the evidence. Third, I will give you certain instructions concerning one of your most important jobs - judging the credibility of witnesses. Fourth, I will review the elements, or parts, of the crime that defendant is accused of committing. Last, I will explain the rules that you must follow in your deliberations.

COURT'S INSTRUCTION NO. 1.3

STIPULATED INSTRUCTION NO. 1.4

CONSIDERATION OF THE INDICTMENT

The indictment in this case charges that:

[SUMMARIZE THE INDICTMENT]

I will discuss the elements of this charge in detail in a few minutes. Right now, I simply want to state several general rules which you must constantly remember as you consider these charges.

1.2.1 Defendant is only on trial for the particular charge alleged against him in the indictment. I instruct you that your job is to determine whether the Government has proved beyond a reasonable doubt the precise charge in the indictment. If it has not proven the precise charge in the indictment, then you must acquit the defendant on that charge, even if you think that the defendant did commit some other act not charged in the indictment.

1.2.2 As I told you at the outset, the indictment itself is not any evidence of guilt. It does not even raise any suspicion of guilt. It is nothing more than the formal way that the Government tells a defendant, the court, and you what crime the defendant is accused of committing.

COURT'S INSTRUCTION NO. 1.4 (adapted to replace "[READ THE INDICTMENT]" WITH "[SUMMARIZE THE INDICTMENT]").

STIPULATED INSTRUCTION NO. 1.5

"ON OR ABOUT"

The indictment charges that the crime happened "on or about" a certain date. The Government does not have to prove that the crime happened on the exact date alleged. It must prove, however, that the crime happened reasonably close to that date.

COURT'S INSTRUCTION NO. 1.5

STIPULATED INSTRUCTION NO. 1.6

THE DEFENSE

I have now told you about the rules you should follow in reviewing the indictment. Defendant has pleaded "not guilty" to the charge contained in the indictment. This plea puts in issue each of the essential elements of the offense and imposes on the Government the burden of establishing each of these elements by proof beyond a reasonable doubt. (As I indicated, I will discuss the elements of the offense later in these instructions.)

STIPULATED INSTRUCTION NO. 1.7

BURDEN OF PROOF - REASONABLE DOUBT

The law presumes a defendant to be innocent of any crime. Thus a defendant, although accused, begins the trial with a "clean slate" - with no evidence against him. This presumption of innocence stays with the accused unless the Government produces evidence which convinces you beyond a reasonable doubt that the accused is guilty. In other words, the presumption of innocence alone entitles the accused to an acquittal, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt is simply proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt of each element of a crime beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

If the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of a charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions - one of innocence, the other of guilt - the jury should of course adopt the conclusion of innocence.

COURT'S INSTRUCTION NO. 1.7

STIPULATED INSTRUCTION NO. 2.0

EVIDENCE & CATEGORIES OF EVIDENCE

That concludes my explanation of the general rules that you must constantly remember as you review the indictment and consider the case. I will now reiterate what I told you at the beginning of the trial concerning what is - and what is not - evidence in the case. I will also tell you how the law requires you to consider the evidence, and I will conclude my discussion of the evidence by talking about specific types of evidence.

STIPULATED INSTRUCTION NO. 2.1

QUESTIONS NOT EVIDENCE

Statements, assertions, and arguments of the lawyers are not evidence in the case. Neither are the lawyers' questions. If a lawyer asks a witness a question which implies that the lawyer knows the answer or which contains an assertion of fact, you may not consider the implied assertion as evidence of that fact. The lawyers' questions and statements are not evidence; the witnesses' answers are. You should therefore focus on the witnesses' answers, not the lawyers' questions.

COURT'S INSTRUCTION NO. 2.1

STIPULATED INSTRUCTION NO. 2.2

COURT'S QUESTIONS TO WITNESSES; COURT'S COMMENTS ON EVIDENCE

Similarly, my questions and comments are not evidence in the case. The sole purpose of such questions and comments is to assist the jury in finding the facts and applying the law to those facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts. Please remember, however, to distinguish between the judge's comments concerning the facts – which you may disregard – and the judge's instructions concerning the law: the jury is duty-bound to follow the principles of law stated in the judge's instructions.

COURT'S INSTRUCTION NO. 2.2 (adapted to remove the statement "My comments are only expressions of the judge's opinion as to the facts").

STIPULATED INSTRUCTION NO. 2.3

JURY'S RECOLLECTION CONTROLS

It follows from what I have just said about the lawyers' remarks that it is the jury's recollection of the evidence which is critical. If the court's recollection or the lawyers' recollection about the evidence differs from your own, you should rely on your own recollection, not on the statements of the court or the lawyers.

COURT'S INSTRUCTION NO. 2.3

STIPULATED INSTRUCTION NO. 2.4

EVIDENCE RECEIVED IN THE CASE

The evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Nothing else is evidence. Any proposed testimony or proposed exhibit to which an objection was sustained by the court must be entirely disregarded. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath as jurors not to let them influence your decision in any way.

Anything you may have seen or heard outside the courtroom is not proper evidence and must be entirely disregarded. I further instruct you that you should not try to gather any information about the case on your own while you are deliberating. Do not conduct any experiments inside or outside the jury room. Do not bring any books, like a dictionary, or anything else with you. Also, if any of you have brought a cellular telephone with you, you must leave the telephone with the deputy clerk for safekeeping; it must not be in the jury room with you. Do not conduct any independent research, reading, or investigation about the case, and do not visit any of the places mentioned during the trial.

You are to base your verdict only on the evidence received in the case. In considering and discussing the evidence received, however, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as you feel are justified in the light of your experience and common sense - remembering always that the facts and inferences you draw

from them must convince you of guilt beyond a reasonable doubt. "Inferences," of course, are simply

deductions or conclusions which reason and common sense lead the jury to draw from the evidence received in the case.

COURT'S INSTRUCTION NO. 2.4

STIPULATED INSTRUCTION NO. 2.5

JUDGING THE EVIDENCE

I will summarize all of this by saying that, in your deliberations in this case, you are expected to use your good sense, considering the evidence in the case for only those purposes for which it has been admitted, and giving it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the accused be proved guilty beyond reasonable doubt, say so. If not so proved, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Remember also that the question before you can never be: will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

COURT'S INSTRUCTION NO. 2.5

STIPULATED INSTRUCTION NO. 2.6

DIRECT EVIDENCE - CIRCUMSTANTIAL EVIDENCE

I will now give you several additional rules which you should apply in considering the evidence.

There are two types of evidence from which you may find the truth as to the facts of a case - direct evidence and circumstantial evidence.

Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. If a witness testified that he saw it raining outside, and you believed him, you would have direct evidence that it was raining.

Circumstantial evidence is proof of a chain of facts and circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, this would be circumstantial evidence from which you could conclude that it was raining.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. If, after weighing all the evidence, you are not convinced of the guilt of defendant beyond a reasonable doubt, you must find defendant not guilty.

COURT'S INSTRUCTION NO. 2.6

INSTRUCTION NO. 2.7

ALL AVAILABLE EVIDENCE NEED NOT BE PRODUCED

[Not stipulated. Defendant is proposing this instruction as part of his proposed disputed instructions. The government is proposing an amended version of this instruction as part of its proposed disputed instructions.]

COURT'S INSTRUCTION NO. 2.7

INSTRUCTION NO. 2.8

EXTRA JUDICIAL STATEMENTS OR CONDUCT - GENERALLY

[Deleted per stipulation of parties that this does not apply.]

STIPULATED INSTRUCTION NO. 2.9

EFFECT OF THE DEFENDANT'S FAILURE TO TESTIFY

The defendant in a criminal case has an absolute right under our Constitution not to testify or present any evidence.

The fact that Defendant did not testify or present evidence must not be discussed or considered by the jury in any way when deliberating and in arriving at your verdict. No inference of any kind may be drawn from the fact that a defendant decided to exercise his or her privilege under the Constitution and did not testify. As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or of producing any evidence.

COURT'S INSTRUCTION NO. 2.9

STIPULATED INSTRUCTION NO. 2.10

OPINION EVIDENCE-EXPERT WITNESS

The rules of evidence ordinarily do not permit witnesses to testify about their personal opinions. Any person whom the court has qualified as an "expert witness" is an exception to this rule. The law allows such witnesses to state their opinion concerning matters in which they profess to be expert, and it also allows them to state their reasons for the opinion.

The fact that the court has qualified any person an "expert witness" does not mean that the court is endorsing or approving that person's testimony. Nor does it mean that you should automatically believe such a witness or that you should give the person's testimony extraordinary weight in your deliberations. It means only that the court thinks such testimony *might* be helpful to you. Judgments concerning any expert's credibility and the weight of the expert's testimony must still be made by you alone.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

COURT'S INSTRUCTION NO. 2.10

STIPULATED INSTRUCTION NO. 2.11

CHARTS AND SUMMARIES -- FRE 1006 [if applicable]

Charts or summaries have been prepared by _____, have been admitted into evidence and have been shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, or other documents. You may consider the charts and summaries as you would any other evidence admitted during the trial and give them such weight or importance, if any, as you feel they deserve.[1]

[1] 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions § 14.02 (5th ed.). *See* Tenth Circuit, Pattern Jury Instructions, No. 1.41 (2006)); cmt. (where the underlying evidence has been introduced along with the summaries or charts, the Tenth Circuit has suggested, in the context of tax prosecutions, that limiting instructions are proper*, citing United States v. Mann*, 884 F.2d 532, 539 (10th Cir. 1989)); *United States v. Kapnison*, 743 F.2d 1450, 1458 (10th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985); *United States v. Harenberg*, 732 F.2d 1507, 1513–14 (10th Cir. 1984); *United States v. Kaatz*, 705 F.2d 1237, 1245 (10th Cir. 1983)).

STIPULATED INSTRUCTION NO. 2.12

CHARTS AND SUMMARIES -- PEDAGOGICAL/DEMONSTRATIVE
[if applicable]

Charts or summaries have been prepared by _____ and shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, and other documents which are in evidence in the case. Such charts or summaries are not evidence in this trial or proof of any fact. If you find that these charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, then you should disregard the charts or summaries.

In other words, such charts or summaries are used only as a matter of convenience for you and to the extent that you find they are not, in truth, summaries of facts or figures shown by the evidence in the case, you can disregard them entirely.[1]

[1] 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions § 14.02 (5th ed.).; 3 K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions § 104.50 (5th ed.); *United States v. Mann,* 884 F.2d 532, 539 (10th Cir. 1989) (no error in district court admitting testimony of summary witness and related charts in tax case; such summary evidence may be put before the jury with limiting instructions, *citing United States v. Kaatz,* 705 F.2d 1237, 1245 (10th Cir. 1983)); *see Tenth Circuit, Pattern Jury Instructions, No. 1.41 (2006)*

STIPULATED INSTRUCTION NO. 3.0

CREDIBILITY

I will now give you certain instructions concerning one of your most important jobs - judging the credibility of witnesses. I will first give you some general suggestions; then I will talk about several specific rules which you can apply in deciding whether to believe certain categories of witnesses or evidence.

COURT'S INSTRUCTION NO. 3.0

STIPULATED INSTRUCTION NO. 3.1

CREDIBILITY OF WITNESSES - DISCREPANCIES IN TESTIMONY

It must be clear to you by now that you are being asked to resolve various factual issues raised by the parties in the face of very different pictures painted by both sides. In resolving factual disputes, you will need to decide what evidence to believe. You, as jurors, are the sole judges of the believability of the witnesses and the weight their testimony deserves.

In deciding what to believe, remember that differing versions of an event do not always mean that someone must be lying about the event. People sometimes honestly see and hear things differently, depending on their viewpoint. Some people simply have better memories than others. One person may honestly recall a once-forgotten event if his or her memory is jogged in some way. A truthful witness may be nervous and seem to contradict himself or herself. In weighing a witness's version of a disputed event, you should ask yourselves whether the witness has failed to observe or recall matters of importance, which one might expect the witness to recall, or whether the witness has overlooked or forgotten insignificant details. You should also ask yourselves whether the witness's version is a product of the sorts of innocent errors which I just mentioned, or whether it results from intentional falsehood.

If you are satisfied that a witness has knowingly given false testimony concerning one fact or event, you have a right to conclude that the witness may have lied concerning other facts or events as well. You may therefore reject that witness's testimony entirely or you may accept whatever part you deem worthy of belief. A person knowingly gives false testimony when that person gives testimony which he or she knows to be untrue, voluntarily and intentionally, and not because of mistake, accident, or other innocent reason.

In the face of vastly different pictures painted by the parties, how can you determine where the truth lies? I suggest that you ask yourselves the following questions:

(1) How well was the witness able to see, hear, or know the things about which that witness testified?

(2) How well was the witness able to recall and describe those things?

(3) Was the witness's testimony about an event contradicted? Was it contradicted by what the witness had said or done before he or she testified? Was it contradicted by the testimony of other witnesses or evidence which strikes you as persuasive?

(4) Did the witness have an interest in the outcome of this case or the event about which the witness testified? Did the witness have a bias or prejudice concerning any party or any matter involved in the case? Did the witness have a motive to see or recall an event in a certain way?

(5) What was the witness's state of mind, demeanor, and manner on the witness stand? Did he or she strike you as frank, forthright, and candid? Was the witness evasive and edgy, as if hiding something? You watched the witness testify. Everything a witness said or did on the witness stand counts in your determination.

(6) In light of all the evidence in the case and your own common sense, how probable or improbable was the witness's testimony?

These are simply some considerations which may help you determine the accuracy of what each witness said. You should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves. In making this judgment, you are perfectly free to believe all of what a witness said, part of it, or none of it.

[The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.]

COURT'S INSTRUCTION NO. 3.1; Tenth Circuit Pattern Criminal Jury Instructions § 1.08.

STIPULATED INSTRUCTION NO. 3.2

IMPEACHMENT – INCONSISTENT STATEMENTS OR CONDUCT – BY A NON-PARTY WITNESS

You have heard evidence that, at some time before giving testimony here in court, certain witnesses have said or done something which, counsel argues, is inconsistent with the witnesses' trial testimony.

Evidence of prior inconsistent statements or conduct was placed before you for the purpose of helping you decide whether to believe the trial testimony of the witnesses in question. If you decide that a witness made an earlier statement (or engaged in conduct) that conflicts with his or her trial testimony, you may consider that fact in deciding how much of the witness's trial testimony, if any, to believe.

In evaluating conflicts between a witness's trial testimony and his or her earlier statements or conduct, you may consider whether the witness has purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact or a small detail; and whether the witness had an explanation for the inconsistency that appealed to your common sense.

It is exclusively your duty, based on all the evidence and your own good judgment, to determine whether a prior statement or conduct was really inconsistent; and, if it was, how much weight you should give to the inconsistent statement or conduct in determining whether to believe all or part of the witnesses' trial testimony.

STIPULATED INSTRUCTION NO. 3.3

CREDIBILITY OF LAW ENFORCEMENT WITNESS

You have heard the testimony of law enforcement officials. The fact that a witness may be employed as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case. It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

COURT'S INSTRUCTION NO. 3.3

STIPULATED INSTRUCTION NO. 4.0

PARTICULAR CRIMES

I am now at that part of the instructions where I will review the elements, components, or parts, of the crime that defendant is accused of committing. This part of the instructions should answer your questions concerning what it is that the Government must prove beyond a reasonable doubt.

As I go through the elements of each crime, you will see that a common element of all these crimes is that defendant act with a specified bad state of mind. This is a critical element of each crime, for the law does not usually punish acts which are done mistakenly or even carelessly. Because of its importance, I will discuss this "state of mind" element separately, after I have explained all other elements of the various charges.

COURT'S INSTRUCTION NO. 4.0

STIPULATED INSTRUCTION NO. 5.0

REQUISITE STATE OF MIND

You will note that I have referred at several points to a requirement that defendant act "knowingly," or with "knowledge," and/or "wilfully." This requirement refers to the state of mind which accompanied defendant's acts. This is a critical requirement, for our system of justice does not ordinarily criminalize acts which are simple mistakes or even those which are careless; there must be something more than carelessness or mistake. I will now define what I mean by such terms.

STIPULATED INSTRUCTION NO.

"KNOWINGLY" -- DEFINED

The term "knowingly", as used in these instructions to describe the alleged state of mind of the defendant, means that he was conscious and aware of his action, realized what he was doing or what was happening around him, and did not act because of ignorance, mistake, or accident, or carelessness.

COURT'S INSTRUCTION NO. 5.1; see O'Malley, Grenig, and Lee, Federal Jury Practice and Instructions, Fifth Edition, 2000, § 17.04. Defendant notes that while he has no objection to this definition, it is covered as part of his proposed disputed instructions.

INSTRUCTION NO. 5.2

DEFINITION OF "INTENTIONALLY"

[Deleted by parties on understanding that the Court determined the content of this definition at the October 12, 2006 hearing.]

COURT'S INSTRUCTION NO. 5.2; see 1 L. Sand, et al., Modern Federal Jury Instructions ¶ 3A.01 (Instruction No. 3A-4) (1996).

STIPULATED INSTRUCTION NO. 5.3

PROOF OF KNOWLEDGE OR INTENT

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

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

COURT'S INSTRUCTION NO. 5.3; see O'Malley, Grenig, and Lee, Federal Jury Practice and Instructions, Fifth Edition, 2000, § 17.07

INSTRUCTION NO. 5.4

MOTIVE

[Deleted: Defendant objects to this instruction. The United States is including this stock instruction as part of its proposed disputed instructions.]

COURT'S INSTRUCTION NO. 5.4; see O'Malley, Grenig, and Lee, Federal Jury Practice and Instructions, Fifth Edition, 2000, § 17.06

STIPULATED INSTRUCTION NO. 6.0

JURY DELIBERATIONS

Before concluding these instructions, I will give you certain rules which you must follow while you are deliberating.

STIPULATED INSTRUCTION NO. 6.1

VERDICT - UNANIMOUS - DUTY TO DELIBERATE

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning 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.

COURT'S INSTRUCTION NO. 6.1

STIPULATED INSTRUCTION NO. 6.2

ELECTION OF FOREPERSON - GENERAL VERDICT

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesman here in court.

A form of the verdict has been prepared for your convenience.

[Form of verdict read.]

You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form which sets forth the verdict upon which you unanimously agree; and then return with your verdict to the courtroom.

COURT'S INSTRUCTION NO. 6.2

STIPULATED INSTRUCTION NO. 6.3

VERDICT FORM - JURY'S RESPONSIBILITY

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

COURT'S INSTRUCTION NO. 6.3

STIPULATED INSTRUCTION NO. 6.4

COMMUNICATIONS BETWEEN COURT AND JURY DURING JURY'S DELIBERATIONS

If it becomes necessary during your deliberations to communicate with the court, you may write a note, have your foreperson sign the note, and deliver the note to the bailiff with the request that he deliver it to the court. If, for some reason, your foreperson will not sign the note, then one or more other members of the jury may sign the note. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing. Similarly, the court will must always communicate with members of the jury only in writing, or orally here in open court. If you do find it necessary to send the court a note during your deliberations, please understand that I will not usually be able to respond right away. I must consider your note, allow the lawyers and parties to be heard concerning the proper response, and then draft a written response.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person - not even to the court - how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.