IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Civil Action No. ***-cv-*-JLK**

***,**

Plaintiff,

v.

***,**

Defendant.

JURY INSTRUCTIONS

INSTRUCTION NO. 1.1

OPENING INSTRUCTIONS

We are about to begin the trial of the case you heard about during the jury selection process. Before the trial begins, I am going to give you instructions that will help you to understand what will be presented to you and how you should conduct yourself during the trial.

During the trial you will hear me use a few terms that you may not have heard before. Let me briefly explain some of the most common to you. If, during the course of the trial, there are terms you don't recognize, please let me know and I will explain them. The party who sues is called the plaintiff. In this action, the plaintiff is *. Because of the nature of this case, he is referred to as the Relator. The parties being sued are called the defendants. In this action, the defendants are certain affiliates of *. The companies are engaged in exporting meat and animal products, including beef hides. For convenience and clarity, all defendants will be referred to collectively as "*."

You will sometimes here me refer to "counsel." "Counsel" is another way of saying "lawyer" or "attorney." I will do my best to avoid it, but may sometimes refer to myself as the "Court."

When I "sustain" an objection, I am excluding that evidence from this trial for a good reason. When you hear that I have "overruled" an objection, I am permitting that evidence to be admitted.

When I say “admitted into evidence” or “received into evidence,” I mean that this particular statement or the particular exhibit may be considered by you in making the decisions you must make at the end of the case. I am not indicating in any way that you must accept it, but only that you may consider accepting or rejecting it.

By your verdict, you will decide disputed issues of fact. I will decide all questions of law that arise during the trial. Before you begin your deliberation at the close of the case, I will instruct you one more time on the law that you must follow and apply.

During the course of the trial I may have to interrupt the proceedings to confer with the attorneys about the rules of law that should apply. Sometimes we will talk briefly, at the bench. But some of these conferences may take more time, so I will excuse you from the courtroom. I will try to avoid such interruptions whenever possible, but please be patient even if the trial seems to be moving slowly because conferences often actually save time in the end.

You are to consider all the evidence received in this trial and only the evidence received at trial. It will be up to you to decide what evidence to believe and how much of any witness's testimony to accept or reject.

After you have heard all the evidence on both sides, the government and the defense will each be given time for their final arguments. These arguments are not evidence. After these closing arguments, I will again instruct you on the rules of law you are to use in reaching your verdicts, and then you will retire to decide your verdicts.

During the course of the trial I may ask a question of a witness. If I do, that does not indicate I have any opinion about the facts in the case but am only trying to bring out facts that you may consider. From time to time during the trial I may also direct your attention to particular instructions of law.

Ordinarily, the attorneys, will develop all the relevant evidence that will be necessary for you to reach your verdicts. However, in rare situations, a juror may believe a question is critical to reaching a decision on a necessary element of the case. In that situation, you may write out a question and provide it to the courtroom deputy at the next recess. I will then consider that question with the lawyers. If it is determined to be a proper and necessary question, I will ask it. If I do not ask it, I will tell you why and explain why such an answer cannot be considered in your deliberations.

If you would like to take notes during the trial, you may. On the other hand, you are not required to take notes.

If you decide to take notes, be careful not to get so involved in note taking that you become distracted, and remember that your notes will not necessarily reflect exactly what was said, so your notes should be used only as memory aids. Therefore, you should not give your notes precedence over your independent recollection of the evidence. You should also not be unduly influenced by the notes of other jurors. If you do take notes leave them in the jury room at night and do not discuss the contents of your notes until you begin deliberations.

During the course of the trial, you should not talk with any witness, or with [Defendant(s)], or with any of the lawyers at all. In addition, during the course of the trial you should not talk about the trial with anyone else. Also, you should not discuss the merits of this case among yourselves until you have gone to the jury room to make your decision at the end of the trial. It is important that you wait until all the evidence is received and you have again heard my instructions on the controlling rules of law before you deliberate among yourselves. In other words, keep an open mind and form no opinions until you can consider all the evidence and the instructions of law together.

During the course of the trial you will receive all the evidence you legally may consider to decide the case. Gathering any information on your own that you think might be helpful is against the law and would be a violation of your oath. Do not engage in any outside reading on this case, even including dictionaries or a bible, do not attempt to visit any places mentioned in the case, and do not in any other way try to learn about the case outside the courtroom. Part of my job is to protect you from outside influences. Your job is to confine your decisions to what takes place in this courtroom.

I wish I did not have to dwell on this topic, but recent events around the United States and recent technologies require me to point out that some common practices and habits many of you enjoy are strictly forbidden in your role as jurors. You may not, under any circumstances, have your cell phones, blackberries, iphones or the like on when court is in session. Whether you are here or away from the court during recess you may not “google, twitter, tweet, text message, blog, post” or anything else with those gadgets

about or concerning anything to do with this case. To do so could cause a mistrial, meaning all of our efforts would have been wasted and we would have to start all over again with a new trial before a new jury. If you were to cause a mistrial by violating these orders, you could be subject to paying all the costs of these proceedings and perhaps punished for contempt of court. What you may do is advise anyone who needs to know, such as family members, employers, employees, schools, teachers, or daycare providers that you are a juror in a case and the judge has ordered you not to discuss it until you have reached a verdict and been discharged from the case. At that point you will be free to discuss this case or investigate anything about it to your heart's delight.

If during the course of the trial you believe there is anything you need to know, please write down your request and give it to the courtroom deputy. She will give it to me and we will do our best to attend to it.

Fairness to all concerned requires that all of us connected with this case deal with the same information and with nothing other than the same information. The reason for this is that your decision in this case must be made solely on the evidence presented at the trial.

Finally, I note that the court reporter is making stenographic notes of everything that is said. This is basically to assist any appeals. You will *not* have a typewritten copy of the testimony available for your use during deliberations. On the other hand, any exhibits admitted at trial will be available to you during your deliberations.

INSTRUCTION NO. 1.2

STATEMENT OF THE CASE

* is in the business of *. The federal government, specifically the United States Department of Agriculture (the USDA), is charged with making any necessary inspections of these products under applicable rules and regulations and then issuing paper export certificates for inclusion with *'s shipments of products. A fee is charged for issuing each export certificate.

* worked for * between 1996 and 1998 at its Greeley, Colorado, facility. * was a document clerk in *'s beef hide export department, and in the course of his job, worked with hide export certificates issued by the government. This case involves claims brought by * under the False Claims Act in which he alleges that * employees, when discovering errors on hide export certificates that had already been issued by the USDA, routinely made changes to those certificates over the USDA inspector's signature, rather than secure necessary replacement certificates for a fee. Through these actions, * contends * defrauded the government out of thousands of dollars' in fees it was otherwise owed. You will hear more about *'s claims below. First, however, an overview of the False Claims Act, or FCA, as it is sometimes referred to.

The purpose of the False Claims Act is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government. A private individual, known as a "Relator," may bring a civil action for a violation of the False Claims Act for himself and for the United States Government in the name of the United

States. The Government may elect to intervene – that is, "to come into the case" and take over – or, if the Government declines to intervene, the Relator may continue the action on his own. Either way, the Relator receives a share of any Government recovery. In this action, * is the Relator, and he is pursuing his claims both on his own behalf and on behalf of the United States Government.

* denies any of the changes its employees made to original hide export certificates were of the type that required the securing of a replacement certificate and denies its employees ever changed certificates in order to avoid paying replacement certificate fees.

As I will explain in more detail in the specific instructions that follow, it has already been decided in this case that there is no legal obligation or requirement that exporters obtain a replacement certificate *every time* a change to an existing certificate is made. Instead, an exporter must obtain and pay for replacement certificates only where the desired change is "major" or "significant." As a result, it is only the desire to make a "major" or "significant" change that triggers an actionable obligation under the False Claims Act to obtain a replacement certificate and pay a fee. You will hear testimony and see evidence concerning approximately 1,000 hide export certificates, known as VS Form 16-4s, on which * claims * employees made "major" or "significant" changes, without obtaining replacement certificates, to avoid having to pay the attendant replacement fees.

This case has proceeded in two separate phases. The first phase has already been heard by a different jury. You are the jury for the second phase, and will make findings on the merits of *'s claims relating to hide export certificates only. While you may hear

references to the first trial or to *'s meat claims in documents or witness testimony in passing, you will be making determinations only about *'s hide export certificate claims.

At the close of the evidence, you will be asked to determine (1) whether any of the certificate changes at issue in this case were of the type – i.e., "major" or "significant" changes – that the law says required the securing of a replacement certificate and payment of the attendant fee; and if so, (2) whether any employee making such a change without obtaining a replacement certificate did so with the requisite state of mind, or *scienter*, to trigger liability under the False Claims Act for defrauding the government.

INSTRUCTION NO. 1.3

ORDER OF TRIAL

The case will proceed as follows:

First, the lawyers for each side may make opening statements. What is said in the opening statements is not evidence, but is simply an introduction to help you understand what each party expects the evidence to show. A party is not required to make an opening statement.

After the opening statements, * will present evidence in support of his claims and *'s lawyers may cross-examine the witnesses. At the conclusion of *'s case, * may introduce evidence and *'s lawyers may cross-examine the witnesses. * is not required to introduce any evidence or to call any witnesses. If * does introduce evidence, * may then present rebuttal evidence.

After the evidence is presented, the parties' lawyers make closing arguments explaining what they think the evidence has shown. What is said in the closing arguments is not evidence.

Finally, I will instruct you on the law that you are to apply in reaching your verdict. You will then decide the case.

INSTRUCTION NO. 1.3.1

DUTY TO FOLLOW INSTRUCTIONS

(from use in criminal cases to be adpated in JLK civil cases – instructions *infra* re Juror Conduct should be revised to avoid redundancies)

You, as jurors, are the judges of the facts. But in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you.

You may not disregard or give special attention to any one instruction, or question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

In your deliberations you must see to it that no one else on the jury ignores the instructions or attempts to decide the case on anything other than the law and the evidence. It is always to be born in mind that our collective commitment is to equal justice under the law. Matters of race, creed, color, nationality and gender have no place in this process. To the best of your ability you are to judge others as you would want others to judge you under the law I give you. The very heart of justice is that all apply the same law to the same evidence and leave our personal desires out of it.

You should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.

INSTRUCTION NO. 1.4

EVIDENCE – GENERAL

It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law I give you. That is how you will reach your verdict. In doing so, you must follow the law whether you agree with it or not.

At no time during the trial will I suggest what I think your verdict should be nor do I want you to guess or speculate about my views of what verdict you should render.

You will decide what the facts are from the evidence that the parties will present to you during the trial. That evidence will consist of the sworn testimony of witnesses on both direct and cross-examination, regardless of who called the witness; documents and other things received into evidence as exhibits; and any facts on which the lawyers agree or which I may instruct you to accept as true.

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

1. Statements and arguments by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence,

but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of the facts controls.

2. Questions and objections by the lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered by you.

4 Anything you may see or hear when the Court is not in session is not evidence, even if what you see or hear is done or said by one of the parties or by one of the witnesses.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts that you find have been proved, such reasonable inferences as seem justified in the light of your experience. Inferences are inductions or conclusions your reason and common sense lead you to draw from the facts established by the evidence in the case.

INSTRUCTION NO. 1.5

EVIDENCE - DIRECT AND CIRCUMSTANTIAL

Evidence can be either direct or circumstantial. Direct evidence is 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 that another fact exists or is true.

You should consider both kinds of evidence in deciding this case. It is for you to decide how much weight to give to any evidence, direct or circumstantial.

The rules of evidence control the facts you may consider. When one lawyer asks a question or offers an exhibit and an opposing lawyer thinks that it is not permitted by the rules of evidence, the opposing lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

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

(Alternate) **INSTRUCTION 1.4**

Evidence—Defined

You must make your decision based only on the evidence that you see and hear [saw and heard] here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses say [said] while they are [were] testifying under oath, the exhibits that I allow [allowed] into evidence, the stipulations that the lawyers agree [agreed] to and I accept [accepted], and the facts that I judicially notice [noticed]. Judicial notice is my recognition of commonly accepted facts such as time, date and place, as well as matters such as existing government regulations.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial, I will not [did not] let you hear the answers to some of the questions that the lawyers ask. I may also rule [also ruled] that you cannot see some of the exhibits that the lawyers want you to see. And sometimes I may order [ordered] you to disregard things that you saw or heard, or I may strike [struck] things from the record. You must completely ignore all of these things. Do not even think about them. 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 not to let them influence your decision in any way.

(Alternate) **INSTRUCTION NO. 1.5**

Evidence - Direct and Circumstantial - Inferences

Generally speaking, two types of evidence are available from which you may properly determine the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of facts which point to the existence or non-existence of certain other facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence. The law requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.

While you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in the light of common experience. An inference is a conclusion that reason and common sense may lead you to draw from facts which have been proved.

By permitting such reasonable inferences, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

INSTRUCTION NO. 1.6

FILING OF LAWSUIT AND PLEADINGS

The fact that a plaintiff files a lawsuit is not evidence that the other party did anything wrong. The fact that a plaintiff complains damage or loss occurred is not evidence of such damage or that the other party violated the law. Similarly, the fact that a defendant denies such damage or loss occurred is not evidence that no loss occurred or that the law was not violated. Both the complaint and the denial are merely the formal way in which the case is brought to court for you to decide. The traditional expression, "where there's smoke there's fire" is not always true and it cannot have any part in your reaching a decision in this case.

INSTRUCTION NO. 1.7

BURDEN OF PROOF

This is a civil case. The burden of proof, therefore, is by a preponderance of the evidence." A "preponderance" means that no matter who produces the evidence, when you consider a particular claim in light of all the facts, you believe that claim is more likely true than not true. To put it differently, if you were to put all of the evidence in favor of one party and all of the evidence in favor of another party on opposite sides of the scales, the party bearing the burden of proof would have to make the scale tip, even just slightly, to its side.

In this case, * bears the burden of proof with respect to his reverse false claims under the FCA. This means * bears the burden of proving:

1. That for each certificate * alleges has been changed, the change on the certificate was "major" or "significant" and no replacement certificate was obtained; and

2. That * made the change with the requisite state of mind to defraud the Government.

In evaluating whether a party has met its burden of proof, you should also know that the law does not require parties to call as witnesses all persons who may have been

present at any time or place involved in the case, or who may appear to have some knowledge of the matter at issue in this trial. Nor does the law require parties to produce as exhibits all papers or other things mentioned in the evidence in the case.

(Alternate) **INSTRUCTION 1.7**

(claims and affirmative defenses)

BURDEN OF PROOF

This is a civil, rather than criminal, case and therefore * has the burden of proving its claim by what is called a preponderance of the evidence. "By a preponderance of the evidence" means that no matter who produces the evidence, when you consider the claim of * in light of all the facts, you believe that *'s claim is more likely true than not true. To put it differently, if you were to put all of the evidence in favor of * and all of the evidence in favor of * on opposite sides of the scale, * would have to make the scale tip to its side. If * fails to meet this burden, your verdict must be for [Defs].

In defense to the claim of *, [Defs] have asserted an affirmative defense, which will be described to you more fully later. An affirmative defense is more than a denial of the claim. You should treat an affirmative defense in the same way you treat *'s claim. That is, [Defs], as the parties asserting the affirmative defense, have the burden of proving that defense by the same standard, that is, of proving that the affirmative defense is more likely true than not true.

In evaluating whether *, on the one hand, and [Defs], on the other hand, have met their respective burdens on their claims and defenses, you should also know that the law does not require parties to call as witnesses all persons who may have been present at any

time or place involved in the case, or who may appear to have some knowledge of the matter at issue at this trial. Nor does the law require parties to produce as exhibits all papers or other things mentioned in the evidence in the case.

INSTRUCTION NO. 1.8

JUROR CONDUCT

Your conduct as jurors is of the utmost importance.

First, do not talk with one another about this case or about anyone who has anything to do with it until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case or about anyone who has anything to do with it until the trial has ended and you have been discharged as jurors. "Anyone else" includes members of your family and your friends. You may tell them that you are a juror in a case and that I have ordered you not to tell them anything else about it until the case is over.

Third, do not let anyone talk to you about the case or about anyone who has anything to do with it. If someone tries to talk to you, please report it to me immediately.

Fourth, do not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with the case.

Fifth, do not do any research, such as consulting dictionaries or other reference materials, and do not make any investigation about the case on your own. Do not look

things up on the internet. Do not "google." Do not post anything about the case or your participation in it to Facebook, MySpace or the like. Do not "Twitter."

Sixth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Seventh, each of you will have one or more notebooks containing the names of the witnesses and copies of exhibits. You are free to take notes in order to enhance your memory or assist you in recollecting during your deliberations. I caution you, however, not to become a slave to your notes. It is most important that you observe the witnesses and listen to their testimony. Your note taking should merely assist you.

INSTRUCTION NO. 1.9

QUESTIONS BY JURORS – PERMITTED

Jurors normally do not ask a witness questions. However, you may ask important questions during the trial under certain conditions.

If you feel that the answer to your question would be helpful in understanding the issues in the case, please write down your question during a break and give it to my courtroom deputy. I will make a copy of your note for the lawyers and speak privately with them to decide whether the question is proper under the law and how best to address it.

If the question is proper, we will repeat it in open court and someone will answer it. If there is some reason why the question cannot be answered, I will tell you what that reason is.

INSTRUCTION NO. 1.10

PUBLICITY DURING TRIAL

If there is publicity about this trial, you must ignore it. Do not read anything or listen to any television or radio programs about the case. You must decide this case only from the evidence presented here in the courtroom.

INSTRUCTION NO. 1.11

JUDGE'S QUESTIONS TO WITNESSES

During the trial, I may sometimes ask a witness questions. Please do not assume that I have any opinion about the subject matter of my questions. They are intended only to clarify or to repeat something I may have missed.

INSTRUCTION NO. 1.12

BENCH CONFERENCES

It may be necessary for me to talk to the lawyers about an issue of law out of your hearing. The purpose of these conferences is to decide how certain legal matters are to be treated. We will not be discussing factual matters. The lawyers and I will do what we can to limit the number and length of these conferences.

INSTRUCTION NO. 1.13

"INFERENCES" DEFINED

You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.

"Inferences" are inductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case.

INSTRUCTION NO. 1.14

CREDIBILITY OF WITNESSES

In deciding the facts of this case, you will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says, only part of it, or none of it.

In considering the testimony of any witness, you may consider:

1. The witness's opportunity and ability to see or hear or know the things to which the witness testified;
2. The quality of the witness's memory;
3. The witness's manner while taking the oath and while testifying;
4. Whether the witness had an interest in the outcome of the case or any motive, bias or prejudice;
5. Whether the witness's testimony is contradicted by anything the witness said or did at another time, by the testimony of other witnesses, or by other evidence;
6. How reasonable the witness's testimony was in light of all the evidence; and
7. Any other facts that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify to that fact.

If you believe a witness has willfully lied regarding any material fact, you have the right to disregard all or any part of that witness's testimony.

INSTRUCTION NO. 1.15

SINGLE WITNESS

The testimony of a single witness that produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 1.16

EQUALITY OF PARTIES

All persons are equal before the law regardless of race, national origin, citizenship, or whether the party is a corporation. I tell you that all parties are equal before the law to remind you that you must base any decision in this case on the law and facts, not outside factors such as race, national origin, citizenship, or corporate status.

INSTRUCTION NO. 1.17

STATUS OF A CORPORATION

All persons are equal before the law. A corporation is considered by the law to be a person. Corporations are entitled to the same fair and conscientious consideration by you as any physical person.

Corporations can act only through their officers and employees. Any act or omission of an officer or employee while acting within the scope of his or her employment or authority is the act or omission of the corporation.

SECTION 2.0

INSTRUCTIONS FOR USE DURING TRIAL

INSTRUCTION 2.1

Evidence Considered for Limited Purpose

[reserved]

INSTRUCTION 2.2

CHARTS AND SUMMARIES

There are two types of charts or summaries that may be used in this case. The following instructions may be given during trial before the use of a particular chart or summary.

Not Received in Evidence (Demonstrative Exhibit).

An exhibit such as a chart or summary often referred to as a "Demonstrative Exhibit" is not received in evidence. Its only purpose is as an illustrative aid to help explain the evidence in the case. It is not evidence itself and does not prove any fact.

Received in Evidence.

However, I have admitted two summaries into evidence because I have determined they accurately and reliably summarize complex or voluminous evidence in a manner that may materially assist you in understanding that evidence. You are instructed that a summary is not independent evidence of its subject matter, and is only as valid and reliable as the underlying evidence it summarizes.

SECTION 3.0

SUBSTANTIVE INSTRUCTIONS

INSTRUCTION NO. 3.1

USDA HIDE EXPORT CERTIFICATES AND

REPLACEMENT CERTIFICATES - GENERALLY

To facilitate and promote foreign trade and to protect the food supply, the United States Department of Agriculture (the "USDA") provides certificates to companies that export animal products. These export certificates are part of a comprehensive scheme administrated by the Food Safety and Inspection Service, which regulates meat exports, and the Animal Plant Health Inspection Safety Service ("APHIS"), which regulates hide exports. It is APHIS's regulation of hide exports that is at issue in this case.

APHIS issues the VS Form 16-4 **"hide export certificates"** you will hear about in this case to certify that certain diseases do not exist in the United States, and to affirm that the hides are not likely to transmit infectious diseases. APHIS regulations do not require exporters to get hide export certificates. Certificates are required only by certain importing countries, and the government issues them as a service to exporters.

A **"replacement certificate"** is a re-issued certificate prepared at an exporter's request. A replacement certificate may be issued in situations such as, but not limited to, when:

1. The original certificate did not carry the required information;

2. The original certificate carried incorrect information;

3. The name of the consignee or exporter has changed; or

4. The certificate has been lost.

The list above identifies circumstances under which an exporter ***may*** obtain a replacement certificate from the USDA. Unanswered at the time *'s case was filed was the question of when it is that an exporter ***must*** obtain one. Since the filing of this case, that question has been answered as follows:

While there is no requirement that an exporter get a replacement certificate *every time* a change to an existing certificate is made, a replacement certificate is required where the desired change is a "major" or "significant" one. The parties in this case disagree about whether the particular changes in the particular certificates were "major" or "significant" enough to require * to obtain replacements.

INSTRUCTION NO. 3.2

LIABILITY FOR REVERSE FALSE CLAIMS - HIDE EXPORT CERTIFICATES

INTRODUCTION

The False Claim Act allows the Government or individuals acting on behalf of the Government to sue to recover for fraud that is direct – meaning a person receives, through fraudulent means such as the submission of a false claim for payment, money from the Government to which the person is not entitled – or indirect, meaning a person avoids, through fraudulent means, paying the Government money to which it is entitled. This indirect form of fraud is called a "reverse false claim," and it is the type of fraud alleged by * to have taken place here.

Under the False Claims Act, a person engages in a "reverse false claim" if he or she "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government." 31 U.S.C. § 3729(a)(7). Section 3729(a)(7) subjects a person or entity engaging in such conduct to civil penalties of not less than $5,500 and not more than $11,000 per claim, plus three times the amount of the actual losses the Government sustained because of that conduct.

The following propositions have already been determined in this case and you are instructed to accept them as true:

1. The changing of an export certificate over the signature of a USDA inspector who has not actually seen or approved those changes qualifies as a "false record or statement" for purposes of § 3729(a)(7), regardless of whether the change merely corrected an error in the original certificate; and

2. While making changes of any kind to a USDA export certificate without approval may subject an exporter to fines or penalties under various federal statutory or regulatory provisions, only "major" or "significant" changes trigger the type of "obligation" contemplated in § 3729(a)(7) to obtain and pay for a replacement certificate.

Based on these propositions, *'s false claims in this case are that * employees knowingly made "major" or "significant" changes to hide export certificates to avoid obtaining and paying for necessary replacement certificates.

It is your task in this case to make the findings necessary to determine whether * employees engaged in such conduct.

INSTRUCTION NO. 3.3

REVERSE FALSE CLAIM - ELEMENTS OF LIABILITY

For each certificate * alleges constituted a reverse false claim under 31 U.S.C. § 3729(a)(7), he must prove, by a preponderance of the evidence, that

1. the change on the certificate is a "major or significant" change (as defined in Instruction 3.4); and
2. * made the change "knowing" a replacement was required but failing to get one. (The term "knowing" or "knowingly" is defined in Instruction 3.5.)

If you find both of these statements have been proved by a preponderance of the evidence, then your verdict with respect to that certificate must be for * and against *. If you find that either or both of these statements has not been proved, then your verdict with respect to that certificate must be for *.

INSTRUCTION NO. 3.4

"MAJOR" OR "SIGNIFICANT" CHANGE-- DEFINED

As you have already been told, there is no requirement under USDA statutes or regulations that an exporter must obtain a replacement certificate every time a change to an existing certificate is made. It is the law of this case that only the making of "major" or "significant" changes triggers an obligation to obtain and pay for a replacement certificate.

That is not to say that the law allows exporters to change certificates at will or that it is not unlawful to do so. There are, in fact, laws that prohibit exporters from making any kind of unauthorized change or alteration to a government-issued certificate and which subject exporters to administrative fines and penalties if they do so. These laws say nothing, however, about replacement certificates and say nothing about when an exporter who wishes to make a change to a certificate must get a replacement certificate to do so. For this reason, it is not a * employee's making of a correction or change to a certificate that creates an "obligation" under the law to obtain a replacement certificate and pay the fee at issue in this case. Instead, that obligation arises from the discovery, by the employee making the correction, that a "major" or "significant" change is necessary.

You will hear considerable testimony from various witnesses about what does and does not constitute a "major" or "significant" change to a hide export certificate. All I can tell you about what "major" or "significant" means is that it embodies a principle of

materiality. Something is "material" if it has the tendency to influence or persuade a person to act in a certain way. As it is contemplated in this case, a "major" or "significant" change is one that would have influenced or persuaded the certifying official that a replacement certificate was, in fact, required.

INSTRUCTION NO. 3.5

"KNOWING" AND "KNOWINGLY" - DEFINED

The terms "knowing" and "knowingly" mean that a person, with respect to information:

1. Has actual knowledge of the information;

2. Acts in deliberate ignorance of the truth or falsity of the information; or

3. Acts in reckless disregard of the truth of falsity of the information.

In this case, the information at issue is whether the change being made was the type of change that required getting a replacement certificate.

Based on this standard, you may find that * acted "knowingly" for purposes of making a reverse false claim if the employee making the change to a particular hide export certificate made a "major" or "significant" change directly to the certificate without getting a replacement and

1. Had actual knowledge at the time he or she made the change that the change required getting a replacement certificate;

2. Knew certain types of changes required getting a replacement certificate but deliberately chose not to find out whether the change he or she wanted to make fell into that category; OR

3. Knew certain types of changes required getting a replacement certificate but acted recklessly with regard to whether the change he or she wanted to make fell into that category.

With respect to whether the employee acted in "deliberate ignorance," you should consider that the necessary inquiry is one that is reasonable and prudent under the circumstances.

"Recklessness" or "reckless disregard" is conduct that entails such an unjustifiably high risk of running afoul of the standard that it can be said doing so was either known or so obvious that it should have been known. Mere negligence is not sufficient to constitute "recklessness" or "reckless disregard."

In determining whether a * employee "knowingly" avoided an obligation to get a replacement certificate under these standards, you are instructed that the salient moment in time is when the employee discovered that a "major" or "significant" change was necessary, but chose to make the change directly instead of getting a replacement. In other words, the employee must "know" (or be deliberately ignorant of or recklessly disregard the fact that), at the time he or she makes the change, that the change being made is the type of change that requires getting a replacement certificate.

INSTRUCTION NO. 3.6

GOVERNMENT KNOWLEDGE

Government knowledge may negate the state of mind, or *scienter*, necessary to establish a violation of the False Claim Act. If you find that at the time * made "major" or "significant" changes to export certificates, Government employees or officials with authority to require * to obtain replacement certificates knew the facts relevant to Relator's claims, you may consider that in determining whether * "knowingly" avoided an obligation to obtain a replacement certificate.

In other words, Government knowledge of the facts relevant to Relator's claims may raise an inference that * did not act knowingly to defraud the Government. It is only an inference, however, and a finding of such Government knowledge does not preclude you from finding that * acted with the requisite state of mind to support Relator's claim.

INSTRUCTION NO. 3.7

FEES FOR REPLACEMENT CERTIFICATES

The United States Department of Agriculture charges a fee for the issuance of original and replacement certificates for the export of animal products such as hides. You are instructed that for the period of time relevant to this case, the fee charged by the USDA for re-certifying a reissued or replacement hide export certificate was Twenty-One-Dollars and Fifty Cents ($21.50).

INSTRUCTION 3.8

COUNTING REVERSE FALSE CLAIMS

If you determine * made "major" or "significant" changes to export certificates, you must also determine the number of false records with "major" or "significant" changes. Each separate export certificate that you determine contains a "major" or "significant" change constitutes a separate false record. There will be a space in the verdict form for you to place this number, if you find for *.

INSTRUCTION 3.9

DAMAGES DETERMINATION

If you find in favor of * on any of his reverse false claims in this case, I will determine the amount damages sustained based upon the number of false records containing “major” or “significant” changes you identify in your verdict.

SECTION 4.0

FINAL INSTRUCTIONS

INSTRUCTION NO. 4.1

GENERAL INTRODUCTION

Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

Each of you has a copy of the instructions to consult whenever you wish. The lawyers may properly refer to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions.

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

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

INSTRUCTION NO. 4.2

JURY DELIBERATIONS – GENERAL INSTRUCTIONS

It is your duty to find the facts from all the evidence in the case. To those facts, you must apply and follow the laws contained in these instructions whether you agree with them or not. Your decision is called a verdict and is reached by applying those laws to the facts as you find them. You have taken an oath promising to do just so.

You must follow all of these instructions and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything I may say or do any suggestions as to what verdict you should return. Your verdict is a matter entirely for you to decide.

INSTRUCTION NO. 4.3

JURY – DELIBERATIONS

When you go to the jury room to begin your deliberations, you must elect one of you to serve as your Presiding Juror. He or she will preside over your deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreements if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it with your fellow jurors, and listened to the views of your fellow jurors. I offer some suggestions on how you might do this in the next jury instruction, entitled "Jury – The Deliberations Process."

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

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

INSTRUCTION NO. 4.4

JURY – THE DELIBERATIONS PROCESS

Once you have elected your Presiding Juror as directed by the previous instruction, you are free to proceed as you agree is appropriate. Therefore, I am not directing you how to proceed, but I offer the following suggestions that other juries have found helpful so that you can proceed in an orderly fashion, allowing full participation by each juror, and arrive at a verdict that is satisfactory to each of you.

First, it is the responsibility of the Presiding Juror to encourage good communication and participation by all jurors and to maintain fairness and order. Your Presiding Juror should be willing and able to facilitate productive discussions even when disagreements and controversy arise.

Second, the Presiding Juror should let each of you speak and be heard before expressing his or her own views.

Third, the Presiding Juror should never attempt to promote nor permit anyone else to promote his or her personal opinions by coercion or intimidation or bullying of others.

Fourth, the Presiding Juror should make certain that the deliberations are not rushed to reach a conclusion.

If the Presiding Juror you select does not meet these standards, he or she should voluntarily step down or be replaced by a majority vote.

After you select a Presiding Juror you should consider electing a secretary who will tally the votes, help keep track of who has or hasn't spoken on the various issues, make certain that all of you are present whenever deliberations are under way and otherwise assist the Presiding Juror.

Some juries are tempted to start by holding a preliminary vote on the case to "see where we stand." It is most advisable, however, that no vote be taken before a full discussion is had on the issue to be voted on, otherwise you might lock yourself into a certain view before considering alternative and possibly more reasonable interpretations of the evidence. Experience has also shown that such early votes frequently lead to disruptive, unnecessarily lengthy, inefficient debate and ineffective decision-making.

Instead, I suggest the Presiding Juror begin your deliberations by directing the discussion to establishing informal ground rules for how you will proceed. These rules should assure that you will focus upon, analyze and evaluate the evidence fairly and efficiently and that the viewpoints of each of you is heard and considered before any decisions are made. No one should be ignored. You may agree to discuss the case in the order of the questions presented in the special verdict form or in chronological order or according to the testimony of each witness. Whatever order you select, however, it is advisable to be consistent and not jump from one topic to another.

To move the process of deliberation along in the event you reach a controversial issue, it is wise to pass it temporarily and move on to the less controversial ones and then

come back to it. You should then continue through each issue in the order you have agreed upon unless a majority of you agrees to change the order.

It is very helpful, but certainly not required of you, that all votes be taken by secret ballot. This will help you focus on the issues and not be overly influenced by personalities. Each of you should also consider any disagreement you have with another juror or jurors as an opportunity for improving the quality of your decision and therefore should treat each other with respect. Any differences in your views should be discussed calmly and, if a break is needed for that purpose, it should be taken. As I mentioned at the beginning of this trial, each of you is responsible for making sure that no juror bases a decision on matters that are not evidence.

Each of you should listen attentively and openly to one another before making any judgment. This is sometimes called "active listening" and it means that you should not listen with only one ear while thinking about a response. Only after you have heard and understood what the other person is saying should you think about a response. Obviously, this means that, unlike TV talk shows, you should try very hard not to interrupt. If one of your number is going on and on, it is the Presiding Juror who should suggest that the point has been made and it is time to hear from someone else.

You each have a right to your individual opinion, but you should be open to persuasion. When you focus your attention and best listening skills, others will feel respected and, even while they may disagree, they will respect you. It helps if you are

open to the possibility that you might be wrong or at least that you might change your mind about some issues after listening to other views.

Misunderstanding can undermine your efforts. Seek clarification if you do not understand or if you think others are not talking about the same thing. From time to time the Presiding Juror should set out the items on which you agree and those on which you have not yet reached agreement.

In spite of all your efforts, it is indeed possible that serious disagreements may arise. In that event, recognize and accept that "getting stuck" is often part of the decision-making process. It is easy to fall into the trap of believing that there is something wrong with someone who is not ready to move toward what may be an emerging decision. Such a belief is not helpful. It can lead to focusing on personalities rather than the issues. It is best to be patient with one another. At such times slower is usually faster. There is a tendency to set deadlines and seek to force decisions. Providing a break or more time and space, however, often helps to shorten the overall process.

You may wish from time to time to express your mutual respect and repeat your resolve to work through any differences. With such a commitment and mutual respect, you will most likely render a verdict that leaves each of you satisfied that you have indeed rendered justice.

INSTRUCTION NO. 4.5

COMMUNICATIONS WITH JUDGE

If it becomes necessary during your deliberations to communicate with me, you may send a folded note through the court security officer, signed by one of you. Do not disclose the content of your note to the court security officer. No member of the jury should hereafter attempt to communicate with me except by signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. You are not to tell anyone – including me – how the jury stands, numerically or otherwise, until you have reached a unanimous verdict and I have discharged you.

If you send a note to me containing a question or request for further direction, please bear in mind that responses take considerable time and effort. Before giving an answer or direction I must first notify the attorneys and bring them back to the court. I must confer with them, listen to arguments, research the legal authorities, if necessary, and reduce the answer or direction to writing.

There may be some question that, under the law, I am not permitted to answer. If it is improper for me to answer the questions, I will tell you that. Please do not speculate about what the answer to your question might be or why I am not able to answer a particular question.

In some instances jurors request that certain testimony be read to them. This cannot be done as it is inappropriate for the court to single out testimony. In those circumstances you must rely upon your own recollection.

INSTRUCTION NO. 4.6

UNANIMOUS AGREEMENT AND JURY VERDICT FORM

You each have copies of a document called a Jury Verdict Form. You should answer the questions in the Jury Verdict Form as directed. You must reach unanimous agreement on the answers to each of the questions you are directed in the form to answer. Upon arriving at an agreement, your Presiding Juror will insert each answer on the Jury Verdict Form. After all of the questions have been answered as directed by the Jury Verdict Form, your Presiding Juror will date the Jury Verdict Form, sign it, and then ask all of the other jurors to sign it.

After you have filled out the Jury Verdict Form in this manner, your Presiding Juror should advise the court security officer stationed outside the jury room that you have reached a verdict.