

1 **INTRODUCTION**

2 Defendants have requested that the Court give an interim instruction regarding the
3 testimony of government witness J.Y. Ho, who testified pursuant to a plea agreement.
4 Specifically, defendants have asked the Court to instruct the jury that evidence of a plea
5 agreement by a government witness “may not be considered as proof of the guilt or participation
6 in the charged conspiracy of any defendant in this trial. The plea agreement of a testifying
7 witness instead be [sic] may be considered solely for the purpose of assessing the credibility of
8 the testifying witness.” Defendants’ Proposed Instruction Re: Consideration of Guilty Pleas
9 (Dkt. 676) at 2. Defendants’ request for an interim instruction should be denied. An interim
10 instruction on the issue of plea agreements is premature and is not necessary to guard against
11 prejudice. The Court’s instruction to the jury at the end of the case with respect to witnesses
12 who testified pursuant to a plea agreement will be sufficient to ensure that no prejudice results.

13 Alternatively, if the Court decides in its discretion to give an interim instruction regarding
14 witnesses who testify pursuant to a plea agreement, the government respectfully requests that the
15 Court give the government’s proposed instruction, which is consistent with Ninth Circuit Model
16 Criminal Jury Instruction 4.9.

17 **ARGUMENT**

18 **I. Defendants’ Requested Interim Instruction is Premature And is Not Necessary to**
19 **Guard Against Prejudice**

20 The Ninth Circuit Manual of Model Criminal Jury Instructions identifies appropriate
21 instructions to be given during the course of trial and those to be given at the end of the case.
22 See Table of Contents of Ninth Circuit Manual of Model Criminal Jury Instructions (2010), at
23 xxv-xxxii. The appropriate instructions to be given during the course of trial include limiting
24 instructions “whenever evidence is received for a limited purpose,” but do not include an
25 instruction regarding witnesses who have testified pursuant to a plea agreement. *Id.* at xxv.
26 Instead, the instruction regarding witnesses who have testified pursuant to a plea agreement
27 (section 4.9) is to be given at the end of the case once all the witnesses have testified. *Id.* at xxvi.
28 In giving this instruction, the Court specifically names all of the witnesses who have testified

1 pursuant to a plea agreement during the trial and instructs the jury as to how to evaluate their
2 testimony. Ninth Circuit Manual of Model Criminal Jury Instructions (2010), §4.9. To give an
3 interim instruction after only one witness has testified pursuant to a plea agreement would result
4 in piecemeal instructions regarding the issue of plea agreements. Clearly, this was not the intent
5 of the Model instructions, which recommend waiting until the end of the trial to instruct the jury
6 as to how to evaluate the testimony of all of the witnesses who testified pursuant to a plea
7 agreement during the course of the trial. Moreover, there is no need for an interim instruction
8 regarding the witnesses who testify pursuant to a plea agreement, because an instruction given at
9 the end of the case will be sufficient to guard against prejudice. *See United States v. Oxford*, 735
10 F.2d 276, 280 (7th Cir. 1984) (district court properly instructed jury at the end of the case about
11 its obligation to consider evidence as to each defendant); *United States v. Slade*, 627 F.2d 293,
12 309-10 (D.C. Cir. 1980) (conspiracy instructions given at the end of the case were sufficient to
13 guard against prejudice). Accordingly, defendants' request is premature and should be denied.

14 **II. Alternatively, The Court Should Give the Government's Proposed Jury**
15 **Instruction Which Is Consistent With The Ninth Circuit Model Instructions.**

16 If the Court determines in its discretion that it should instruct the jury during trial
17 regarding witnesses who testify pursuant to a plea agreement, the government respectfully
18 requests that the Court give the following instruction that is more consistent with the Ninth
19 Circuit Model Criminal Jury Instruction 4.9: "You have heard the testimony of J.Y. Ho, who
20 pleaded guilty to price fixing for his participation in the conspiracy for which the defendants are
21 on trial. A witness's guilty plea is not evidence against the defendants, and you may consider a
22 witness's guilty plea only in determining that witness's believability."

23 **CONCLUSION**

24 Defendants' request for an interim instruction regarding the testimony of government
25 witnesses who testify pursuant to a plea agreement should be denied as premature and
26 unnecessary to prevent prejudice. Alternatively, the government respectfully requests that the
27
28

1 Court instruct the jury according to the government's proposed jury instruction regarding plea
2 agreements.

3
4 Dated: January 12, 2012

Respectfully submitted,

5
6 /s/ Peter K. Huston
7 Peter K. Huston
8 Antitrust Division
9 U.S. Department of Justice
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28