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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	SA CR 04-281 AHS
)	
Plaintiff,)	
)	
v.)	ORDER DENYING DEFENDANTS'
)	MOTIONS FOR ACQUITTAL AND
OLGA LILIA TOSCANO and MARIA)	MOTIONS FOR A NEW TRIAL
LICEA ROSALES,)	
)	
)	
Defendants.)	
_____)	

I.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants Olga Lilia Toscano ("Defendant Toscano") and Maria Licea Rosales ("Defendant Rosales") (collectively, "Defendants") were indicted for one count of conspiracy in violation of 18 U.S.C. § 371 ("Count 1"), ten counts of mail fraud in violation of 18 U.S.C. § 1341 ("Counts 2-11"), and one count each for use of the mails to promote and carry on unlawful activity in violation of 18 U.S.C. § 1952(a)(3) ("Counts 12-13"). The Indictment alleged that Defendants, who were "marketers" at Millenium Outpatient Surgery Center ("MOSC"), illegally recruited

1 patients to undergo unnecessary medical procedures that could be
2 billed to insurance companies at exorbitant rates in exchange for
3 kickbacks, such as money and free or discounted cosmetic surgery.

4 On December 19, 2007, the jury returned verdicts of
5 guilty and not guilty as to some counts, and a mistrial was
6 declared as to others.¹ Following the trial, "Juror R" disclosed
7 in a declaration that jurors may have consulted the Internet using
8 a wireless device for the meaning of the word "scheme," which was
9 used in the jury instructions. Other jurors, "Juror P" and "Juror
10 S," denied in their declarations that any extrinsic information was
11 introduced into deliberations. Juror S was the juror with the
12 wireless device in question, an iPhone.

13 On February 4, 2008, Defendant Rosales filed a Motion for
14 Acquittal or, Alternatively, for a New Trial. On February 5, 2008,
15 Defendant Toscano filed a Motion for a New Trial. On April 18,
16 2008, the government filed opposition to all motions. On May 7,
17 2008, Defendant Rosales filed a reply. On May 13, 2008, Defendant
18 Rosales filed a corrected reply. The Court held a hearing on
19 Defendants' motions on May 16, 2008. At the hearing, Defendant
20 Toscano orally moved to join in Defendant Rosales' Motion for

21 //

22 //

24 ¹ The jury found Defendant Toscano guilty as to counts 1, 2,
25 7, 9, and 10, and not guilty as to counts 3, 4, and 8. The jury
26 found Defendant Rosales guilty as to counts 1 and 6, and not
27 guilty as to counts 3, 4, and 8. A mistrial was declared for
28 count 6 as to Defendant Toscano and for counts 2, 7, 9, and 10 as
to Defendant Rosales. Counts 5, 11, 12, and 13 were dismissed by
the government during the course of the trial, prior to the jury
verdict.

1 Acquittal.² After hearing testimony from Juror R, the Court took
2 all motions under submission.

3 By this Order, the Court denies the requested acquittals
4 on the basis that when the evidence is viewed in the light most
5 favorable to the government, a rational trier of fact could have
6 found Defendants guilty beyond a reasonable doubt. The Court finds
7 that Defendants' grounds for a new trial are not well-taken, and,
8 that, among other things, no jury misconduct occurred.

9 **II.**

10 **SUMMARY OF PARTIES' CONTENTIONS**

11 **A. Defendants' Motions under Federal Rules of Criminal**
12 **Procedure 29(c) and 33**

13 Based on the aforementioned facts, Defendants are
14 entitled to new trials because the jury was improperly exposed to
15 extrinsic information during deliberations and, if necessary, to
16 compel an evidentiary hearing to assess the juror misconduct and
17 its effect on the verdict. See, e.g., United States v. Rosenthal,
18 454 F.3d 943, 949 (9th Cir. 2006); United States v. Steele, 785
19 F.2d 743, 746 (9th Cir. 1986); Gibson v. Clanon, 633 F.2d 851, 855
20 (9th Cir. 1980).

21 Acquittal or, alternatively, a new trial, is warranted on
22 several additional grounds. First, the government produced
23 insufficient evidence at trial to support the convictions for
24 _____

25 ² Because Defendant Toscano joins Defendant Rosales' Motion
26 for Acquittal, and because Defendant Toscano did not separately
27 file moving papers or orally state on what grounds she moves for
28 acquittal, the Court construes her oral motion to join Defendant
Rosales' motion as joining on all grounds raised therein, with
the exception of those grounds which clearly only apply to
Defendant Rosales, as specified in this Order.

1 conspiracy and the individual mail fraud counts. Second, the
2 introduction of evidence at trial, over objection, regarding
3 patients and surgery centers not named in the Indictment
4 constituted a variance that warrants dismissal of the Indictment
5 and/or acquittal. Third, Defendant Rosales was prejudiced by the
6 Court's denying her motion for severance, in light of testimony
7 that her co-defendant engaged in efforts to influence grand jury
8 testimony and made admissions to other parties. Fourth, the Court
9 erroneously admitted highly prejudicial lay opinion based on
10 perceptions that they instructed patients to fabricate symptoms
11 when examined by MOSC doctors. Fifth, the Court erred in allowing
12 and refusing certain jury instructions. In particular, it was
13 error to instruct the jury that commercial bribery could be a basis
14 to find a conspiracy; that it was error to refuse Defendants'
15 proposed instruction, based on Chiarella v. United States, 445 U.S.
16 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980), that failure to
17 disclose information cannot constitute fraud unless there is an
18 affirmative duty to disclose; that it was error to deny an
19 instruction regarding the legal effect of kickbacks; and, finally,
20 that it was error to not instruct the jury to acquit Defendants if
21 it found multiple conspiracies or schemes, as opposed to one
22 overall scheme.

23 **B. Government's Consolidated Opposition**

24 Defendants have failed to show, by a preponderance of the
25 evidence, that the jury was exposed to, or considered, extrinsic
26 information during deliberations. United States v. Caro-Quintero,
27 769 F. Supp. 1564, 1574 (C.D. Cal. 1991). Even if the alleged
28 juror misconduct took place, the information's introduction to

1 deliberations did not prejudice Defendants and, accordingly, does
2 not necessitate further evidentiary proceedings or a new trial.
3 See id.; United States v. Aquirre, 108 F.3d 1284, 1288 (10th Cir.
4 1997).

5 Moreover, Defendants' arguments regarding the sufficiency
6 of the evidence are unfounded, since both direct and circumstantial
7 evidence was presented at trial sufficient for a rational jury to
8 infer Defendants' intent to promote the objects of the conspiracy
9 and to commit mail fraud. The inclusion of 404(b) and
10 "inextricably intertwined" evidence pertaining to patients and
11 other surgery centers not named in the Indictment did not
12 constitute a prejudicial variance, since the evidence need not
13 support only the conspiracy charged in the Indictment to the
14 exclusion of other possible conspiracies.

15 The Court committed no error in denying Defendant
16 Rosales' motion to sever. It gave appropriate limiting
17 instructions to the jury regarding what evidence was admissible as
18 to each Defendant. Zafiro v. United States, 506 U.S. 534, 538,
19 541, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Furthermore, the
20 statements in question were properly received as admissions by a
21 party opponent under either an adoptive admission theory pursuant
22 to Federal Rule of Evidence 801(d)(2)(B) or as a co-conspirator
23 statement under Federal Rule Evidence 801 (d)(2)(E).

24 Finally, the lay opinion of government witnesses was
25 properly admitted under Federal Rule of Evidence 701 and no error
26 occurred in denying Defendants' proposed jury instructions, as each
27 proposed instruction represented an incorrect statement of the law.

28 //

1 **C. Defendants' Reply**

2 The conflicting statements in the three jurors'
3 declarations warrant holding an evidentiary hearing during which
4 all twelve jurors could be examined. It is particularly necessary
5 to have a hearing because the portions of the jurors' affidavits
6 which purport to describe the subjective effect of the extrinsic
7 information on other jurors are inadmissible. Fields v. Brown, 503
8 F.3d 755, 802-803 (9th Cir. 2007). The Court should additionally
9 grant acquittal or a new trial on the grounds set forth in the
10 original moving papers.

11 **III.**

12 **DISCUSSION**

13 **A. Legal Standards**

14 **1. Rule 29(c) Motion**

15 A judgment of acquittal under Fed. R. Crim. Proc. 29(c)
16 is improper if the district court finds that, "viewing the evidence
17 in the light most favorable to the government, a rational trier of
18 fact could have found the defendant guilty beyond a reasonable
19 doubt." United States v. Ching Tang Lo, 447 F.3d 1212, 1221 (9th
20 Cir. 2006); United States v. Alston, 974 F.2d 1206, 1210-11 (9th
21 Cir. 1992). Stated another way, sufficient evidence exists to
22 support a conviction if the district court concludes that a
23 rational trier of fact "could have found the essential elements of
24 the crime beyond a reasonable doubt." Ching Tang Lo, 447 F.3d at
25 1225; United States v. Norris, 428 F.3d 907, 914 (9th Cir. 2005).
26 In reviewing a motion for judgment of acquittal, the government is
27 entitled to all reasonable inferences that might be drawn from the
28 evidence. United States v. Johnson, 804 F.2d 1078, 1083 (9th Cir.

1 1986). This standard gives "full play to the responsibility of the
2 trier of fact fairly to resolve conflicts in the testimony, to
3 weigh the evidence, and to draw reasonable inferences from basic
4 facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 99 S.
5 Ct. 2781, 319, 61 L. Ed. 2d 560 (1979).

6 **2. Rule 33 Motion**

7 A district court may vacate a judgment and grant a new
8 trial "if the interest of justice so requires." Fed. R. Crim. P.
9 33. "A district court's power to grant a motion for a new trial is
10 much broader than its power to grant a motion for judgment of
11 acquittal." Alston, 974 F.2d at 1211. Nevertheless, the Court of
12 Appeals for the Ninth Circuit has stated that a motion for a new
13 trial should be granted "only in exceptional cases in which the
14 evidence preponderates heavily against the verdict." United States
15 v. Pimentel, 654 F.2d 538, 545 (9th Cir. 1981).

16 **B. Analysis**

17 **1. Juror Misconduct**

18 When inquiring into the validity of a verdict after
19 alleged juror misconduct, the Court's analysis must comport with
20 the limitations set forth in Federal Rule of Evidence 606(b):

21 Upon inquiry into the validity of a verdict or
22 indictment, a juror may not testify as to any
23 matter or statement occurring during the course
24 of the jury's deliberations or to the effect of
25 anything upon that or any other juror's mind or
26 emotions as influencing the juror to assent or
27 to dissent from the verdict or indictment or
28 concerning the juror's mental processes in
connection therewith. But a juror may testify
about (1) whether extraneous prejudicial
information was improperly brought to the
jury's attention, (2) whether any outside
influence was improperly brought to bear upon
any juror, or (3) whether there was a mistake
in entering the verdict onto the verdict form.

1 A juror's affidavit or evidence of any
2 statement by the juror may not be received on a
3 matter about which the juror would be precluded
4 from testifying.

5 The determination of whether a jury's exposure to
6 extrinsic evidence or other information during deliberations
7 warrants a new trial initially proceeds in two steps. "The first
8 step of the analysis requires the defendants to prove by a
9 preponderance of credible evidence that the jury was exposed to
10 extrinsic evidence." Caro-Quintero, 769 F. Supp. at 1574. "There
11 is no presumption that the jury was exposed to extrinsic
12 information. In fact, there is an opposite presumption that the
13 jury performed its duties faithfully and diligently." Id.³

14 If the Court finds the jury was improperly exposed to
15 extrinsic information, the Court must then determine whether such
16 information reasonably could have affected the verdict (not whether
17 it "actually affected" the verdict). Id.; see also Steele, 785
18 F.2d at 746 ("The jurors' improper use of the dictionary to
19 determine the precise definition of several words does not require
20 reversal unless there is a reasonable possibility that the
21 extrinsic material could have affected the verdict." (citing United
22 States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979))); United
23 States v. Bagley, 641 F.2d 1235, (9th Cir. 1981) (stating Vasquez
24 "reasonable possibility" proper inquiry in examining effect of

25 ³ The analysis appears to be the same whether "evidence" or
26 other types of information are at issue. See Rosenthal, 454 F.3d
27 at 949 ("Extraneous-evidence cases involve not only the
28 introduction of 'evidence' per se but the 'submission of
"extraneous information" (e.g., a file or dictionary) to the
jury.'" (quoting United States v. Madrid, 842 F.2d 1090, 1093
(9th Cir. 1988)).

1 extrinsic material on verdict). To assess the possibility that the
2 alleged juror misconduct affected the verdict, the Ninth Circuit
3 has stated that "[t]he trial court, upon learning of a possible
4 incident of juror misconduct, must hold an evidentiary hearing to
5 determine the precise nature of the extraneous information."
6 Steele, 785 F.2d at 746.⁴ "An evidentiary hearing must be granted
7 unless the alleged misconduct could not have affected the verdict
8 or the district court can determine from the record before it that
9 the allegations are without credibility." United States v.
10 Navarro-Garcia, 926 F.2d 818, 822 (9th Cir. 1991). "The extent of
11 a hearing or the way a hearing is conducted is at the Court's
12 discretion." Caro-Quintero, 769 F. Supp. at 1570. A trial judge's
13 determination regarding the likelihood, or lack of likelihood, that
14 extraneous information affected the verdict is reviewed "in the
15 context of the entire record," for the reason that:

16 The trial judge is uniquely qualified to
17 appraise the probable effect of information on
18 the jury, the materiality of the extraneous
19 material, and its prejudicial nature. He or
20 she observes the jurors throughout the trial,
 is aware of the defenses asserted, and has
 heard the evidence. The judge's conclusion
 about the effect of the alleged juror
 misconduct deserves substantial weight.

21 Steele, 785 F.2d at 746 (quoting United States v. Bagnariol, 665
22 F.2d 877, 885 (9th Cir. 1981)).

23 If the Court determines there is a reasonable possibility
24 the extrinsic material could have affected the verdict, "[t]he

26 ⁴ Defendants' extensive citation to Fields is to a
27 dissenting opinion for the proper uses of juror declarations.
28 503 F.3d at 802-803. The Court limits its consideration of the
juror declarations to the uses permitted by Federal Rule of
Evidence 606(b).

1 government bears the burden of proving that constitutional errors
2 are harmless beyond a reasonable doubt." Caro-Quintero, 769 F.
3 Supp. at 1574; see also Marino v. Vasquez, 812 F.2d 499, 505 (9th
4 cir. 1987) (hereinafter "Marino," to distinguish from other Vasquez
5 case) ("[U]nauthorized reference to dictionary definitions
6 constitutes reversible error which the State must prove harmless
7 beyond a reasonable doubt."). The government can establish
8 harmless error "by showing that the extraneous material was merely
9 duplicative of evidence introduced in open court," or by showing
10 that "the other evidence amassed at trial was so overwhelming that
11 the jury would have reached the same result even without the
12 extraneous material." Caro-Quintero, 769 F. Supp. at 1574 (citing
13 Hughes v. Borg, 898 F.2d 695, 700 (9th Cir. 1990)).

14 **(a) No Extrinsic Data Reached the Deliberating Jury**

15 In this case, the evidence of jury misconduct provided to
16 the Court prior to the May 16, 2008 hearing consisted of three
17 juror declarations - the declaration of Juror R, who served as the
18 foreperson, the declaration of Juror S, who is accused of
19 introducing the extrinsic information, and the declaration of Juror
20 P. The declarations of the latter two jurors directly contradict
21 Juror R's declaration. Whereas Juror R states that Juror S read
22 "the first couple of sentences" of the definition of the word
23 "scheme," Juror P says that "[a]t no time did [Juror S] read
24 anything from her device to the jury." (Compare Juror R Decl. ¶¶
25 3, 4 with Juror P Decl. ¶ 3). Juror S likewise asserts that she
26 "did not actually obtain the definition of the word scheme from
27 [her] iPhone" and that she "did not read anything from the iPhone
28 to the other jurors." (Juror S Decl. ¶ 2).

1 The government points out that Juror R does not
2 specifically state what, if any, information was introduced to the
3 jury. This is accurate: though Juror R states in his declaration
4 that a definition for "scheme" was read, he does not relate any
5 particular content. However, the fact that Juror R states that
6 "the first couple of sentences of the definition" of scheme were
7 read to the jury necessarily causes concern.

8 At the May 16, 2008 hearing on the instant motions, the
9 Court permitted Defendants to call Juror R to testify and
10 supplement the evidentiary record regarding the events described in
11 his declaration.⁵ The Court inquired of Juror R regarding the
12 precise nature of the extrinsic information allegedly introduced
13 during deliberations:

14 Court: Tell us in the best words you can or
15 the memory that you have what you heard that
16 juror say when she consulted the electronic
17 device?

18 The Witness: Scheme. And then she paused for
19 a moment. A plan, or group, or set - I'm not
20 sure of that word - of plans. Her next
21 syllable was then "in." And that was when she
22 stopped.

23 The Court cannot credit Juror R's statements, in either
24 his declaration or at the May 16, 2008 hearing, in light of the
25 evidence indicating Juror S attempted to obtain extrinsic
26 information but did not actually see the effort to completion. It
27 is evident from the sworn declarations of Juror P and Juror S that
28 the likely course of events consisted of Juror S volunteering to

⁵ Although it was pointed out by the government that Juror P was voluntarily present, Defendants did not call him as a witness.

1 look up the information and being told not to as she was in the
2 process of searching for the information. Though the declarations
3 of Juror R and Juror S conflict in this regard, the Court finds the
4 declaration of the juror who actually made use of the iPhone to
5 give a more credible account of what transpired. In his
6 declaration, Juror R states that Juror S read "the first couple of
7 sentences of the definition" but at the hearing he testified to
8 having heard only a few words. Moreover, the facts in the
9 declaration of Juror S are supported in their entirety by the
10 description of events in Juror P's declaration. Accordingly, the
11 preponderance of the evidence supports a finding by the Court that
12 the jury was not exposed to a dictionary/Internet definition of
13 "scheme." Caro-Quintero, 769 F. Supp. at 1574. Under the Caro-
14 Quintero framework, the analysis ends here. Id. The Court does so
15 find. If the jury was not exposed to the extrinsic information,
16 the Court can safely conclude that extrinsic information did not
17 affect the verdict. Id.; see also United States v. Plunk, 153 F.3d
18 1011, 1025 (9th Cir. 1998) ("Because none of the jurors in the
19 instant case ever actually viewed the definition of the word . . .
20 there could be no reasonable possibility that the evidence affected
21 the jury's deliberations." (internal quotations and citations
22 omitted)), overruled on other grounds, United States v. Hankey, 203
23 F.3d 1160, 1169 (9th Cir. 2000).

24 **(b) No Extrinsic Data Reasonably Could Have Affected the**
25 **Verdict**

26 Defendants argue that a further hearing involving all
27 remaining jurors is necessary to determine the effect Juror S's
28 statement had on other jurors, assuming Juror R's retelling of the

1 deliberation events is true. However, even assuming the alleged
2 extrinsic information was introduced to the jury, the Court concurs
3 with the government that there is no reasonable possibility such
4 information could have affected the verdict, and that, to the
5 extent it might possibly have, such error would be harmless beyond
6 a reasonable doubt. Caro-Quintero, 769 F. Supp. at 1575.

7 Accepting Juror R's account, Juror S read the definition
8 of the word scheme as "a plan, or group, or set . . . of plans."
9 The Court defined "scheme to defraud" in Jury Instruction No. 11 as
10 follows: "A 'scheme to defraud' is any deliberate plan of action
11 or course of conduct by which someone intends to deceive or cheat
12 another or by which someone intends to deprive another of something
13 of value." (See Court's Jury Instructions, at 15). The words "a
14 plan, or group, or set . . . of plans" are unambiguously subsumed
15 by the "any deliberate plan of action or course of conduct." (Id.
16 (emphasis added)). Even if extrinsic information was introduced to
17 the jury, then, it was, at most, "merely duplicative" of
18 information already available to the jury. Caro-Quintero, 769 F.
19 Supp. at 1574.

20 Cases cited by Defendants discussing jury misconduct in
21 the form of dictionary consultation do not require a contrary
22 conclusion. In Gibson, jurors consulted a medical dictionary to
23 obtain information regarding blood type rarity, information which
24 related to evidence previously deemed inadmissible by the Court and
25 which bolstered the credibility of a prosecution witness. 633 F.2d
26 at 855. In Steele, a copyright infringement prosecution case, the
27 bailiff provided the jury with a common dictionary without first
28 informing the court or the parties - the jurors proceeded to use

1 the dictionary to search for the definitions of a host of words,
2 including, *inter alia*, "plagiarism," "copyright," "infringement,"
3 and "doubt." 785 F.2d at 744. The Steele court, which presents
4 facts regarding dictionary use more akin to those alleged here,
5 found the type of breach in Gibson "readily distinguishable" from
6 its own facts. Id. at 747. Whereas in Gibson the extrinsic
7 dictionary information "bolstered the government's case" by
8 presenting to jurors facts in a manner "not tested for their
9 trustworthiness under our adversarial system of justice," in
10 Steele, where the jury looked to a dictionary for the meaning of
11 words, "no facts were gathered, and no evidence pointing to guilt
12 or discrediting a defense was presented by any of the jurors." Id.
13 Similarly here, no additional facts, much less facts previously
14 deemed inadmissible, are at issue. More importantly, though, in
15 affirming the trial court's denial of defendant's motion for a new
16 trial, the Steele court took note of the fact that many of the
17 words the jurors looked up in the dictionary were "not contrary to
18 any instruction given by the court." Id. Indeed, the court "did
19 not define" these words, even though "they were used in several
20 instructions." In this case, the alleged infraction is much less
21 significant than that in Steele, since the Court here did instruct
22 the jury on the definition of the word scheme as used in its
23 instructions *and* the words proffered by Juror R were "not contrary"
24 to such instructions. (See Court's Jury Instructions, Jury
25 Instruction No. 11, at 15).

26 Though not cited by Defendants, the Ninth Circuit also
27 dealt with juror use of dictionaries in Marino. 812 F.2d at 505.
28 In Marino, a state murder case before the court on a petition for

1 writ of habeas corpus, the uncontroverted evidence indicated that a
2 juror, after holding out against a guilty verdict for thirty days,
3 changed his vote to guilty after receiving the dictionary
4 definition for the word "malice." Id. In finding prejudicial
5 error, the Court observed that the dictionary definition of malice
6 on which the juror relied "differed materially from the trial
7 court's instruction on malice," since the dictionary's definition
8 omitted key elements of the offense, as detailed in the court's
9 instructions. Id. ("The substitute definition included no
10 consideration of the element of intent for the purpose of express
11 malice, nor did it reflect the factors that constitute implied
12 malice, where a killing results from an intentional act involving a
13 high probability that it will result in death, and is done for a
14 base antisocial purpose, and with a wanton disregard of human
15 life."). Unlike in Marino, the juror in the instant case is
16 alleged to have spoken only a few words that did not "differ[]
17 materially" from the Court's Jury Instructions. See also United
18 States v. Kupau, 781 F.2d 740, 744 (9th Cir. 1986) (finding use of
19 dictionary by jury harmless because "[t]he words whose definitions
20 were ascertained had negligible bearing on the case"); Aquirre, 108
21 F.3d at 1289 (finding no prejudice after jury used dictionary to
22 search for word "distribution" because court did not believe "the
23 dictionary definition of [the word] differs appreciably or is less
24 demanding than [the] legal definition provided by the district
25 court," such that "to the extent any of the jurors determined
26 [defendant] engaged in distribution under the term's dictionary
27 meaning, they also determined [he] engaged in distribution under
28 its legal definition").

1 Other factors point to an absence of prejudice. The
2 government cites to a Tenth Circuit case setting forth a five-
3 factor test for determining whether the prosecution has
4 successfully rebutted the presumption of prejudice arising from the
5 introduction of extraneous information specifically in the form of
6 dictionary definitions. Aquirre, 108 F.3d at 1288. Under Aquirre,
7 the Court considers the following:

8 (1) The importance of the word or phrase being
9 defined to the resolution of the case. (2) The
10 extent to which the dictionary definition
11 differs from the jury instructions or from the
12 proper legal definition. (3) The extent to
13 which the jury discussed and emphasized the
14 definition. (4) The strength of the evidence
15 and whether the jury had difficulty reaching a
16 verdict prior to introduction of the dictionary
17 definition. (5) Any other factors that relate
18 to a determination of prejudice.

14 Aquirre, 108 F.3d at 1288. A similar test (of general
15 applicability) has been used by courts in the Ninth Circuit to
16 assess the effect of extraneous material on jury deliberation.⁶ As
17 to the first Aquirre factor, the government argues that the word
18 "scheme" does not carry the level of importance Defendants assign
19 it because the operative words in the Court's Jury Instructions
20 were "fraud" and "defraud" - words which were typically coupled
21 with the "scheme" in the instructions. The terms "fraud" and
22

23 ⁶ Under Ninth Circuit cases, the Court considers: "[1]
24 [W]hether the material was actually received and if so how; [2]
25 the length of time it was available to the jury; [3] the extent
26 to which the jurors discussed and considered it; [4] whether the
27 material was reached and if so at what point in the
28 deliberations; and [5] other matters which bear on the issue of
reasonable possibility of whether the extrinsic material affected
the verdict." Caro-Quintero, 769 F. Supp. at 1575 (citing
Marino, 812 F.2d at 504 (9th Cir. 1987)); see also Plunk, 153
F.3d at 1024-25; Navarro-Garcia, 926 F.2d at 822-23.

1 "defraud" were clearly important to the resolution of the case,
2 since they served as the key qualifiers to the term "scheme."
3 However, the meaning of "scheme," even when coupled with the words
4 "fraud" and/or "defraud," is also independently important to the
5 case, since it is used in the Court's Jury Instructions -
6 particularly, Jury Instructions Nos. 9, 10, 11, and 12 - to
7 describe the relevant culpable conduct the jury was tasked with
8 finding when reviewing the evidence. (See Court's Jury
9 Instructions, at 12-16). Accordingly, while not singularly
10 important, "scheme" was an important term in the Court's Jury
11 Instructions and, consequently, to the resolution of the case.
12 Aguirre's first factor supports Defendants' position.

13 The second Aguirre factor does not counsel in favor of
14 finding prejudice, however. As discussed above, the dictionary
15 definition which Juror R asserts was introduced to the jury was not
16 inconsistent with the definition provided in the Court's Jury
17 Instructions, but rather, was encompassed by it.

18 The third Aguirre factor disfavors a finding of prejudice
19 as well. The declarations of Juror P and Juror S are both in
20 agreement that the incident at issue as described by Juror R did
21 not occur because Juror S immediately complied with the
22 foreperson's request that she not use her electronic device to
23 attempt to consult extrinsic information. (Juror P Decl. ¶¶ 2, 3;
24 Juror S Decl. ¶ 2). Juror R's account contradicts the accounts of
25 Jurors P and Juror S, but his declaration omits the definition he
26 claims was verbalized. Juror R did not supply the definition he
27 claims he heard until weeks later at the May 16, 2008 hearing. As
28 already stated, in light of the contrary evidence provided by the

1 other two jurors, the Court finds it doubtful Juror R is correct
2 and highly likely Juror P and Juror S are accurate in their account
3 of what transpired with Juror S's iPhone.

4 As to the fourth Aguirre factor, which relates to the
5 strength of the evidence, the government argues, and the Court
6 agrees, that the evidence from which the jury could infer
7 Defendants' guilt was quite strong. It included, *inter alia*,
8 testimony of witnesses who were recruited by Defendants for
9 unnecessary medical procedures in exchange for money or cosmetic
10 surgery; testimony of multiple witnesses that they learned of
11 Defendants through employees of companies at which Defendants
12 worked or recruited other employees; testimony of multiple
13 witnesses that Defendants coached patients to state false symptoms;
14 testimony that Defendants falsely told patients they would not be
15 responsible for insurance co-payments; evidence that Defendants
16 knew claim packets containing false information regarding patients'
17 symptoms and co-pay responsibility would be sent to insurance
18 companies using the mails; and, witness testimony regarding
19 Defendants' admitting to knowing the fraudulent nature of their
20 marketing practices at MOSC. A finding that the "other evidence
21 amassed at trial was so overwhelming that the jury could have
22 reached the same result even without the extraneous material"
23 suffices, in itself, to establish harmless error. Caro-Quintero,
24 769 F. Supp. at 1574.

25 The Court finds an absence of prejudice to Defendants
26 even assuming the extrinsic information was received and considered
27 by the jury. The same result obtains under the Ninth Circuit's
28

1 more general test.⁷ Id. at 1575. If Juror R's account is taken as
2 true, "the length of time [the definition] was available to the
3 jury" and "the extent to which the jurors discussed and considered"
4 the definition was extremely brief. Id. According to Juror R's
5 testimony, Juror S stopped talking and put away her iPhone after
6 stating only a few words. This is insignificant when compared to
7 the facts of Steele, for example, where a dictionary was available
8 to the jury for "approximately two hours." 785 F.2d at 745. As
9 such, the first three factors of the Ninth Circuit's test disfavor
10 a finding of prejudice. Caro-Quintero, 769 F. Supp. at 1575. As
11 to the fourth factor, regarding the timing of the extrinsic
12 material's introduction, Juror R's account of events states that
13 the material came toward the end of deliberations.

14 In sum, the Court finds that no extrinsic information
15 reached the jury. The Court further finds that even if the alleged
16 extrinsic information did reach the jury, it could not reasonably
17 have affected the verdict and that the government has proven beyond
18 a reasonable doubt that any such influence was harmless.

19 Defendants' request for an evidentiary hearing, in
20 addition to that already had with Juror R, is denied. The Court in
21 denying Defendants' motion has already considered a scenario where
22 all jurors were exposed to and considered the information Juror R
23 claims was introduced during deliberations and finds no possibility
24 of prejudice to Defendants. Holding further evidentiary
25 proceedings with the nine remaining jurors, within the confines of
26 Fed. R. Evid. 606(b), will not likely produce additional

27
28 ⁷ See Footnote 6, *supra*.

1 information, given the evidence of record. The law does not
2 encourage inquiry into jury room deliberations - a procedure that
3 historically derives its effectiveness from the assurance to jurors
4 of the confidentiality of their discussions - when it is
5 overwhelmingly clear a further evidentiary hearing would be
6 fruitless.

7 **2. Sufficiency of the Evidence**

8 Defendants argue the government was required to show
9 Defendants committed or conspired to commit commercial bribery, but
10 that there is "no evidence that the patients were using their
11 respective positions as employees in any corrupt way." (See
12 Motion, at 7). The government contends that testimony against
13 Defendants to the effect that they recruited insured employees,
14 coached them so that they exaggerated symptoms, and promised them
15 they would not be responsible for co-payments, as well as other
16 evidence, sufficiently allowed the jury to infer the Defendants'
17 intent to induce employees to defraud their employers. (See
18 Opposition, at 7-8). The elements of commercial bribery, set forth
19 in the Court's Jury Instruction No. 8, hold that a person is guilty
20 of the offense if she "offers or gives an employee money or
21 anything of value" without "the knowledge or consent of the
22 employer," in exchange for "the employee using his or her position
23 to benefit that other person." (See Court's Jury Instructions, at
24 10). The evidence identified by the government provides a
25 sufficient evidentiary basis from which a jury could find these
26 elements were satisfied.

27 Defendants also claim the government produced
28 insufficient evidence that they knew about MOSC's billing and

1 mailing procedures and, accordingly, lacked the requisite knowledge
2 to support a conspiracy conviction. This argument is unavailing.
3 The government produced testimony from co-employees that Defendants
4 knew insurance claims packages containing false information would
5 be mailed. Moreover, the insurance forms Defendants completed with
6 patients made it clear on their face that they were to be mailed.

7 Defendants additionally challenge the government's theory
8 that they had knowledge of an ongoing conspiracy because they
9 failed to disclose the "kickbacks" patients received for undergoing
10 medical procedures. Defendants rely on Chiarella to argue that a
11 specific duty to disclose is required to support criminal liability
12 for failing to disclose kickbacks and that the Court should have
13 supplied an instruction to this effect. 445 U.S. at 235.

14 Chiarella, however, specifically interprets the Securities Exchange
15 Act and does not require the instruction requested by Defendants.
16 This argument does not support an acquittal or a new trial.

17 Lastly, Defendants raise an argument regarding the
18 existence of multiple conspiracies. Specifically, they argue the
19 evidence presented supports a finding of several conspiracies,
20 rather than just one overall conspiracy. From a sufficiency of the
21 evidence perspective, government's point in opposition is well-
22 taken - the evidence does not have to exclude every hypothesis
23 except guilt, rather, the inquiry is whether a jury could
24 reasonably arrive at its verdict from the evidence. United States
25 v. Mares, 940 F.2d 455, 458 (9th Cir. 1991). Though Defendants
26 argue that the evidence can be interpreted in such a way as to
27 support multiple minor conspiracies rather than just one, this does
28 not necessarily exclude the possibility that a jury could have

1 reasonably interpreted the evidence differently in finding one
2 overall conspiracy which included both Defendants.

3 The Ninth Circuit Model Jury Instructions ("MJI") include
4 a multiple conspiracies instruction echoing Defendants' concerns.

5 See MJI 13.3. The instruction states (with emphasis added):

6 You are further instructed, with regard to the
7 alleged conspiracy offense, that proof of
8 several separate conspiracies is not proof of
9 the single, overall conspiracy charged in the
10 indictment *unless one of the several*
11 *conspiracies which is proved* is the single
12 conspiracy which the indictment charges. What
13 you must do is determine whether the single
14 conspiracy charged in the indictment existed
15 between two or more conspirators. If you find
16 that no such conspiracy existed, then you must
17 acquit the Defendants of that charge. However,
18 if you decide that such a conspiracy did exist,
19 you must then determine who the members were;
20 and, if you should find that a particular
21 Defendant was a member of some other
22 conspiracy, not the one charged in the
23 indictment, then you must acquit that
24 Defendant.

25 In other words, to find a defendant guilty you
26 must unanimously find that such a defendant was
27 a member of the conspiracy charged in the
28 indictment and *not a member of some other*
separate conspiracy.

19 The MJI is at odds with Defendants' argument that the jury should
20 have been instructed regarding "the requirement of an acquittal if
21 multiple conspiracies or schemes were found, instead of one overall
22 scheme as alleged" in the Indictment. (See Motion, at 15).

23 Instead, the MJI supports government's position. Additionally, the
24 Ninth Circuit has held as follows in response to similar arguments:

25 [W]e view the question of whether a single
26 conspiracy has been proved, rather than
27 multiple conspiracies, as essentially that of
28 sufficiency of the evidence. The evidence need
not be such that it excludes every hypothesis
but that of a single conspiracy; rather, it is
enough that the evidence adequately supports a

1 finding that a single conspiracy exists.
2 United States v. Kenny, 645 F.2d 1323, 1335 (9th Cir. 1981); see
3 also United States v. Bibbero, 749 F.2d 581, 586 (9th Cir. 1984)
4 (same). The Court finds the evidence produced at trial was
5 sufficient to find the single conspiracy alleged in the Indictment,
6 even if, in addition, it lent itself to other possibilities.
7 Defendants' argument, as such, does not compel the relief they
8 seek.

9 Defendants rely on the same arguments regarding the
10 insufficiency of the evidence for the conspiracy count as they do
11 for the individual mail fraud counts. Accordingly, neither a
12 judgment of acquittal or a new trial are warranted on these bases.

13 3. Variance

14 Defendants' variance argument mirrors their argument
15 regarding the insufficiency of the evidence. To the extent
16 Defendants argue there was material variance because of the
17 existence of "multiple conspiracies," this argument, for the
18 foregoing reasons, is rejected.

19 Defendants' reply papers supplement their argument by
20 contending that a material variance additionally occurred because
21 "other acts" and/or "inextricably intertwined" evidence admitted at
22 trial impermissibly broadened the scope of the Indictment. The
23 Jury Instructions, they additionally claim, were ineffective in
24 limiting the jury's reliance on such evidence. Defendants'
25 objections to the admission of the other acts or inextricably
26 intertwined evidence essentially challenges the Court's ruling on

27 //

28 //

1 the parties' motions *in limine*.⁸ As an initial matter, Defendants
2 appear to overstate the importance of the government's references
3 to this evidence in closing arguments. (Reporter's Transcript,
4 Dec. 17, 2007, Vol. 1, at 67-68). Though the government did refer
5 to this evidence in closing, the jury was only required to find the
6 performance of one overt act for the purposes of finding a
7 conspiracy. (See Court's Jury Instructions, at 7). It is more
8 than reasonable, especially when the evidence is viewed in favor of
9 the government, that the jury could have concluded that the acts
10 which served as the basis for the mail fraud convictions (and which
11 were alleged in the Indictment) could have constituted these overt
12 acts.

13 Defendants contend the Indictment's alleged "broadening"
14 prejudiced their substantial rights because it gave them inadequate
15 time to prepare a defense. The government, however, provided the
16 requisite notice of its intent to introduce such evidence. (See
17 Docket No. 148). Since the government complied with the Federal
18 Rules of Evidence's notice requirement, and consistent with the
19 Court's previous determination that the evidence in question
20 constitutes permissible other acts and/or inextricably intertwined
21 evidence, Defendants' arguments are unavailing. See Fed. R. Evid.
22 404(b) (requiring that the prosecution provide "reasonable notice"
23 of intention to introduce 404(b) other acts evidence).⁹

24
25 ⁸ Defendants distinguish the evidence admitted by the Court
26 as either "inextricably intertwined" or Rule 404(b) evidence, but
the Court's order found the evidence admissible on both grounds.

27 ⁹ The Rule 404(b) notice sent by the government also
28 indicates it would seek to have the evidence in question
introduced as "inextricably intertwined" evidence.

1 **4. Severance**

2 Defendant Rosales contends evidence relating to Witness
3 Cornejo's testimony and evidence that her co-defendant, Defendant
4 Toscano, attempted to influence grand jury witnesses warranted
5 severance. Severance of a trial with multiple defendants is
6 appropriate when "there is a serious risk that a joint trial would
7 compromise a specific trial right of one of the defendants, or
8 prevent the jury from making a reliable judgment about guilt or
9 innocence." Zafiro, 506 U.S. at 539. A serious risk might occur
10 when a jury considers evidence against a defendant that would not
11 have been admissible if the "defendant were tried alone," such as
12 evidence of a co-defendant's "wrongdoing." Id. However, "less
13 drastic measures, such as limiting instructions, often will suffice
14 to cure any risk of prejudice." Id. Here, the Court provided such
15 a limiting instruction. Jury Instruction No. 35 clearly delineated
16 how Witness Cornejo's testimony could and could not be used. (See
17 Court's Jury Instructions, at 40). The Court, additionally,
18 provided a limiting instruction during trial as to the grand jury
19 tampering issue and invited the parties to submit further
20 instructions for the Court's review. None were submitted. This
21 issue does not warrant acquittal or a new trial.

22 **5. Lay Opinion Evidence**

23 Defendants suggest the testimony from witnesses about
24 what they heard Defendants tell patients while they were waiting to
25 see a doctor at MOSC constituted inadmissible lay opinion. Federal
26 Rule of Evidence 701 provides:

27 If the witness is not testifying as an expert,
28 the witness' testimony in the form of opinions
 or inferences is limited to those opinions or

1 inferences which are (a) rationally based on
2 the perception of the witness, (b) helpful to a
3 clear understanding of the witness' testimony
4 or the determination of a fact in issue, and
5 (c) not based on scientific, technical, or
6 other specialized knowledge within the scope of
7 Rule 702.

8 "The admission of lay opinion testimony is within the
9 broad discretion of the trial judge and not to be disturbed unless
10 it is manifestly erroneous." United States v. Simas, 937 F.2d 459,
11 464 (9th Cir. 1991). A witness' "understanding of . . . words and
12 innuendo" can be helpful to a jury in determining what defendant
13 meant to convey when she was speaking. Id. Testimony is not
14 helpful within the meaning of Rule 701 when it simply tells the
15 jury "what result to reach." United States v. Koon, 34 F.3d 1416,
16 1430 (9th Cir. 1994), reversed on other grounds, 518 U.S. 81, 116
17 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (reversing as to sentencing
18 guideline departures). Defendants contend the testimony was unduly
19 speculative because the witnesses often were not able to connect
20 their impressions to particular patients. While it is true this
21 injects some level of ambiguity to the testimony, it is not true
22 that it renders the witnesses' perception of the overheard
23 statements themselves unhelpful to the jury. The Court's admission
24 of the challenged testimony was thus not "manifest[] error[]" and
25 does not merit acquittal or a new trial. Simas, 937 F.2d at 464.

26 **6. Jury Instructions**

27 Defendants raise several objections relating to the
28 Court's Jury Instructions, all of which have previously been
overruled by the Court. For reasons discussed in other sections of
this order, the contention that the Court erred in regard to
instructing the jury on commercial bribery, that it erred in not

1 providing an instruction based on Chiarella, and that it erred in
2 not instructing regarding multiple conspiracies, are not well
3 founded. Defendants additionally contend the Court committed error
4 in not using the following proposed instruction:

5 The mere payment of a 'kickback' does not
6 constitute health care fraud; there must in
7 addition be an affirmative act of false or
8 fraudulent representation in relation to said
9 'kickback.'

10 It was not error to omit this instruction. The
11 Indictment did not charge the Defendants with health care fraud,
12 which is a separate offense. See 18 U.S.C. § 1347. Moreover, the
13 case on which Defendants rely in support of this instruction
14 expressly limits its discussion regarding kickbacks to its specific
15 facts. United States v. Medina, 485 F.3d 1291, 1298 (11th Cir.
16 2007). Defendants are not entitled to acquittal or a new trial on
17 this basis.

18 IV.

19 CONCLUSION

20 The Court denies Defendants' motions for acquittal. When
21 the evidence is viewed in the light most favorable to the
22 government, a rational trier of fact could have found Defendants
23 guilty beyond a reasonable doubt. The Court also denies
24 Defendants' motions for a new trial.

25 IT IS SO ORDERED.

26 IT IS FURTHER ORDERED that the Clerk shall serve a copy
27 of this Order on counsel for all parties in this action.

28 DATED: June 10, 2008.

ALICEMARIE H. STOTLER

ALICEMARIE H. STOTLER
CHIEF U.S. DISTRICT JUDGE