THOMAS P. O'BRIEN
United States Attorney
CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division
BRUCE H. SEARBY (SBN 183267)
Assistant United States Attorney
JONATHAN E. LOPEZ (SBN 210513)
Senior Trial Attorney, Fraud Section
United States Department of Justice
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-5423
Facsimile: (213) 894-6269
bruce.searby@usdoj.gov

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GERALD GREEN and PATRICIA GREEN, Defendants.	CR No. 08-59(B)-GW GOVERNMENT'S OPPOSITION TO MOTION TO PRECLUDE PROSECUTORS' USE OF THE TERM "BRIBE" OR ITS SYNONYMS AT TRIAL WITH SOME EXCEPTIONS; MEMORANDUM OF POINTS AND AUTHORITIES Pre-trial Conf. Date: 7/27/09 Pre-trial Conf. Time: 8:30 a.m.

Plaintiff, the United States of America, by and through the United States Attorney's Office for the Central District of California, and the Fraud Section, United States Department of Justice, Criminal Division (together, "the Government"), hereby files this opposition to the Motion to Preclude Prosecutors' use of the Term "Bribe" or its Synonyms at Trial filed by defendants Gerald Green and Patricia Green ("the Motion").

This opposition is based upon the attached memorandum of points and authorities, all the files and records of this case, and such other facts and evidence as the Court may admit.

DATED: July 20, 2009

THOMAS P. O'BRIEN
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

/s/
BRUCE H. SEARBY
Assistant United States Attorney
JONATHAN E. LOPEZ
Senior Trial Attorney
United States Department
of Justice, Fraud Section

Attorneys for Plaintiff
UNITED STATES OF AMERICA

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants' Motion seeks to preclude the Government from using the words "bribe," "kickback," or similar terms at trial (other than in opening statements or closing argument) on the basis that the use of such words by the Government (a) would necessarily illicit inadmissable evidence in the form of improper lay testimony under Rule 701; and (b) is unduly prejudicial. As discussed below, both claims are without merit.

The words "bribe," "kickback," and similar terms are common terms that a lay witness may use in his or her vocabulary while testifying to the relevant facts of the case. That this case involves the Foreign Corrupt Practices Act ("FCPA") does not transform the word "bribe" to a term as to which only an expert is qualified to an offer an opinion. Indeed, contrary to defendants' assertions, the words "bribe" and "kickback" are not even mentioned in the text of FCPA, let alone defined in that statute. Nor does a prosecutor's or witnesses' use of the words "bribe," "kickback," or similar terms provide an impermissible window into the defendant's state of mind or constitute some other impermissible legal conclusion. Words such as "bribe" and "kickback" are routinely used by prosecutors and witnesses in corruption, tax, mail fraud, and other federal criminal cases throughout the country –- including in this District and Courthouse. Defendants fail to cite a single case in which the use of such words was held to be an impermissible legal conclusion or opinion on a defendant's state of mind.

Similarly, the Government's or witnesses' use of such terms is not unduly prejudicial. There is nothing about the word "bribe" that will provoke such an emotional response with the jury that unfair prejudice will result. Nor is the use of the word "bribe" or "kickback" so confusing that the jury will be left bewildered as how to weigh the evidence in this case or consider the crimes charged. Moreover, it is difficult to fathom how such terms may properly be used by the Government in opening and closing, but become "unduly prejudicial" if used by the Government at any other point in the trial.

Accordingly, defendants' Motion should be DENIED.

II.

DISCUSSION

A. USE OF THE TERM "BRIBE," "KICKBACK," OR SIMILAR WORDS BY THE GOVERNMENT OR THE WITNESSES DOES NOT CONSTITUTE INADMISSIBLE LAY TESTIMONY.

Defendants' Motion is based on the incorrect premise that under the FCPA, the term "bribery" has a specific statutory definition that includes corrupt intent; and that consequently, any use of the word by the Government, or by witnesses in response to prosecutors' questions, constitutes an impermissible commentary on the defendants' mental state in violation of Rule 701 of the Federal Rules of Evidence.[1] Defendant's assumptions and arguments have no basis in the FCPA statute, case law, or common sense.

[1] Defendants do not challenge use of the words "bribe," "kickback" or similar by their own counsel. Evidently, defense counsel is capable of using such words without illiciting inadmissible lay testimony or prejudicing the jury.

Defendants' assertion that "bribery" has a specific statutory definition within the FCPA is troubling at best –- as this assertion is just plain wrong. (Motion at 3, 6.) Nowhere in the text of the FCPA is the word "bribe" or the word "kickback" mentioned, let alone defined. Therefore, the whole premise of the defendants' argument – that there is some precise legal definition of "bribery" that only someone with "specialized knowledge" can speak to – is baseless. While the Government certainly recognizes that the term "bribery" is used in other places in federal criminal law as well as in the jury instructions likely to be given in this case, the simple use of the word "bribe" in and of itself does not automatically transform that word (and every synonym of that word) beyond something a lay witness can testify to or something a prosecutor can ask about.[2]

Bribery is a common concept that is commonly understood and well within the purview of Rule 701 lay testimony –- it is not some window into the defendants' mental state. Indeed, the words "bribe," "kickbacks," and similar terms are routinely used by both prosecutors and lay witnesses in corruption cases throughout the country and in this District and Courthouse. In United

[2] To the extent that the defendants' intimate that the Government's use of the word "bribe" or similar terms in questioning trial witnesses constitutes inadmissable evidence, that argument is wholly meritless. It is well-settled that what the lawyers say is not evidence and this Court will no doubt instruct the jury as such. See 9th Circuit Criminal Pattern Preliminary Jury Instruction 1.4 (questions and objections of the attorney are not evidence).

States v. Matthews, 787 F.2d 38 (2nd Cir. 1986), a case cited to in the defendants' Motion, the defendant's knowledge of a bribe payment played a central role in the case. The government's chief witness, a lay witness, testified to his understanding of the bribe requested. Id. at 41. In addition, and as defendants' note in their Motion, the prosecutors in that case incorporated the words "bribe, bribery, and slush fund into every possible question, and prominently displayed one or more of these words in his blown-up charts." Id. at 46. (Motion at 3). The Second Circuit in Matthews, however, did not disapprove of the lay testimony incorporating the word "bribe," nor did it take issue with the prosecutors' rampant use of the word. Indeed, neither the Second Circuit nor the defendants alleged that such use was in any way improper -- as that case had nothing to do with the appropriateness of the word "bribe" –- but rather, the scope of certain SEC regulations. Id. at 49. Defendants' Motion here takes a passage from the Matthews opinion out of context in an attempt to color the use of the word "bribe" in questioning a witness as a "heinous tactic," when in reality, the Matthews case underscores that such use of the term "bribe" is commonplace and, even when used in the extreme, not a practice that has drawn objection either at the trial or the appellate court level. See also, United States v. Lightle, 728 F.2d 468 (10th Cir. 1984) (percipient witness testimony regarding nature of scheme to pay "kickbacks" in mail fraud, extortion, and tax case); United States v. Zichettello, 208 F.3d 72 (2nd Cir. 2000) (percipient witness testimony using the terms "bribes" and "kickbacks" in RICO bribery, money laundering and witness tampering case).

Defendants' application to have the Court issue a blanket and sweeping prohibition of the Government's use of the word "bribe" (or similar words) at any time during the trial –- other than opening statement or closing argument –- is groundless, without precedent, and should be flatly denied.[3] The fact is that bribery is a part of this case. As defendants' Motion points out, the Government is required "to prove the underlying crime alleged, i.e., bribery under the FCPA..." (Motion at 3). In doing so, the Government will necessarily want to ask witnesses questions relating to bribery. A witness can explain what bribery (or similar term) means to such witness if necessary and the jury can weigh such evidence accordingly. There is no reason to think that this Court cannot oversee this trial as it would any other trial, that is, hear the questions and evidence -- relating to bribery or any other topic -- as it comes in, and make rulings as needed. If the form of a question is objectionable on some other ground (such as leading, calls for speculation, hearsay, etc.) defendants can, and assuredly will, object. At that time, and in the context of the trial, the testimony to that date, and any particular circumstances presented, the Court can either sustain or overrule any objection to use of the word "bribe." This Court should not issue a blanket ruling prohibiting certain words being used in a question because of defendants' hypothetical and unsubstantiated fear that inadmissible testimony will result.

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[3] Defendants' Motion also concedes such terms may be used by the Court during the jury instructions.

B. USE OF THE TERM BRIBE IS NOT UNDULY PREJUDICIAL UNDER RULE 403.

Defendants further claim that the Government's use of the word "bribe" (or similar words) is more prejudicial than probative and should be precluded under Rule 403 of Federal Rules of Evidence. The Government's anticipated use of the word "bribe" does not give rise to unfair prejudice under Rule 403. The word "bribe" may in fact be a prejudicial term *as to these defendants*, however, prejudicial terms are perfectly permissible. "[A]ll evidence which tends to establish the guilt of a defendant is, in one sense, prejudicial to that defendant, but that does not mean that such evidence should be excluded." United States v. Fagan, 996 F.2d 1009, 1015 (9th Cir. 1993) citing United States v Bailleaux, 685 F.2d 1105, 1111 (9th Cir. 1982). The concern is whether that prejudice is *unfair* under Rule 403. As defendants correctly point out, Rule 403 states that unfair prejudice results

> "...from an aspect of the evidence which makes conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from the its judgment as to his guilt or innocence of the crime charged."

There is nothing to suggest that the word "bribe", when uttered by the Government in a question or a witness in his or her testimony, is a word that will provoke an emotional response in a juror's mind or otherwise adversely affect the jury's attitude toward the defendants. Moreover, it is unclear why, if the word bribe is so unfairly prejudicial, it can be used by the prosecutors in opening and closing, but not at any other time in trial. Defendants have

failed to cite to one case where the word "bribe" or similar has been deemed too prejudicial.

Similarly, there is nothing to suggest that the use of the word "bribe" or similar term will cause undue confusion for the jury. The jury is perfectly capable of grasping the meaning of the word "bribe." Defendants try to make much of the fact that the word bribe can have different meanings in different contexts. This argument is unavailing. Just because a word can be interpreted different ways does not make it unduly confusing and off-limits. Defendants' reliance on United States v. Cohen, 202 F. Supp. 587 (D.Conn. 1962) and United States v. Zacher, 586 F.2d 912 (2d Cir. 1978) in this context is misplaced. Both Cohen and Zacher relate to statutory interpretation and application, not to confusion caused by witness testimony or the prosecutors' questions.

As noted previously, if a witness is unclear about the meaning of the word bribe, the witness can ask for clarification. Moreover, the defendants are able to ferret out on cross-examination any subjective nature of the witness' use of the word "bribe" or the witness' knowledge of the defendant's state of mind. Finally, the defendants of course, may object at trial to any particular use of the word "bribe," "kickback," or similar term. There is nothing unduly prejudicial or confusing about the word "bribe" that requires its prohibition at trial.

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III.

CONCLUSION

Therefore, for the reasons stated above, the Court should deny defendants' motion to preclude the Government's use of the words "bribe," "kickback," or similar terms.

DATED: July 20, 2009

Respectfully submitted,

THOMAS P. O'BRIEN
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

/s/
BRUCE H. SEARBY
Assistant United States Attorney
JONATHAN E. LOPEZ
Senior Trial Attorney
United States Department
of Justice, Fraud Section

Attorneys for Plaintiff
UNITED STATES OF AMERICA