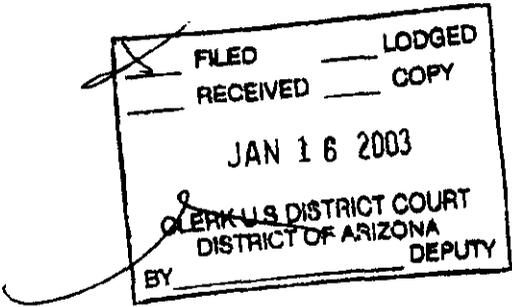


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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

TIG Insurance Company,  
Plaintiff,  
vs.  
Liberty Mutual Insurance Company,  
Liberty Mutual Fire Insurance Company,  
Defendants.

No. 99-766-PHX-ROS  
**ORDER**

On Sept. 27, 2002, following a six-day trial, the jury returned a verdict for Plaintiff against Defendants [Doc. #317]. The Court allowed trial counsel a brief period following the trial to question jurors who voluntarily agreed to speak to them. Following those interviews, Defendant filed Motion to Interview Jurors Based on Juror Misconduct [Doc. #330]. For the reasons set forth, Defendants' Motion will be denied.

**Discussion**

The first trial in this case ended in a hung jury, and the retrial ended in a verdict for Plaintiff, TIG Insurance Company. Following the announcement of the verdict, despite the limitations of Local Rule 1.11, counsel were given limited time to speak with jurors. This luxury, not afforded counsel in other district courts, is designed to permit counsel to avail themselves of constructive feedback from jurors regarding the effectiveness of their

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1 presentation of evidence; it is not designed as a method and means of conducting an  
2 inquisition into the jurors' deliberative processes. According to the sworn affidavit of  
3 Defendants' counsel, Mr. Robert Seide, one juror indicated that she had "brought in a  
4 dictionary." Aff. of Seide [Doc. #332]. Defendants now request they be granted permission  
5 to serve interrogatories upon at least two of the jurors to determine the extent of the use of  
6 the dictionary. This request will be denied.

7 The Local Rules provide for limited contact between counsel and jurors. Rule 1.11(b)  
8 provides that, "Interviews with jurors after trial by or on behalf of parties involved in the trial  
9 are prohibited," except where an attorney files written interrogatories and an affidavit setting  
10 forth reasons for the proposed interrogatories. "Approval for the interview of jurors ... will  
11 be granted *only* upon the showing of good cause." *Id.* (emphasis added). As the Supreme  
12 Court has noted, "long-recognized and very substantial concerns support the protections of  
13 jury deliberations from intrusive inquiry." Tanner v. United States, 483 U.S. 107, 127  
14 (1987).

15 Additionally, Fed. R. Evid. 606(b) restricts the use of juror testimony about the jury  
16 deliberation process. Rule 606(b) provides, in part, "a juror may not testify as to any matter  
17 of statement occurring during the course of the jury's deliberations or to the effect of anything  
18 upon that or any other juror's mind or emotions as influencing the juror to assent or dissent  
19 ... or concerning the juror's mental processes in connection therewith." Rule 606(b) does  
20 provide a narrow exception for the admissibility of juror testimony: "a juror may testify on  
21 the question whether extraneous prejudicial information was improperly brought to the jury's  
22 attention or whether any outside influence was improperly brought to bear upon any juror."  
23 Though jurors may testify about the presence of extraneous information, "[j]urors may not  
24 testify as to how they or other jurors were affected by the extraneous prejudicial information  
25 or outside influence; they may only testify as to its existence." Hard v. Burlington Northern  
26 Railroad Co., 870 F.2d 1454, 1461 (9<sup>th</sup> Cir. 1989).

1 Defendants bear the burden of showing that the verdict would have been different but  
2 for the presence of the external influence. "Where a losing party in a civil case seeks to  
3 impeach a jury verdict, it must be shown by a preponderance of the evidence that the  
4 outcome would have been different." Hard, 870 F.2d at 1461. Without such a showing, the  
5 Court need not order additional investigation, since, "[a]n evidentiary hearing is justified only  
6 when these materials are sufficient on their face to require setting aside a verdict." Id.

7 Defendants concede that they cannot articulate how that they can meet the burden of  
8 proof required by the Ninth Circuit under Hard to impeach a verdict. Defendants admit they  
9 are "currently at the investigation stage." Def's Reply at 2. In response to Plaintiff's clear  
10 argument that Defendants cannot meet the Ninth Circuit test, they "concede that issue," but  
11 claim "that is the purpose for obtaining additional information" and "[w]hether it rises to the  
12 level required by those cases in the Ninth Circuit is yet unknown." Id. Defendants' burden,  
13 however, is to show that the information they seek will show by a preponderance of the  
14 evidence that the outcome would have been different. Defendants admit again in their Reply  
15 that they do not yet have such information and cannot specify what it would be. They are not  
16 entitled to question the jury based on suspicion. See Local Rule 1.11(b).

17 Further, the juror testimony itself would be of limited usefulness in establishing  
18 prejudice. It is impermissible for jurors to testify as to the effect of the dictionary on their  
19 decision-making. Hard, 870 F.2d at 1461; Fed R. Evid. 606(b). To find prejudice, the Court  
20 would have to infer how the juror's decisions were affected by the presence of a dictionary  
21 containing many thousands of words, because the mere use of a dictionary definition does  
22 imply prejudice. See, e.g., Karis v. Calderon, 283 F.3d 1117, 1129 n.6 (9<sup>th</sup> Cir. 2002)  
23 (upholding district court finding that juror use of dictionary to define "circumstantial" was  
24 not misconduct).

25 Finally, Defendants overlook the fact that the jury was already provided dictionary  
26 definitions of the terms that Defendants contend were most important. In fact, the jury was  
27 provided dictionary definitions of "attempt" and "initiate," the two key terms in dispute  
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1 following the first trial. When preparing for the retrial, Defendants proposed to add  
2 dictionary definitions of those terms, and the definitions were incorporated into the jury  
3 instructions. Exh. B, D to Pl's Opposition. Moreover, the source of the definitions, the  
4 Merriam-Webster Collegiate Dictionary, appears to be the *same* dictionary that one juror  
5 indicated was brought into the jury room. Exh. D to Pl's Opposition; Aff. of Seide [Doc.  
6 #332]. Even if the dictionaries were not exactly the same, Defendants offer no persuasive  
7 evidence why one particular dictionary definition would be prejudicial. Dictionary  
8 definitions are generally considered prejudicial if they differ from *legal* definitions of terms.  
9 See, e.g., Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 924 (10<sup>th</sup> Cir. 1992).

10 For these reasons, Defendants' motion to further interview jurors will be denied.

11 Accordingly,

12 **IT IS ORDERED** that Defendants' Motion to Interview Jurors Based on Juror  
13 Misconduct [Doc. #330] is **DENIED**.

14  
15 DATED this 15 day of January, 2003.

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19 Roslyn O. Silver  
United States District Judge